



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**Election Petition 1 of 2008**

**IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT,  
CHAPTER 7, PARLIAMENTARY AND PRESIDENTIAL ELECTION REGULATIONS THE  
NATIONAL ASSEMBLY (ELECTION PETITION) RULES, THE ELECTION OFFENCES ACT,  
CHAPTER 66**

**AND**

**IN THE MATTER OF THE PARLIAMENTARY ELECTION FOR MAGARINI  
CONSTITUENCY**

**BETWEEN**

**ESPOSITO FRANCO .....PETITIONER**

**VERSUS**

**AMASON KINGI JEFFAH .....1<sup>ST</sup> RESPONDENT**

**AMINA KALE ..... 2<sup>ND</sup> RESPONDENT**

**ELECTORAL COMMISSION OF KENYA .....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

By a Notice of Motion, dated 8<sup>th</sup> February 2008, pursuant to the provisions of Section 23(1) (d) of the National Assembly and Presidential Elections Act [Cap 7], Section 3 and 3A of the Civil Procedure Act [Cap 21] Laws of Kenya and all the enabling provisions of the Law, the applicant seeks orders that:

- 1. The application be heard ex-parte in the first instance.**
- 2. Service of the application be dispensed with.**
- 3. This honourable court be pleased to extend time in order to enable the petitioner/applicant to pay the security for costs into court.**
- 4. The costs of this application be provided for.**

The application is based on the grounds that:

- (a) It is a requirement of Section 21 of the National Assembly and Presidential Election Act (Cap. 7)**
- (b) The orders sought will not prejudice the respondents in any event.**
- (c) This application has been brought expeditiously, in good faith and without inordinate delay.**
- (d) It is in the interest of justice and fair play.**

The application is predicated upon the annexed affidavit, of Churchill Midwa advocate, sworn on the 8<sup>th</sup> day of February 2008.

On behalf of the applicant it was argued that on 10<sup>th</sup> January 2008 at 2.30pm, in the company of Mr. Samwel Maina Karanja advocate, Mr. Midwa advocate attended the High Court Civil Registry at Malindi Law Courts, with a view to presenting an intended election petition on behalf of the petitioner herein.

That upon presenting the petition to the Executive Assistant, Gladys Kalama, he was informed that guidance would be sought from the office of the Registrar in Nairobi in respect of the assessment of the filing fees.

That the Higher Clerical Officer, Douglas Randu, requested him to leave the petition and to return the next day for further directions.

The following day - 11<sup>th</sup> January 2008 - at about 9.30am; again in the company of Mr. Samuel Maina Karanja advocate, he returned to the said Registry as a follow up.

That Douglas Randu, the Higher Clerical Officer, informed him that he had been directed by the office of the High Court Registrar in Nairobi to assess the filing fees for the petition at Kshs. 25,000. He then promptly paid the filing fees and the petition was duly stamped, with the official High Court stamp, and duly received and acknowledged by the Deputy Registrar.

He enquired from Douglas Randu, the mode of payment of the security for costs of Ksh. 250,000, since he was desirous of paying the same then. However, he was informed that the matter required further direction from the Resident Judge, who was then on leave. In the circumstances, although he had the said amount of money in cash he could not pay the same. He then returned the money to the petitioner.

That by reason of the foregoing, the petitioner should be allowed to pay the deposit in court, out of time in the interest of justice and fair play. In this regard, time should be extended to enable the petitioner to comply with Section 21 of the National Assembly and Presidential Elections Act (Cap 7) Laws of Kenya.

Mr. Weloba, for the first respondent, urged that Section 44 of the Constitution makes Election Court a special court, with special procedures and powers under Section 44 (4).

