



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
ELECTION PETITION NO. 5 OF 2013

ABDISALAN MOHAMED.....PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....1ST RESPONDENT

IBRAHIM ABDI SANEY.....2ND RESPONDENT

RULING

The ruling herein is on the Petitioner's Application to Withdraw the Election Petition filed herein. The Petitioner is seeking leave to withdraw the election petition on the grounds that the parties have been prevailed upon by their electorate after a series of meetings not to proceed with this petition. The Petitioner prays that owing to the special circumstances of the withdrawal, each party bears its own costs.

The Petitioner filed the election petition on 5th April 2013, and sought prayers therein that the 2nd Respondent was not validly elected as the Member of the National Assembly of Wajir North Constituency in the elections held on 4th March 2013, and that it be declared that one Abdullah Ibrahim Ali was the one validly elected. In the alternative that there be a declaration that the elections leading to the 2nd Respondent being declared the MP-elect for Wajir North Constituency were fatally flawed and new elections should be called. The said petition was supported by affidavits sworn by the Petitioner and two witnesses on 4th April 2013.

The 2nd Respondent thereupon filed two Notices of Motion dated 22nd April 2013. The first Notice of Motion sought to strike out part of the Petitioner's exhibits, and the second Notice of Motion sought orders to strike out the entire Petition. The 2nd Respondent also filed a Response to the Petition dated 22nd April 2013 together with a Replying Affidavit with various annexures sworn on the same date by the 2nd Respondent, and the affidavits of eleven (11) witnesses. All these documents were filed in court on 23rd April 2013.

On 26th April 2013 the 1st Respondent filed a response to the Petition dated 24th April 2013, together with a replying affidavit with annexures sworn on the same date by Joel Omae Okiabera, the returning Officer for Wajir North Constituency in the disputed election. The parties were thereupon served with notice to attend court on 2nd May 2013 for directions. The counsel for the 1st and 2nd Respondents attended court on that date, and directions were given that the parties file their pretrial checklists and further affidavits before the pretrial conference that was set for 31st May 2013. The 1st and 2nd Respondents later filed their

duly filled pre-trial check list with the court on 30th May 2013 and 27th May 2013 respectively.

During the pretrial conference on 31st May 2013 in which the counsel for all the parties were present, the counsel for the Petitioner sought leave to withdraw the election petition. The court directed the counsel to file his application for withdrawal and to comply with Rules 23 to 25 of the Elections (Parliamentary and County Elections) Petitions Rules of 2013 in this respect. Consequently, the Petitioner's Application to Withdraw the Election Petition dated 5th June 2013, and a supporting affidavit by the Petitioner sworn on the same date were filed. The 1st and 2nd Respondents filed replying affidavits enclosing Bills of Costs on 26th June 2013 and 18th June 2013 respectively.

The Petitioner's application to withdraw the election petition was heard on 19th June 2013. The Petitioner's counsel, Ms. Ontiti, who was holding brief Mr. P.K Kamau, submitted that the Notice of Withdrawal had been published in the Kenya Gazette and served on the Registrar. Further, that the petition had been heard by the court on three occasions, and that any costs awarded should have a basis.

The 1st Respondent did not oppose the application to withdraw the petition, subject to payment of costs. The 1st Respondent counsel, Mr. Mahat Somane, stated in a replying affidavit sworn on 26th June 2013 that the 1st Respondent had incurred considerable expenses in engaging counsel to prepare responses to the Petition, attending court and in collecting evidence. Further, that it had also incurred costs in the production of evidence such as transportation of ballot boxes, transport, security and accommodation of its officers from Wajir to Nairobi., Mr. Somane further submitted during the hearing of the application that the 1st Respondent is a public body that depends upon public funds and requires to be reimbursed for the costs it had incurred.

