



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUNGOMA

PETITION NO.8 OF 2013

MAJOR RTD. GODFREY MASABA PETITIONER

VERSUS

IEBC 1ST RESPONDENT

MADAHANA MBAYA 2ND RESPONDENT

REGINALDA NAKHUMICHA 3RD RESPONDENT

RULING

1. This petition was filed by Major Retired GODFREY MASABA who described himself as a registered voter, Kenyan citizen and a registered member of FORUM FOR RESTORATION OF DEMOCRACY (FORD-K) a political party. In the petition he indicated that he was aggrieved by the outcome of the General elections held on 4th March 2013, with regard to the results of “County Woman Member of the National Assembly”, as declared and published by the Independent Electoral and Boundaries Commission (IEBC) and the 2nd respondent (Madahana Mbaya, the IEBC Returning Officer for Bungoma County Election).

2. The petitioner (a male) was not a candidate in the elections, the position for County Woman Member of National Assembly being restricted to members of the female gender. The candidates who vied for the position were:

1. CAROLINE NALIAKA
2. CATHERINE WAMBILIANGA
3. HELLEN NAFUNA NGEMA
4. JACKLYNE NEKESA NYONGESA
5. JULIET NALIAKA MAKOKHA
6. KELLEN KHAOMBA WAVOMBA
7. LORNA E. NANJALA
8. NALIAKA SALOME MWANGALE
9. REGINALDA NAKHUMICHA WANYONYI

3. Reginalda was declared the duly elected County Woman Member of National Assembly.

4. However the petitioner as a voter contested the results saying they did not reflect a free, fair and transparent process. The petitioner was clearly in sympathy with his party's candidate CATHERINE WAMBILIANGA, who was the 1st runner up. The petitioner listed various irregularities, saying the results as declared were false or incorrect, and the outcome had been influenced by the declared winner.

5. This petition was eventually struck out as the petitioner was not able to deposit the security for costs as required by **section 78(2) (b)** of the **Elections Act 2011** and **Rule 11** of the **Elections (Parliamentary and County Elections) Petition Rules 2013**. Ordinarily, costs follow the event, and in this instance, the event being that the petition did not succeed, the party to bear the costs would be the one who caused it to be filed in court in the first instance.

6. The petitioner did not have any serious objection to the striking out of the petition, but he protested against any orders condemning him to bear costs of this petition. His contention was that, Catherine Wambilianga had filed a petition contesting the same results, through Sichangi Advocate. Later on she was approached by the Ford Kenya party leader, Moses Masika Wetangula, who introduced her to advocate Wasuna. Catherine thus withdrew the petition she had filed, having been advised to use a voter to pursue the petition, so that the political party could pay all the costs. Eventually the petitioner was placed as the one pursuing the matter, although in actual fact it was Catherine. When he expressed reservations, Catherine laughed and said:

“Everyone knows Catherine is the one who has the petition. You are not a woman, and therefore you need not worry. I am sourcing for the funds.”

7. All along Catherine kept telling him that she was depending on Moses Wetangula to provide funds relating to the petition. When he realized no money was forthcoming, he told his advocate, Mr. Wasuna to withdraw the petition, but the latter said he had communicated with Mr. Wetangula who was keen in having the petition proceed, the reason being that if the petition succeeded, he hoped Ford Kenya party would clinch the seat in a by-election.

8. The petitioner now describes himself as a **“flower boy”** who was used for convenience sake and the bride and groom (i.e. Catherine and Wetangula) who would have benefitted from the petition plus advocate Wasuna (who insisted on pursuing the petition) ought to be ordered to bear costs of the petition.

9. In describing himself as a **“flower boy”**, the petitioner wishes the court to find that he was just proxy for other parties who understood the implications of filing a petition. That if it were not for them he wouldn't have filed the petition and so wouldn't have incurred costs.

10. The issue which arises then is whether all the persons alleged to have worked with the petitioner in filing this petition should be condemned to bear the costs. Since the persons named were not parties to this suit, 3rd respondent's counsel requested the court to direct that they attend court for purposes of clarification and to shed light on the claims made by the petitioner.

11. The request was made on the basis that if this petition was filed by proxy, then those involved in conceiving the petition should bear the costs. Prof. Sifuna's submissions were that the filing of this petition was a devious scheme by parties whose names have been made known – this instance being pegged to the provisions of Rule 36(1) of the Election Petition Rules which states:-

“Section 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 person by and to whom the costs shall be paid.**

2(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.”

