



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
ELECTION PETITION NO.10 OF 2013

**IN THE MATTER OF THE ELECTIONS ACT NO.24 OF 2011 AND THE ELECTIONS
(GENERAL) REGULATIONS MADE THERE UNDER AND THE POLITICAL PARTIES ACT
NO.11 OF 2011**

AND

**IN THE MATTER OF AN ELECTION OF THE ELECTION OF THE WOMAN MEMBER OF
THE NATIONAL ASSEMBLY, KISII COUNTY**

AND

IN THE MATTER OF THE PETITION OF EZEKIEL OKONDO ONCHIEKU

BETWEEN

EZEKIEL OKONDO ONCHIEKU PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 1ST RESPONDENT

SHEM NYANGA'U 2ND RESPONDENT

MARY SALLY KERRA alias MARY SALLY OTARA 3RD RESPONDENT

RULING

INTRODUCTION

1. The factual basis of this ruling lies in the petition dated and filed on 10th April 2013 by Ezekiel Okondo Onchieku, challenging the election of the 3rd Respondent herein, Mary Sally Keraa alias Mary Sally Otara as woman member of the National Assembly of Kisii County.

THE APPLICATIONS

2. There are 2 applications for determination. The first one is the Petitioner's Notice of Motion dated 29th May 2013 expressed to be brought pursuant to **Rule 23** of the **Elections (Parliamentary and County Elections) Petition Rules 2013** made under the **Elections Act No.24 of 2011** (hereinafter

- referred to as the Rules) and founded on the grounds set out on its face and the Petitioner's sworn affidavit dated 10th April 2013. The Petitioner says he wishes to withdraw the petition for purposes of fostering unity and pave way for development of the county and also bring to an end the electioneering mood and temperatures in the county. He further avers that he has brought his application without any undue influence and/or collusion with any of the parties to the petition.
3. While the application was filed by the petitioner in person after filing a Notice to Act in person dated 25th April 2013, the petition was drawn and filed by the firm of Minda & Company Advocates. By a Notice of Appointment of Advocates dated 29th April 2013, the firm of Bosire Gichana & Company Advocates came on record for the petitioner. M/s Minda & Company Advocates are now on record for the Interested Parties Evans Nyambaso Zedekiah and Mabutu Nyakeriga who have brought the Notice of Motion dated 29th April 2013 by which they seek to be substituted herein as petitioners in the place of Ezekiel Okondo Onchieku.
 4. When the matter came up before me on 29th May 2013, Mr. Bosire submitted that the petitioner had given sufficient reasons for his proposed withdrawal as a petitioner and in particular that it was other persons who had caused the petition to be filed. Counsel urged the court to allow the application with a rider that costs of the application do abide the outcome of the petition.
 5. Mr. Okongo of Okongo Wandago & Company Advocates did not oppose the application for withdrawal, subject to costs. He urged court to order that the security deposited in court by the Petitioner be retained to abide the outcome of the petition.
 6. Miss Aron who appeared for the 3rd Respondent did not also object to the petitioners wish to withdraw subject to payment of costs to the 3rd respondent. She contended that the petitioner had unjustifiably dragged the 3rd respondent to court. The 3rd respondent however consented to the Petitioner's application vide a consent dated 26th April 2013.
 7. The second application is the Interested Parties' Notice of Motion dated 29th April 2013 filed pursuant to **Rule 26** of the **Rules**, by which application the 2 interested parties seek to be substituted as petitioners herein instead of Ezekiel Okondo Onchieku.
 8. The grounds in support of the motion are that: the present petition was filed after many voters from Kisii County were aggrieved and dissatisfied with the election of the 3rd Respondent as woman Member of the National Assembly for Kisii County; the petitioner espouses the grievances of many aggrieved voters and losing candidates; the petition being one on elections is a public interest claim; the petitioner's decision to withdraw the petition was unilateral and without consultation with the financiers of the petition; no prejudice will be suffered by any party if the application for substitution is allowed and finally that the law provides for substitution of a petitioner.
 9. The applicants filed affidavits in support of their quest to be made petitioners herein instead of the petitioner. Both affidavits are dated 29th April 2013. Evans Nyambaso Zedekiah avers that he was registered as a voter at Nyagesa Primary School in Bomachoge Chache Constituency and voted as such during the 4th March 2013 General Elections and was also the Chief Elections Agent to a candidate by the name Brigid Ombati, a candidate for the seat of woman representative for Kisii County. That he and others were dissatisfied with the election results concerning the Kisii County woman representative and thereafter agreed to have the petitioner herein Ezekiel Okondo Onchieku file the petition to challenge the election of the 3rd Respondent herein. He said that the decision by the petitioner to withdraw from this petition was without merit as the same was made without consultation with those who had mooted the idea and provided the money to file the petition hence the application for substitution.
 10. Mabutu Nyakeriga also swore a supporting affidavit on the 29th April 2013. He supports the averments contained in the affidavit of Evans Nyambaso Zedekiah. He prays that the application for substitution be allowed as prayed so that the wishes of the many voters who were dissatisfied with the election results for the woman representative for Kisii County can be realized.
 11. Both deponents at paragraphs 19 of their respective supporting affidavits took issue with the petitioner for failing to have the withdrawal notice gazetted in the Kenya Gazette so as to pave the