The 2nd Respondent averred that the Application for withdrawal ought to have been signed by both the Petitioner and his Advocate. The 2nd Respondent's counsel. Ms. Kethi Kilonzo submitted that this was a minor technicality that could be overlooked. The 2nd Respondent's counsel prayed for costs incurred, and submitted that the 2nd Respondent had no option but to defend the Petition as he stood to lose his position as Member of Parliament for Wajir North. The 2nd Respondent further stated in the replying affidavit he swore on 18th June 2013 that he had incurred considerable expenses and time in engaging counsel to prepare his responses to the Petition, attend court and in collecting evidence.

Both Respondents asked the court to assess the costs incurred and enclosed their Party and Party Bills of Costs. They also averred that this Court has jurisdiction to order that the money deposited by the Petitioner as security be used to meet the costs they have thus incurred in defending the petition.

I have carefully considered the pleadings, evidence and arguments made by the parties herein. There are two issues for determination. The first issue is whether the Petitioner has complied with the procedures laid down for withdrawal of an election petition. These procedures are to be found in Rules 23 to 25 of the Elections (Parliamentary and County Elections) Petitions Rules of 2013 which state as follows:

“Withdrawal of petition.

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

(2) The court shall grant leave on such terms as to the payment of costs or as the court may consider fit and just.

(3) 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 leave for withdrawal of an election 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 being 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 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.”

(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.

Copies of and notice of the application for withdrawal of petition.

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 EP 6 set out in the Schedule at the Petitioner’s own expense.

Notice of time and place of hearing of application.

25. (1) The Registrar shall issue a notice in Form EP 6 set out in the Schedule, to a person who has given notice to the Registrar of their intention to apply to be a substituted Petitioner.

(2) The notice issued under sub-rule (1) shall specifying the time and place for hearing of the application for withdrawal of an election petition as directed by the court.”

I have carefully perused the application to withdraw the election petition and the affidavits filed in support of and in reply to the said application, and have noted certain areas of non-compliance with the laid down procedure. Firstly, as was pointed out by the 2nd Respondent’s counsel, the application to withdraw the petition was only signed by Advocate for the Petitioner and not by the Petitioner. Secondly, the parties and their Advocates did not file affidavits as required. In the case of the Petitioner and 2nd Respondent only the parties filed affidavits, and in the case of the 1st Respondent, only its Advocate filed an affidavit in reply. Lastly, it was also noted that the 1st Respondent’s replying affidavit did not contain the statement required by Rule 23(6).

I however do not consider the non-compliance that was identified to be fatal, as the application to withdraw the petition even though not signed by the Petitioner himself, was supported by an affidavit which he swore and signed. Under Rule 23(4) the court is also granted power to dispense with the affidavit of a person if it is fit and just to do so, and the failure by some of the parties and Advocates to file affidavits is not fatal. I am also of the opinion that since the 1st Respondent did not contest the Petitioner’s averments save on the issue of costs, its failure to include the statement required by Rule 23(6) is not prejudicial as the said statement was in the Petitioner’s supporting affidavit. This Court is in this regard now enjoined by the Constitution under Article 159(2)(d) and the overriding principles in Rule 4 of the Elections (Parliamentary and County Elections) Petitions Rules of 2013 not to give undue regard to technicalities at the expense of substantive justice.

The Petitioner also submitted that a Notice of Withdrawal of the election petition which was dated 6th June 2013 was filed with the Court's Registry on 21 June 2013, as further evidence of procedural compliance. Attached to the Notice of Withdrawal of the election petition was a copy of Gazette Notice No. 8244 in *The Kenya Gazette* dated 14th June 2013 showing the publication of the said Notice of Withdrawal in the Gazette. The Petitioner also referred the court to an affidavit of service sworn on 2nd July 2013 and filed in court on the same date by Rose N. Muhia, a process server of the High Court of Kenya, which attested to the service of both the application and notice to withdraw the election petition on the Respondents. I am accordingly satisfied that the Petitioner has complied with the procedure for withdrawal of an election petition.