12. Attempts made at faulting the summoning of persons not party to the petition as regards costs, have been criticized on grounds that **Section 80(1) (d)** of the **Elections Act** frees parties from cumbersome technicalities, especially when one bears in mind that the position contested was the election of a County Woman's Member of National Assembly, all the candidates were women, yet a man comes up to challenge such election. **Section 80(1) (d)** of the **Elections Act** provides that:

(d) Decide all matters that come before it without undue regard to technicalities.

The court agreed that technicalities should not be used unduly thus allowed the request for summoning and cross-examination of the named parties.

13. The argument here is that there is a fiduciary relationship existing between the petitioner and all the parties mentioned – first being Catherine Wambilianga who was the influential party in this particular intercourse, having made an alleged direct request to the petitioner to be her proxy. The petitioner believes her death knell is a text message sent to him from her phone on 1/06/2013 reading:-

“Hi Major, kufika Monday ndio nitakua nimepata pesa kidogo kulipa.”

Petitioner sent message to Catherine saying:-

“Dear Madam, Wasuna need money to withdraw petition, otherwise it may be forced to pay costs as per respondent demands if case will be thrown. U had promised to send me money 4 refer of my case. Pls let me no ur reaction.”

14. Catherine filed an affidavit and attended court for purposes of cross-examination on this issue. Her contention is that although she had been dissatisfied with the outcome of the elections and even gave instructions to file an election petition through Sichangi & Company Advocates, she eventually abandoned those instructions after wide consultations. This was informed by the fact that she had been re-appointed to the office she had held at Kenya Union of Post Primary Education Teachers (KUPPET) and was no longer interested in the petition. Her counsel Mr. Sichangi, pointed out that when she gave those instructions, she did not appoint a proxy.

15. Catherine deposed in her affidavit that she communicated her decision to the Ford Kenya Headquarters, her friends and supporters who included the petitioner.

16. She later learnt that the petitioner had gone to court to challenge the election through the firm of Wasuna & Company Advocates. She denied ever going to the said firm to seek any legal representation in respect of this petition, saying this petition was entirely a creation of the petitioner, and if it had succeeded, he would have got all the costs and would never had mentioned her in such benefits.

17. She also drew to this court's attention the fact that the firm of Wasuna & Co. Advocates has always told this court they were instructed to lodge the petition by Ford Kenya party. It was her contention that she has been unfairly and unjustly dragged into these proceedings, saying the petitioner is out to find scapegoats having now realized his predicament.

18. Wasuna & Company Advocate: This is the firm on record for the petitioner. The petitioner blames all his woes on his advocate Mr. Wasuna, saying he had given instructions to him as early as 2nd May 2013 to withdraw the petition, but counsel insisted that they must proceed, saying Hon. Moses Wetangula (leader of Ford-Kenya Party) had urged him to ask for extension of time so as to enable him raise funds to deposit as security for costs.

19. It is argued that Mr. Wasuna's liability also stems from the fact that he came to this court with the petition, but did not deposit security, then sought indulgence on behalf of his client when there were instructions to the contrary from the petitioner.

20. Mr. Wasuna appeared in court, and expressed his difficulty in disclosing the on-goings between him

and his client, citing advocate-client confidentiality and therefore privileged information. He submitted that when he sought extension of time, it was not on the strength of an undertaking. He contends that, his firm was paid a deposit and therefore properly retained, and there is no penalty for an advocate who acts for a petitioner.

21. As for claims that petitioner had given instructions to withdraw the petition, counsel points out that:-

- a. Fees would have to be paid on such an application.
- b. Notice of the intention to withdraw must be gazetted, which also attracts gazettment fees – yet upto 5th May 2013, no funds had been availed to enable the advocate act thus.

22. Therefore instructions to gazette and file notice to withdraw without financial accompaniments amounted to no instructions. Petitioner confirmed unavailability of funds.

- c. Even if the petition was withdrawn, the issue of costs would still have arisen.
- d. There is no document exhibited to the court showing that petitioner wanted the matter withdrawn, and considering the gravity of the petition, counsel would not have acted on:-
 - i. Oral instructions
 - ii. Without facilitation

23. FORD KENYA PARTY

Close on the heels of advocate Wasuna is the Ford Kenya party, in particular, the affidavit dated 15/05/2013 by LUCIANNE SECHELE, an advocate in the firm of Wasuna & Co. Advocates. The hangman's paragraph is para 2 and 4 where she states:-

“(2) THAT my firm was instructed by the petitioner and FORD KENYA party to represent the petitioner in this petition.

(4) THAT since 9th May 2013, we have been unable to get further instructions from the petitioner and the FORD KENYA Party.”