- way for the filing of the application for substitution.
- 12.Regarding the issue raised by the 2 deponents on gazettelement of the Notice for withdraw, it is on record that the petitioners notice was gazetted vide Gazette Notice No.6714 published on 17th May 2013. Inmy humble view, the complaint by the Interested Parties against the petitioner was premature and misplaced since their application for substitution was filed long before the relevant gazette notice was published.
- 13.The application for substitution is opposed. The 2nd respondent, Shem Obworo Nyangau swore an affidavit on 22nd May 2013 and averred that since the petition herein is incompetent, and fit for striking out, there would be no purpose in making an order for substitution of a defective petition. He prayed that the entire petition be struck out with costs to the 1st and 2nd Respondents.
- 14.The 3rd Respondent also filed a Replying Affidavit sworn on 22nd May 2013 in which she concurs with the position taken by the 2nd Respondent in his Replying Affidavit that there would be no useful purpose to be served by the substitution since the petition as filed is incurably defective. The 3rd Respondent also prays, like the 2nd Respondent that the petition herein be struck out at this stage.
- 15.The Petitioner also swore a Replying Affidavit dated 7th May 2013 in which he avers that the two interested parties are not the right persons to be substituted as Petitioners in his place; that the persons who should take up this petition in place of himself are Jane Nyaboke Matoke and Brigid Ombati who were candidates for the seat won by the 3rd Respondent but lost.

THE ARGUMENTS

- 16.Parties made their oral arguments before me on 29th May 2013. They cited various provisions of the Constitution, the Elections Act andthe Rules. No authorities were cited.
- 17.During the arguments, Mr. Minda for the Interested Parties submitted that since the law allows for substitution the application ought to be allowed. He relied on **Rule 26** of the **Rules**. **Sub-rule (1)** thereof provides that –

“(1) At the hearing of the application for withdrawal of an election

petition, a person who is qualified to be a petitioner in respect of the election to which the petition relates may apply to the court to be substituted as the petitioner, in place of the Petitioner desirous of withdrawing the petition.”

- 18.Counsel also submitted that since Election Petitions are necessarily public interest claims, the 2 Interested Parties should be allowed to step into the shoes of the petitioner so as to drive the petition forward, especially because the filing of the petition herein was a joint venture involving many other third parties. Further, that there would be no prejudice whatsoever to any of the Respondents if the present application is allowed.
- 19.Commenting briefly on the Replying Affidavit dated 22nd May 2013 by the 3rd Respondent, counsel submitted that the said 3rd Respondent cannot purport to stand in the way of anyone interested in taking over the petition for purposes of enquiring into how she got into office. Counsel also submitted that the petitioner should not be heard to be opposing the application for substitution since the petitioner has opted out of the petition and has not shown what prejudice he would suffer if the petition proceeds under the stewardship of the 2 intending petitioners. Counsel submitted that through this petition the voice of the people of Kisii County will be heard as to whether or not the 3rdRespondent was validly elected.
- 20.Finally, counsel submitted that though Rule 23 seems to imply that once a petition is withdrawn, there would be nothing or no petition left for another party to take up, his view was that a petitioner can withdraw, but the petition can be maintained and taken over by the person applying to be substituted.