The National Assembly and Presidential Elections Act (Cap 7), does not contemplate extension of time (see Section 21). There is no single decision in the case law, so far decided, where extension of time has been allowed for deposit of security. The conduct of the petitioner, even if the law allows, has not been candid. The Deputy Registrar was in the station. Yet the petitioner or his counsel did not contact him faced with the dilemma of depositing the security for costs. As of now no security has been paid in court as enjoined by law. Moreover, the banker's cheque was addressed to the Senior Principal Magistrate who is not one and the same person as the Deputy Registrar as required by Rule 12(1) and (2) of the National Assembly Elections (Election's Petition) Rules, 1993. In addition, the said banker's cheque is dated 7<sup>th</sup> February 2008, when the petition was presented on 10<sup>th</sup> January 2008. That amounts to lack of diligence and is evidence of inordinate delay. It is also evidence of the fact that by 10<sup>th</sup> January 2008 the petitioner

had no money. The two court clerks have denied, in their various affidavits, that they refused to accept the deposit. The petitioner and his agents failed to seek the intervention of the Deputy Registrar of the High Court who, was at the station and, received the petition. The cheque was eventually forwarded by a stranger – Richard Kazungu Mwangandi – who is neither the petitioner nor the agent of the petitioner under the National Assembly and Presidential Elections Act (Cap 7) and the Rules made thereunder.

On the one hand, under Section 44(4) (b) of the Constitution, the powers of the Court are created by the statute [Cap 7]. On the other hand, the rules made thereunder are created by subsidiary legislation. It is trite law that when an Act of Parliament conflicts with the Rules, then the Rules give way to the Act. The National Assembly and Presidential Elections Act [Cap 7] does not contemplate extension of time (see Section 21).

The issue of security is not a mere formality. It goes to jurisdiction. Pursuant to Section 21 of the Act; if no security is furnished, no further proceedings shall be taken. The respondent is at liberty to move the court to strike out the petition. The Court has no discretion in the matter.

The petitioner and his agents were prompted into making payment by a letter dated 8<sup>th</sup> February, 2008 from the Deputy Registrar. Had the Deputy Registrar not written, the petitioner and his advocates may never have known that security for costs was to be paid at all.

Mr. Mrima, for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, relied on the affidavit of **Samwel K. Kivuitu**, sworn on the 13<sup>th</sup> day of February 2008 and filed on 14<sup>th</sup> February 2008. Apart from associating himself with the submissions of Mr. Weloba, for the first respondent, he urged that election petition is presented to the Deputy Registrar. All evidence points irresistibly to the fact that the Deputy Registrar was at the station. He is the one who signed and acknowledged the receipt of the petition on 10<sup>th</sup> January 2008. The petitioner or his counsel did not consult him regarding deposit of security for costs. The petitioner and his counsel are not candid. The application is an afterthought therefor.

In any event all the authorities, on election petitions and particularly Sections 44(1) and (4) of the Constitution, oust the applicability of the Civil Procedure Rules and Act [Cap 21] Laws of Kenya, **except** Order XVIII and the Oaths and Statutory Declaration [Cap 15] Laws of Kenya. The court has no discretion in the matter therefor. If Parliament wanted to give discretion to the Court, it would have done so expressly. The omission to pay security for costs was due to misreading of the law, since the Deputy Registrar was in the station. The petitioner or his counsel made no attempt to consult with him, yet petition was to be presented to him. In any event Kazungu Mwangandi, who deposited the deposit cheque, is neither the petitioner nor the agent by reason of Rule 12 of the National Assembly Elections (Election Petitions) Rules, 1993.

I am grateful to all counsel for their assistance in this application. I have considered all the evidence and legal issues raised, and the authorities cited before me, even though I have not set the same down in extenso. Having done so, I now wish to address the issue at hand: whether the Court has jurisdiction to extend time within which to deposit the security for costs in the context of an election petition.

It is trite law that in the exercise; by the Election Court, of its jurisdiction the High Court (read Election Court) acts in exercise of its original Civil Jurisdiction, by dint of the provisions of Section 23 of the National Assembly and Presidential Elections Act (Cap 7) Laws of Kenya.

The Rules Committee has made rules of court regarding the practice and procedures governing petitions – The National Assembly Elections (Election Petition) Rules, 1993.

