



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Election Petition 2 of 2008

FRANCIS MWANZIA NYENZE PETITIONER

VERSUS

1. CHARLES MUTISYA NYAMAI

2. GABRIEL KOBIA

3. ELECTORAL COMMISSIONER KENYARESPONDENTS

RULING

1. On 9.6.2009, I struck out the Petition herein for want of proper service. I granted costs to the Respondents and what I am supposed to determine now is whether the 1st Respondent is entitled to a certificate of costs for two advocates or only for one advocate. _
2. I have perused the record and prior to my Ruling of 9.6.2009, the appearances were as follows:-
 - i. for the Petitioner –Mr. Kioko Kilukumi and Mr. Albert Simiyu
 - ii. For the 1st Respondent-Mr. Kamau Karori and Mr. William Maema
 - iii. For the 2nd and 3rd Respondent –Mr. Aaron Makau.
3. What is the law on this subject? I have been referred to the following sections and decisions ;
 - i. Section 29 of the National Assembly and Presidential Elections Act, Cap 7- that the Election Court may determine the issue of all costs of and incidental to the presentation of a Petition.
 - ii. Lalji Bhimji Sanghani vs Chemilabs (No 2) [1976- 1980]1 KLR 1151- the decision whether to certify costs for two advocates is purely discretionary.
 - iii. Paragraph 59 of the Advocates Remunerations Order- costs for more than one advocate may be allowed if such an order is reasonable and taking into account ***“the amount sued for or the relief claimed or the nature, importance or difficulty of the matter.”***
 - iv. Jax (k) Ltd vs Old Mutual (k) Ltd [1996]KLR 1786 [HCK] -the meaning of ***“the nature, importance or difficulty of the matter.”*** That the question to be asked is ***“whether the case held a technical and public interest and importance in proportion to the length of the case”*** and ***“the general conduct of the proceedings – preparation of the case, authorities studied and canvassed, facts, files and documents collected.”***
 - v. Kanji Naran vs Devshi Dhanji [1977] KLR 113- that there are instances where the costs payable to a

second advocate are a luxury not to be burdened on the other party.

4. I accept all the propositions set out above as setting out the law on the subject and I should say the following in that regard;
5. What was before me for hearing was an Application to strike out the Petition. It was dated 7.2.2008. Parties appeared before me on five occasions only before I delivered my Ruling. Part of the time was taken by objections raised which have no bearing on what is before me. Granted, election petitions are a matter of public interest but I take the firm view that the fact of being political in contents should not increase their importance in the eyes of the court. Neither do I take the view that there is anything spectacularly technical about them save for political emotions which are in no way a measure of technicality. I may agree with the Applicant that had the Petition gone on for hearing, certainly time to prepare for the hearing; time to study documents, files and other election material would have persuaded me to agree that one advocate may not have been enough. The length of recent election petitions bears him out. However, I have said that the matter before me was not lengthy, neither did it require such manpower as to warrant more than one advocate and I know Mr. Kamau Karori to be capable on his own without the help of Mr. William Maema also capable on his own, on a simple application to strike out a Petition.
6. What am I saying? That I wholly agree with the decision in Kanji Naran (Supra) where the learned taxing officer found that;

“there are other instances where a senior is employed and appears with a junior , but the court does not grant a certificate for two counsel. In such cases it means that the party who engages two advocates would be given costs of one counsel and the second counsel’s fee would be considered a luxury not to burden the other party with.”
7. That statement aptly summarizes the position I have taken in this matter. I see no fair and good reason to accede to the Application to issue a certificate of costs for two advocates appearing for the 1st Respondent. A certificate shall be issued to the firm of M/S Iseme Kamau and Maema Advocates and for one advocate only.
8. I shall make no order as to the costs of this dismissed Application.
9. Orders accordingly.

ISAAC LENAOLA

JUDGE

Countersigned and delivered at **Machakos** this **19TH** day of **March 2010**.

H.P.G. WAWERU

JUDGE