21. Mr. Bosire Gichana appearing for the petitioner submitted that the instant application is not only misconceived but is premature because it was filed long before the date for the hearing of the application for withdrawal. Counsel cited **Rule 26 (1)** of the **Rules** (supra). He asked the court to dismiss the application with costs.
22. Mr. Okongo for the 1st and 2nd Respondents submitted that before an application under **Rule 26** is brought, there must be compliance with **Rule 25** of the **Rules** which deals with notice of time and place of hearing of application for withdrawal of petition. **Rule 25 (1)** requires the Registrar to issue a notice in Form EP 6 set out in the First Schedule, to a person who has given notice to the Registrar of their intention to apply to be a substituted petitioner. It was counsel's submission that only that person who has complied with **Rule 25 (1)** that can benefit from the provisions of **Rule 26**; the Interested Parties herein are not compliant with **Rule 25** as they have not been issued/ given any notice seeking to be substituted. In any event, counsel submitted that the application was made long before the application for leave to withdraw was set down for hearing.
23. Secondly, counsel submitted that the petitioner has, by the averments in his affidavits disowned the entire petition, and that under such circumstances, it would be futile to make the substitution order. Counsel urged court to dismiss the application.
24. Miss Aron who appeared for the 3rd Respondent supported the stand taken by counsel for the 1st and 2nd Respondents. She also submitted that the petition as filed is defective in view of the fact that the petitioner did not comply with **section 78 (1)** of the **Elections Act**.
25. Counsel also submitted that if the court were to grant the prayers sought by the Interested Parties, the 3rd Respondent would be immobilized for a long time to come and as such she would not be able to serve her people, who elected her to her current position. Counsel urged the court to dismiss the application.
26. In reply to the Respondents' submissions, Mr. Minda submitted that the Interested Parties filed their Notice with the Deputy Registrar on 2nd May 2013; that it was incumbent upon the petitioner to gazette the notice of intention to withdraw and for the Deputy Registrar of this honourable court to comply with **Rule 25** of the **Rules**. He also said that the Interested Parties were, at time of hearing the Petitioner's application, effectively complying with **Rule 26** since the said rule is silent on the mode of making the application for substitution and does not also set out any conditions to be met by those intending to be substituted. Counsel asked the court to apply its mind to the provisions of **Article 159 (2) (d)** of the **Constitution** and to allow the application as prayed.

ISSUES FOR DETERMINATION

27. Only three issues arise for determination in the 2 applications that are intertwined:-
- Whether this court has power to allow the petitioner to withdraw from the petition; and*
 - Whether this court has power to allow substitution of the Petitioner as sought vide the Notice of Motion dated 29th April 2013.*
 - Who shall bear the costs of these proceedings*

Whether this Court has power to allow the petitioner to withdraw from the petition.

28. The Petitioner's application is anchored in **Rule 23** of the Rules which provides that no petition shall be withdrawn without leave of the court and that such leave shall be granted on such terms as to the payment of costs or as the court may consider fit and just. **Sub-rule 4** of **rule 23** reads:-

“The parties to the election petition and their advocates shall, before

leave for withdrawal of an election petition is granted, produce affidavits stating the ground on which the petition is intended to be withdrawn.:

and sub-rule (5) thereof reads:-

“Despite sub-rule (4), a court may, on the cause being shown, dispense

with the affidavit of a person if it seems to the court on special grounds to be fit and just.” while

Sub-rule (6) of Rule 23 reads as follows:-

“Each affidavit shall state, to the best of the deponent’s knowledge and

belief “that” no agreement or terms of any kind has been made, and that no undertaking has been entered into, in relation to the withdrawal of the election petition;”

The above provisions are waived where a lawful agreement has been made with respect to the withdrawal of an election petition, and where the affidavit in support of the withdrawal has set out the terms of the agreement.

29. In a nutshell, for the petitioner to succeed on his application he must satisfy the following conditions:-

- **produce affidavits stating the ground on which the petition is intended to be withdrawn;**
- **show that no agreement or terms of any kind has or have been made compromising the decision to withdraw;**
- **Affidavits setting out terms of any agreement reached.**

30. Apart from the above rules, **section 89 (1) (d)** of the **Elections Act**, empowers this court to **“decide all matters that come before it without undue regard to technicalities.”** **Article 159 (2) (d)** of the **Constitution of Kenya 2010** also provides that judicial authority which is vested in the court by the people of Kenya shall be exercised in such a manner that **“justice shall be administered without undue regard to procedural technicalities”** and with the aim of protecting and promoting the purpose and principles of the Constitution. **Article 50** of the **Constitution** behoves the State to ensure access to justice for all persons.

31. In the instant case, the Petitioner has sworn an affidavit dated 6th May 2013 giving the grounds upon which he wishes to withdraw from the petition. He reiterates therein the grounds set out on the face of the application for leave to withdraw and also states at paragraph 18 thereof that no agreement or terms of any kind have been made and that no undertaking has been entered into in relation to the withdrawal of the election petition.