Section 21 of the National Assembly and Presidential Election Act [Cap 7] Laws of Kenya provides:

***“(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 if an objection is allowed and not removed, no further 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."**

In addition thereto Rule 12(1) of the National Assembly [Election Petition] Rules 1993 provides:

**"(1) The deposit of money by way of security for costs, charges and expenses payable by the petitioner shall be made by payment to the Registrar, and such deposit shall be vested in and drawn upon from time to time by the Chief Justice for the purposes of which security is required by the Rules.**

**(2) The Registrar shall give receipt for any such deposit and shall file the duplicate of the receipt, and shall keep a book open to the inspection of all parties concerned, in which shall be entered from time to time the amount and the petition to which it is applicable."**

There is no dispute that the petition was presented within the time prescribed by the law, and was received and acknowledged by the Deputy Registrar. What is in dispute is whether the court clerks, and by extension the Deputy Registrar, refused to accept the deposit for security for costs, so that time should be extended for that purpose. What is further in dispute (and fundamental) is whether the Court has jurisdiction to extend time for deposit of security for costs.

From facts and evidence, discernible from the affidavit evidence and copies of pleadings on record, it is clear to me that the Deputy Registrar of the High Court was at the station at all material times. He received and acknowledged the petition. There were two counsel for the petitioner who presented the petition. The two advocates are deemed to have known the intent and purport of Section 21 of the Act and Rule 12(1) of the Rules. If the two clerks were not co-operative, nothing would have been easier than to take up the matter with the Deputy Registrar personally. I have had the advantage of reading the various affidavits filed herein. It would appear to me that the failure to deposit the security for cost, was either by reason of ignorance or misreading of the law.

Alternatively, the petitioner did not have the deposit at that point in time. This application appears to me to be an afterthought. In my view, had the Deputy Registrar not written the letter of 8<sup>th</sup> February 2008 asking the petitioner to collect his cheque, the petitioner's advocates may not have made this application. But that is not all. There is a further omission which is not only relevant but compounds the problem – service of the petition. The said advocates also failed to serve the Attorney General with a copy of the petition notwithstanding the clear provisions of Rule 36 of the National Assembly [Election Petition] Rules, 1993. In my view the total effect of the aforesaid omissions lends credence to the assertion that this application is not only made in bad faith but also an afterthought. The said advocates are not candid with the court, I find and so hold.

On law, I proceed on the premise that it is a cardinal principle rule of construction of statutes that the court ought not to act on the principle that every procedure is to be taken as prohibited unless expressly provided for, but should proceed on the opposite principle that every procedure is to be understood as permissible till it is shown to be prohibited by law.

The National Assembly and Presidential Election Act [Cap 7] Laws of Kenya, inclusive of its support subsidiary legislation, is a comprehensive code of substantive and procedural election law. Hence the Civil Procedure Act [Cap 21] Laws of Kenya, and the rules made thereunder, do not apply to the National Assembly and Presidential Elections Act [Cap 7] Laws of Kenya, **except where expressly provided** for in the Act or the Rules made thereunder (see Rule 18(1)). Hence an application for extension of time, which is germane to the Civil Procedure Act and Rules, is inapplicable under the National Assembly and Presidential Elections (Cap 7) Laws of Kenya.

Section 21 of the Act is worded in peremptory language. It does not admit of ambiguity or further search for the intention of Parliament. Failure to deposit the security within 3 days is not a mere irregularity. It goes to the root of the matter - jurisdiction. I find and hold that this court lacks jurisdiction, under the National Assembly and Presidential Elections Act (Cap 7) Laws of Kenya, to extend time within which to deposit security for costs. All authorities cited before me and some known to me back this view.

In the final analysis, on facts and evidence, this application is wanting. On law, it has no basis. Accordingly, this application is for rejection.

The upshot is that the application fails and is dismissed with costs to the respondent. It is so ordered.

By way of further directions, and in line with my previous directions of 13<sup>th</sup> February 2008, the respondents are now at liberty to fix for hearing the application by way of Notice of Motion dated 8<sup>th</sup> February 2008.

Dated and delivered at Malindi this 24<sup>th</sup> day of April 2008.

**N. R. O. OMBIJA**

**JUDGE**