



**REPUBLIC OF KENYA**

**High Court at Busia**

**Election Petition 2 of 2013**

**HENRY OKELLO NADIMO .....PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**PAUL CHERUIYOT KONES .....2<sup>ND</sup> RESPONDENT**

**PIUS ABABU NAMBWAMBA .....3<sup>RD</sup> RESPONDENT**

**RULING**

1) This decision is in answer to the 3<sup>rd</sup> Respondent's Notice of Motion dated 20<sup>th</sup> May 2013 and his Preliminary Objection of 10<sup>th</sup> June 2013. In the Motion, the 3<sup>rd</sup> Respondent prays for an order that Security for Costs tendered by the Petitioner be enhanced to kshs.3,000,000/- or such other sum as may be determined by this Court. While the Objection reads as follows:

**“TAKE NOTICE that the 3<sup>rd</sup> Respondent. HON. PIUS ABABU NAMWABA, intends to apply as a preliminary objection for orders to strike out:-**

**(i)The affidavits filed out of time**

**(ii)The video filed out of time; and irregularly placed on record.”**

2) This Court will start by determining the Preliminary Objection. At the hearing, Counsels on the opposing sides argued extensively on the admissibility or otherwise of the affidavits and video. Those arguments may have gone beyond what was primarily before Court for determination. If the scope of the Objection was in doubt, then it is clarified by the very last sentence in the skeleton submissions filed by the 3<sup>rd</sup> Respondent. This is what he said:-

**“The 3<sup>rd</sup> Respondent humbly submits that the affidavit and video should be struck out for having been filed out of time.” (my emphasis)**

The simple question before Court is whether the Affidavits were filed and served within the time directed by this Court at the Pre-trial Conference and whether the video evidence was exchanged by the parties

within the time-frame ordered by the Pre-trial Conference directions. In the course of argument a corollary issue arose, whether or not this court would have power to admit the affidavits and video out of time in the absence of a formal application made in that behalf.

3) In the Pre-trial Conference held by this Court on the 14<sup>th</sup> May 2013, it was agreed by parties and adopted as an order of Court that:-

**“3.4” The Petitioners are granted leave of seven (7) days to file and serve affidavits in respect to additional Evidence.**

3.5 & 3.8 .....

**4) All video, electronic or Photographic evidence shall be exchanged by the parties within seven (7) days hereof and it is hereby agreed that the evidence shall be admitted without calling their makers or producers.** (my emphasis)

4) It is not in dispute that some three (3) affidavits were filed on behalf of the Petitioner on the 21<sup>st</sup> May 2013. They were affidavits made by Edward Obwanda Osunga, Stephen Oundo Orembo and the Petitioner himself. All were expressly stated to have been prepared and filed pursuant to the directions of this Court given on the 14<sup>th</sup> May 2013, the directions at Pre-trial Conference. It was said by the 3<sup>rd</sup> Respondent and confirmed by the Petitioners Counsel that all the affidavits were served on the 3<sup>rd</sup> Respondent on the 24<sup>th</sup> May 2013. There can be no argument therefore that the affidavits were served outside the stipulated deadline of 21<sup>st</sup> May 2013. Surprisingly, even by the time the objection was filed and argued no positive action had been taken by the Petitioner to remedy the situation.

5) The same can be said of the audio evidence. There is a letter annexed to the further affidavit of the 3<sup>rd</sup> Respondent sworn on 29<sup>th</sup> May 2013 showing that some copies of what is referred to as “CD’s of recordings” was forwarded by the Petitioner’s Advocate and received by the firm of Mandala & Co. Advocates on 28<sup>th</sup> May 2013 at 3.42 p.m. That firm is on record as co-acting with Katwa & Kemboy Advocates for the 3<sup>rd</sup> Respondent. On a simple computation of time, the video was forwarded to the 3<sup>rd</sup> Respondent seven (7) days after the agreed deadline.