24. The petitioner, Catherine Wambilianga and Moses Wetangula's cohabitation with the Ford Kenya party, is uncontested. The argument here is that the failure by Catherine to clinch the contested seat was the party's loss, and the party was keen to have the petition heard, with the hope of getting a second bite at the cherry. Prof. Sifuna argues that Ford Kenya party has used the petitioner then dumped him.

25. This view is also echoed by Mr. Sichangi, who appeared on behalf of Catherine Wambilianga.

26. **MOSES WETANGULA** comes into the picture not just as leader of Ford Kenya, but that he seems to have personally, keenly urged Catherine to pursue the petition. He was adversely mentioned by Catherine courtesy of a text message sent to the petitioner, in which she stated:-

“Hi Major, we cannot be able to proceed in that petition coz I was still hoping that Weta would pay the half a million deposit but unfortunately he hasn't. Pls go ahead and write a withdrawal.”

The court was informed that **WETA** is the pet name for Moses Wetangula.

27. When Catherine attended court for cross-examination she stated that two days after the elections Moses Wetangula called her and instructed that Ford Kenya should file a petition against the election of County Woman Member of National Assembly. He assured her that he would pay the legal fees to the firm of Wasuna & Co. Advocates – she expressed her reservation.

28. The petitioner heard the conversation and offered to file a petition and it was under these circumstances that Catherine gave the petitioner Wetangula's telephone number for ease of communication.

29. Catherine claims to have spoken to Moses Wetangula about the present petition and the latter said he would pay the deposit for security. According to her the petition was sponsored by Ford Kenya party which had in fact even approached her to file the petition although in this regard she seems to equate whatever Wetangula does as being done by Ford Kenya. She also maintained that Moses Wetangula paid Advocate Wasuna's legal fees for this petition, because the latter told her so.

30. Ford-Kenya, through its Secretary General DR. DAVID ESELI denied that the party gave instructions to advocate Wasuna to file this petition. He was categorical that if the party was to sponsor a petition, a Management Committee meeting would have to be called, and a resolution passed, because such a decision involves spending funds. He acknowledged that Ford Kenya was not happy about Catherine's loss, but the party had no idea that Catherine intended to file a petition nor did he know Major Masaba (petitioner) and only saw him for the first time in court.

31. He explained that all that has happened with regard to ALL petitions filed by or against the candidates is that the Management Committee has discussed such petitions but Moses Wetangula did not attend that meeting. Further that the Ford-Kenya party does things in a structured and formal way and if there was any communication between Catherine and Wetangula that was not binding on the party. In any event, Dr. Eseli is the one who communicates daily events to Ford Kenya members.

32. **MOSES WETANGULA** denied having any hand in this petition, saying he had enough in his hands, as he too is defending an election petition filed against him. He has never met and does not know Major Masaba and denies all the alleged conversations alluded to by Catherine. Indeed the Major confirmed that he had never met Wetangula nor communicated with him over this petition. Both Wetangula and Dr. Eseli were adamant that there is nothing special regarding the seat of County Woman Member of National Assembly for Bungoma so as to warrant special attention from the political party and draw funding. They also emphasized that senior members and officials of Ford Kenya have election petitions filed against them yet none of them have been sponsored by the party.

33. Moses Wetangula denied having any conversation with advocate Wasuna over this petition or even paying his legal fees.

Section 84 of the Elections Act provides that:-

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

34. The petitioner and some of the respondent's counsel contend that by virtue of the provisions of Rule 36(1) (b), costs need not be restricted to the litigating parties.

35. Further **Rule 36 (2) (b)** takes care of persons who allow themselves to be mischievously used to file petitions or simply file petitions to vex an elected individual. It provides that:-

36(2) (b)

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

36. The flower girl (turned boy) in this case, insisted that the bride and bridegroom whose celebration he was hailing were Catherine and Wetangula (and by extension or inclusion Ford Kenya party).

37. From my analysis of the depositions by the various individuals and their response on cross-

examination, all I can decipher is an image of a gullible man who fits in the description of “**Little Boy Lost**”. There is nothing whatsoever to demonstrate that Catherine was the hand behind the petition. She may have stood to benefit if the petition had proceeded and succeeded, BUT, there isn’t a scintilla of evidence to prove that the petitioner was her proxy. In fact all the evidence presented to this court simply shows how she had urged the petitioner to withdraw this matter.

38. As for advocate Wasuna, he cannot be said to have acted against instructions when there is no evidence of such instruction relating to withdrawal of the suit having been given – I will not say more than that – honouring the timeless protection of advocate-client relationship. However his silence as to the reference of Ford-Kenya as having given instructions raises eyebrows.