32. From the above analysis of the law and the submissions, and bearing in mind the fact that the Respondents are not opposed to the petitioner’s desire to withdraw the petition, I am satisfied that the petitioner has complied with all the legal requirements cast upon him. Accordingly I do hereby grant leave to the petitioner to withdraw the petition dated 10th April 2013 and filed in court on the same day.

Whether this court has power to allow substitution of the Petitioner as sought vide the Notice of Motion dated 29th April 2013

33. From the submissions made by counsel for the Interested Parties (applicants) there seems to be a lacuna between **rule 23** and **26** of the **rules**, the question being: once leave has been granted to withdraw an election petition, does the petition “die” or does it still subsist for other persons interested in pursuing it to be allowed to take it over? **Rule 26 (1)** under which the application for substitution is brought provides that at the time of hearing of the application for withdrawal of an election petition, a person who is qualified to be a petitioner in respect of the election to which the petition relates may apply to the court to be substituted as petitioner instead of the petitioner

- desirous of withdrawing the petition.
34. It is thus clear to me that the two applications must be decided together so that as one seeks to leave, the other is ready and willing to enter, so that no lacuna is created should the petition be withdrawn without any interest being shown to take it over. **Rules 23** and **26** must therefore be read together and not independently of each other.
35. Having stated the above, once an application for substitution has been made as has been done in this case, then the court may substitute an applicant under **Rule 26 (1)** as Petitioner, only noting that if the proposed withdrawal is, in the opinion of the court, induced by any corrupt bargain or consideration, the court may direct that the security deposited on behalf of the original petitioner shall remain as security for any costs that may be incurred by the substituted petitioner, and that to the extent of the sum deposited as security the original petitioner shall be liable to pay the costs of the substituted petitioner.
36. During arguments, Mr. Minda urged the court to allow the application since the law is clear on the issue. I have considered the submissions by counsel for the Respondents and for the Petitioner. The Petitioner wants the application dismissed because it was filed long before the hearing of the application for withdrawal, while the 1st, 2nd and 3rd Respondents contend that the application should not be allowed because the petition sought to be inherited is incompetent and incurably defective. The Respondents have filed separate applications seeking to strike out the petition on grounds of incompetence. The said applications are yet to be heard.
37. Considering all the law and the submissions, I am satisfied that despite the technicalities raised by the Respondents, the applicants have satisfied the court that they are entitled to be substituted as Petitioners instead of the Petitioner who has now been granted leave to withdraw the petition.
38. Though the applicants filed their application on the 29th April 2013, long before the gazette of the notice to withdraw and the hearing of the application for leave to withdraw, I am mindful of the provisions of **Rule 4 (1)** to the effect that **“the overriding objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act”** and that in the exercise of the court’s powers under the Constitution or in the interpretation of any of the provisions in these Rules, the court must give effect to the overriding objective.
39. The above being the case, and despite the fact that counsel for the applicants appeared to be in a hurry, and despite the fact that a formal notice of withdrawal had not been gazetted by the time the application for substitution was filed, the court has accepted the applicant’s contention that they are properly before the court on the instant application.
40. In the premises and for the reasons above stated, Evans Nyambaso Zedekiah and Mabut Nyakeriga be and are hereby substituted as Petitioners in this petition No.10 of 2013 in place of Ezekiel Okondo Onchieku.

Who shall bear the costs of these proceedings

41. Under **Rule 26 (2)** of the **Rules**, the court is obliged to direct that the security deposited on behalf of the original petitioner shall remain as security for any costs that may be incurred by the succeeding petitioner(s). During submissions, counsel for the original petitioner informed the court, and the same has been confirmed by the original petitioner in his affidavit in support that the original petitioner did not contribute to the money deposited in court as security for costs in this petition. Both agreed that the said deposit should remain so deposited awaiting the outcome of the petition. I so direct.
42. Regarding costs for the application for leave to withdraw, the original petitioner shall pay costs to the 1st and 2nd Respondents. Since the 3rd Respondent filed a consent to the application, she is not entitled to costs. The costs of the application for substitution shall abide the outcome of the petition.
43. It is so ordered.

Dated and delivered at Kisii this 11th day of June, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Bosire Gichana for Petitioner

Mr. Odhiambo Kanyangi for Okongo for 1st and 2nd Respondents

Mr. Odhiambo Kanyangi for Owade for 3rd Respondent

Mr. Minda for Interested Parties

Mr. Bibu - Court Clerk