6) It is clear that the service of the affidavits and the audio CDS breached the time-frame set by Court and they are for striking out. And this is the only course that is open to this Court because the Petitioner did not reach out to the help that is available under Rule 20 of The Elections (Parliamentary and County Elections) Petitions Rules. The Rule provides:

**“20. 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 shall be done with such conditions as it may consider fit even though the period initially provided or granted may have expired.”**

The time for filing and serving of the affidavits and for exchange of the audio evidence was fixed by an order of this court during the Pre-Trial motions. This Court has discretion to extend that time but it cannot do so without a specific request by a party requiring the intervention. And certainly not when the request is made, like here, in a reply to an application for striking out whose very basis is the lateness.

7) There is then the interesting question raised in respect to Security for Costs. In the Notice of Motion of 20<sup>th</sup> May 2013, the 3<sup>rd</sup> Respondent contends that the Petitioner is a man of straw and will not be able to raise the costs that may be awarded to the 3<sup>rd</sup> Respondent in the event that the Petition fails. It was argued by the 3<sup>rd</sup> Respondent that an allegation having been made about the Petitioners’ means then the onus rested on the Petitioner to prove his ability to meet the costs that may be eventually awarded against him. There had been no attempt by the Petitioner to discharge that duty. This Court was asked to take notice that in the ordinary course of things costs in Parliamentary Election Petitions range from ksh.6

million to ksh.34 million. The Court was also reminded that costs ordinarily follow the cause (**Section 84 of the Elections Act**) and failure of the cause would inevitably attract costs.

8) The 3<sup>rd</sup> Respondent also argued that the Petition was brought in bad faith and lacks merit. It was said that the Petitioner is a proxy being used by two losers in the Elections which are the subject of this Petition. For instance, Hon Raphael Wanjala who was said to be one of the real Petitioners had filed an affidavit which was not only twice as long as that of the Petitioner but which raised thirteen (13) issues which were not in the Petitioner's affidavit. That paragraph 42 of Hon Wanjala's affidavit sworn on 5<sup>th</sup> April 2013 betrayed that proxy arrangement. Hon Wanjala states:-

**“42) THAT since I could not be everywhere, every time during the election period, my agents, who were my eyes and ears, will also testify to give more credence to my statements.”** (underlining mine)

The 3<sup>rd</sup> Respondent's argument being that all the witnesses in the Petition are witnesses of Hon Wanjala and not of the Petitioner.

9) The Court was also asked to notice that the Petitioner had described himself as an observer during the 4<sup>th</sup> March 2013 elections on behalf of the ‘‘Women's Shadow Parliament (K) Agent’’. Reference was made to Regulation 94 (4) of The Election (General) Regulations 2012) for the argument that accredited observers have a duty to maintain political neutrality. The Court was asked to find that the Petition was in pursuit of a partisan agenda and a breach of observer status. Pressing this argument, the 3<sup>rd</sup> Respondent submitted that the Petition was not a critique of the entire elections in Budalangi Constituency but concentrated only on the Parliamentary elections and a pointed attempt to unseat the 3<sup>rd</sup> Respondent. It was also argued that the Petition was attempting to steal an advantage by arrogating to himself the elevated status of an observer in the hope of the Court will take a favourable of his cause.

10) When invited to respond, the Petitioner told Court that although he is not a man of straw, the amount of Kshs.3,000,000/=(Kenya shillings three million) was well beyond the reach of many ordinary Kenyans. He thought that the application sought draconian and punitive orders that would gravely impact on his Right of Access to Justice. Citing Article 24 of the Constitution, the Petitioner argued that the prayers sought in the Motion was an unreasonable and unjustifiable limit to the Right of Access to Justice as enshrined in Article 48 of the Constitution.