39. Ford-Kenya party is said to have instructed Advocate Wasuna, but there is no letter of instruction from the party nor is there any evidence to persuade the court that this particular candidate’s seat was so significantly invaluable that the party had to sponsor the petition.

40. Moses Wetangula had no direct communication with either the petitioner, Catherine Wambilianga, Wasuna Advocate or Ford-Kenya concerning filing of this petition and the communication by Catherine mentioning him was pegged on some hope – not a promise or an undertaking – that is the wording in the phone text message. There is no evidence that he sponsored the petition by paying filing fees or legal fees.

41. The sum total of the evidence led by way of affidavits and cross-examination certainly suggest that not everything is being laid on the table. Parties are blowing hot and cold. There is a real probability that the persons named had encouraged the petitioner to file this matter but no tangible evidence has been presented. In the end what emerges is that the petitioner allowed himself to be misused by persons who ensured they left no trails whatsoever. There is no evidence that he was forced or coerced to file this petition, and if he was persuaded that he was doing so as a matter of honour and duty to his party, then he must carry the cross.

42. This is a matter which ought to have ended much earlier, but took a winding path due to the contest as to who should bear the costs. In my view, the anchor does not sway away from the petitioner; he cannot now create a techni-coloured sob-story of being misled. The impression created is that petitioner did not even know what he wanted, and perhaps the intention was just to vex and thoroughly unsettle the 3rd respondent.

43. In filing this petition and going on a war path regarding costs, parties have had to retain their advocates for a longer period, leading to unnecessary expense. Although the petition was not heard, and did not even go through the preliminary motions of a pre-trial conference, it nonetheless developed a life which trotted on for quite a while.

44. The matter was not complex, but rather melodramatic. I don’t think too much research or preparation had gone into the same but clearly from the pleadings and submissions made, each counsel involved has given it some thought i.e. both the petitioner’s prayer for striking out and the arguments for costs. I also take into account that most counsel in this matter have travelled either from Nairobi, Kitale or Kisumu to attend court sessions.

45. In considering the issue of costs, I also bear in mind the petitioner’s initial conduct of eagerly filing this matter, his subsequent reaction upon realizing the futility of pursuing the petition, I think he genuinely wanted the petition to die out, hence his willingness to have it struck out. All these factors must be considered in trying to balance the order I shall make, so as not to appear to be too punitive, yet at the same time not over indulge an individual who is out on a limb, like a gun for hire.

46. I have considered the decision by D.S. Majanja J, in **Patrick Ngeta Kimanzi V Marcus Mutua Muluvi & 2 others (2013) eKLR**, where costs were capped at Ksh 600,000 for a petition which was determined preliminarily. I also find useful, the decision in **Kithinji Kiragu V Martin Nyaga Wambora Election Petition No.1 of 2013** where a maximum of Kshs1.5 million was awarded. The 1st respondent

was awarded a maximum of Kshs.750,000/= and the 2nd and 3rd respondents were awarded Kshs.750,000/=. This case involved the election of a Governor and went the full process of trial where parties filed responses.

47. The above circumstances have to be compared and contrasted with the circumstances in the instant petition which was disposed of preliminarily. The issues addressed in this petition were fairly simple, being the effect of failure to pay security for costs as required under the Election Act, 2011 and the Rules made there under. Although the parties made a number of court attendances (in total 11) to answer on the issues that arose in this petition, and in particular, on the issue of costs, I reiterate that the issues for consideration were fairly simple. I also wish to point out that only the 3rd respondent had filed a response at the time the petition was dismissed.

48. Save that the petition herein is in respect of a County Woman Member of National Assembly, and the fact that no response was filed by the 1st and 2nd respondent and further that there were protracted hearings on the issue of costs, there are no major differences between this petition and the Machakos High Court Petition.

49. Doing the best I can, I cap the total costs payable to the respondents at Kshs.700,000/=. Out of this amount the 3rd respondent shall receive a maximum of Kshs.400,000/= while the 1st and 2nd respondents shall have a maximum of Kshs.200,000/=. The interested parties, namely Catherine Wambiliangah and Moses Wetangula shall have their costs of defending the application for costs capped at Kshs.50,000/= each.

50. I also take this opportunity to thank all counsel for conducting themselves in a dignified and very professional manner.

51. This brings to an end the petition filed against Reginalda Nakhumicha and I now direct that a certificate do issue pursuant to Section 86(1) of the Elections Act 2011.

Delivered and dated this 30th day of August 2013 at Bungoma.

H.A. OMONDI

JUDGE