The second issue that remains to be determined is which party shall meet the costs of the petition. The applicable law is section 85 of the Elections Act (Act 24 of 2011) which provides that an election court shall award the costs of and incidental to a petition, and such costs shall follow the cause. Rules 34 to 36 of the Elections (Parliamentary and County Elections) Petitions Rules of 2013 provide more details on the process of awarding and recovery of costs as follows:

“Costs.

34. (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.

(2) When making an order under sub rule (1), the court may —

(a) disallow any costs which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the Petitioner or the Respondent; and

(b) impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.

(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.

Taxation and recovery of costs.

35. (1) The Registrar shall tax costs of an election petition upon the order of the court in the same manner as costs are taxed in civil proceedings and in accordance with the Civil Procedure Act.

(2) An order of the Registrar under sub-rule (1) shall be confirmed in the relevant court.

(3) The court may direct that the whole or any part of any moneys' deposited by way of security may be applied in the payment of taxed costs.

(4) There shall be paid in respect of all proceedings under these Rules the same court fees as are payable in respect of civil proceedings in the High Court or magistrate's court, as the case may be, in so far as the same are applicable.

Return of money deposited.

36. (1) Money deposited under rule 11 shall, if and when it is no longer needed for security payment of costs, charges and expenses be returned or disposed of as justice may require by

order of the Court.

(2) The order may be made upon an application and proof that all just claims have been satisfied or sufficiently provided for as the court may require.

(3) The order may direct payment either to the party in whose name it is deposited or to any person entitled to receive it.”

It is therefore the rule in election petitions that costs follow the cause, which means that the unsuccessful party will be ordered to pay the costs of the successful party. The withdrawal of an election petition however does not entail a determination of, or judgment on any questions or issues before the election court on their merit, and it cannot therefore be found that there was a successful or unsuccessful party herein. This court has in this event found guidance on the issue of award of costs in the case of withdrawal of an election from Rule 34 2 (b) of the Elections (Parliamentary and County Elections) Petitions Rules of 2013. This rule grants the Court discretion to impose the burden of payment of costs on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.

The Petitioner by filing an election petition and electing to withdraw the same has caused the Respondents to incur expenses which they would not have incurred were it not for the election petition. These expenses included those incurred in preparing the responses to the Petition, in addition to the court attendances. The chronology of events given in this ruling shows the steps that were taken by the Respondents in this respect. For this reason this Court finds the Petitioner liable to meet the costs the Respondents have incurred as a result of the election petition. This court is also granted the power under Rule 34 (1) (a) of the Elections (Parliamentary and County Elections) Petitions Rules of 2013 to set the total amount of costs that may be payable in this respect. I find it necessary to do so in the election petition filed herein as it did not proceed to full hearing.

Arising from the foregoing reasons, I hereby order as follows:

1. The Petitioner is granted leave to withdraw Election Petition No. 5 of 2013 dated 4th April 2013 and filed on 5th April 2013 in the Garissa High Court, which Election Petition is hereby marked as withdrawn.
2. The Petitioner shall pay the 1st Respondent the costs of the election petition filed herein, and the total costs awarded to the 1st Respondents shall not to exceed Kenya Shillings 1 million.
3. The Petitioner shall pay the 2nd Respondent the costs of the election petition filed herein, and the total costs awarded to the 1st Respondents shall not exceed Kenya Shillings 1.5 million.
4. The 1st and 2nd Respondents shall forward their Bill of Costs to the Deputy Registrar of the High Court for taxation in accordance with the Civil Procedure Act, and subject to the limitation on the total costs to be awarded as ordered hereinabove.
5. The sum of Kshs 500,000/= deposited in court by the Petitioner as security for costs shall be applied equally to the payment of the taxed costs of the 1s and 2nd Respondent.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this __29th__ day of ____July____, 2013.

P. NYAMWEYA

JUDGE