11) That there was no evidence that the Petitioner is a proxy or agent. The Petition, it was argued was brought by the Petitioner in his own capacity as a voter, constituent and resident of Budalangi Constituency and as a Kenyan citizen. The Court was asked to find that the affidavit of Hon Raphael Wanjala was one of the many affidavits providing evidence in support of the Petition. That the length of that affidavit was immaterial. The length did not place him in a more special position than that of other witnesses. It was further argued that nothing bars a Contestant from being a witness in a Petition. And that it should not be construed to mean that the Contestant is behind the Petition.

12) The Petitioner was confident that the Court had no jurisdiction under the Provisions of Section 78 of The Elections Act to make an order for enhancement of security. That the amount of security had been set by Parliament in its own wisdom and after considering all factors. It was the argument of Counsel for the Petitioner that if this Court were to grant the orders sought, then it would amount to amending an Act of Parliament.

13) The Petitioner was of the view that the 3<sup>rd</sup> Respondent was being overly presumptuous by not only foretelling the outcome of the Petition but also that an order of costs would automatically follow.

14) In answering the application the Court must first satisfy itself that it is seized of jurisdiction to enhance security for cost in an Election matter. It is common ground that there is no express Constitutional or statutory provision empowering the Court to do so.

15) The current provisions of Section 78 on security for costs is almost a carryover of Section 21

of The Repealed National Assembly and Presidential Elections Act. The provisions of the old Act were:-

**“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 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.)**

In the current dispensation, Section 78 provides:-

**“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 a petition against a member of Parliament or a county governor; or**
- c) Once 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.”**

One difference between the two statutes is that the old Act provided for a uniform amount across the board while the current statute has different amounts for the three levels of election. And the deposit required for a Petition against a Member of Parliament was increased from ksh.250,000/= to ksh.500,000/=.

16) The purpose for the Security of costs is explained in the statute itself. Look at Section 78(1) which reads:-

**“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.”**

It is to secure payment of costs if the Petition does not prevail. The purpose is to provide a kitty from which successful respondents may draw their costs. In this way it provides a measure of protection to the Respondents.

17) How was the amount of ksh.500,000/= arrived at by Parliament? This Court has on its own combed through the Hansard of Parliament on the current statute but was unable to find any debate on this issue. Counsel Katwa thought that the amount to be wholly inadequate given the recent Court awards on costs, which he alleges, range from ksh.6 million – 34 million. All I would say is that the Election Act is a fairly recent Legislation enacted in the year 2011 and has been the subject of even more recent revisions, the last being in December 2012. Parliament cannot be taken to have been unaware of the trends allegedly emerging from the Courts. In its wisdom Parliament capped the deposit at a sum of ksh.500,000/=.

18) Counsel for the Petitioner was of the view that an order for enhancement of security would impede his clients access to justice and would therefore be unconstitutional. The Petitioner made the point that even the statutory amount of ksh.500,000/= is beyond many Kenyans and his client, though not a man of straw, had to struggle to raise it. That said, Counsel did not suggest that the provisions of Section 78 are in themselves unconstitutional. This Court will leave it at that and presume those provisions to be Constitutional.

19) Given the wording of Section 78 of The Election Act a person who presents a Petition to challenge an election of a Member of Parliament must deposit the security of ksh.500,000/= not more than ten days after the presentation of the Petition. And although the High Court has recently(see the decision in Kitale High Court Petition No.5 of 2013 – **John Lokitare Lodinyo –v-s Mark Lomunokol & 2 others**) allowed for deposit to be made after the lapse of ten (10) days, it is unlikely that any Court will allow a Petition to go to main hearing before the entire security is deposited. Whether or not an indigent Petitioner can apply for waiver of the requirements for deposit of security is another matter but which is clearly beyond the scope of this decision. But what the application requests is in fact the converse. It is asking this Court to raise the bar for the Petitioner and to make his responsibility on security more onerous than what is required of him by statute. Can this Court make such an order, for whatever reason, in the absence of express statutory authority?

20) In answering that question, the Court must consider the possible ramifications of such an order. If the Court were to enhance the amount to a sum beyond the reach of the Petitioner, then its effect would be to completely shut out this Petition. That would be the end of the Petitioner's access to Justice in this matter. That result would be inconsistent with the provisions of Article 48 of the Constitution on Access to Justice. It is the view of this Court that it is not within its power and function to load a heavier responsibility on the Petitioner than that already placed on him by statute. In reaching this decision, I have also given regard to whether the anxiety and apprehension of the 3<sup>rd</sup> Respondent can be addressed without resorting to a route that is possibly unconstitutional.

21) The 3<sup>rd</sup> Respondent's case was that the Petition is not only without merit and brought in bad faith but also an abuse of the process of Court. I would think that if is so minded, the 3<sup>rd</sup> Respondent can apply for striking out of the Petition. If such an application would prevail then it will bring a quick end to these proceedings and avoid an escalation of costs that is attendant to a full blown hearing. In this regard, this Court fully associates itself with the remarks made by the Court of Appeal of Tanzania in Civil Appeal No.64 of 2001 **Julius Ishengoma Francis Ndayanabo –vs- The Attorney General** where that Court was asked to determine the Constitutionality of a provision similar to Section 78 of the Elections Act. The Court rendered itself as follows:

**“Frivolous or vexatious litigation is, undoubtedly, a detestable thing. But the right way to deal with that evil is not to close the doors of justice, but to depend upon courts invoking their inherent or statutory jurisdictions to strike out actions of that nature.”**

There lies the answer to the 3<sup>rd</sup> Respondent's concerns. It is not by mounting roadblocks to the Petitioner's access to justice but by seeking a summary determination of the Petition.

22) One other issue calls for my observation. The 3<sup>rd</sup> Respondent has repeatedly asserted that this Petition is brought by the Petitioner as a proxy of some named principals. The 3<sup>rd</sup> Respondent will

have to prove those allegations. Needless to say no adverse finding can be made against the so called principals without affording them an opportunity of answering the allegations. But in the event that the proxy arrangement were to be proved and the Petition fails, then a fair question would be whether the Respondents should have a remedy of costs against the “principals.” It is the suggestion of this Court, without pretending to provide a final answer, that Rule 36(1) of the Election Petition (Parliamentary and County Elections) Petition Rules 2013 is wide enough to enable a Court direct an order of costs against such persons. The Rule provides:

**“36(1) The court shall, at the conclusion of an election petition, make an order specifying –**

- (a) The total amount of costs payable; and**
- (b) The persons by and to whom the costs shall be paid.”** (my emphasis)

The use of the word “persons” and not “party” is, in my view, deliberate. In appropriate circumstances, persons other than the Petitioner/s or the Respondents may be subjected to costs. There is no reason why the actual owner of a failed Petition should be left unpunished. This would be one way of deterring the abuse of Court process. And this may yet be another way of addressing the 3<sup>rd</sup> Respondent’s fears.

23) This is now the decision of the Court on the two issues raised.

- a) The Preliminary Objection is hereby allowed. The Affidavits of Henry Okello Nadimo, Edward Obwanda Osunga and Stephen Oundo Orembo all filed on 21st May 2013 are hereby struck out. The recording forwarded to the 3<sup>rd</sup> Respondent’s Counsel vide the letter of the Petitioner’s Counsel which is annexed as ANFA 3 to the affidavit of the 3<sup>rd</sup> Respondent filed on 30<sup>th</sup> May 2013 is hereby struck out and excluded from the Court record.
- b) The 3<sup>rd</sup> Respondent’s application dated 20<sup>th</sup> May 2013 and filed on 21<sup>st</sup> May 2013 is hereby dismissed.
- c) Each party shall bear its own costs.

Those are the orders of this Court.

**DATED, DELIVERED AND SIGNED AT BUSIA THIS 12<sup>TH</sup> DAY OF JUNE 2013.**

**IN THE PRESENCE OF:**

**KADENYI .....COURT CLERK**

.....**FOR PETITIONER**

.....**FOR RESPONDENTS**

**F. TUIYOTT**  
**J U D G E**