



REPUBLIC OF KENYA



**Mwakwaya v Thoya & 2 others (Election Petition 2 of 2017)
[2024] KEHC 8938 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8938 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
ELECTION PETITION 2 OF 2017
SM GITHINJI, J
JULY 25, 2024**

BETWEEN

SAMSON KAZUNGU MWAKWAYA PETITIONER

AND

KINGI MICHAEL THOYA 1ST RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARY COMMISSION 2ND
RESPONDENT**

**RAYMOND MAKAZI (RETURNING OFFICER MAGARINI
CONSTITUENCY) 3RD RESPONDENT**

RULING

Coram: Hon. Justice S. M. Githinji

Mr Otara Advocate is for the Petitioner

M/s Aoko Otieno Advocate for the 1st Respondent

Mr Kazungu Advocate for the 2nd and 3rd Respondent

1. For determination is the Notice of Motion dated 21st July 2021 seeking the orders;
 1. That the sum of Kshs. 500,000 deposited by the firm of Richard O. & Co Advocates be released to Mr. Richard Otara.
 2. That costs of this application be in the cause.
2. The application is premised on the grounds set out on its face and on the supporting affidavit of Richard Otara an advocate of the High Court of Kenya in conduct of the matter on behalf of the Petitioner. He deponed that the petition was initially filed by one Johnson Muthawali and Boniface



Tsuma Nzai and at the time of substituting the petitioner the firm of Richard O. & Co advocates deposited a sum of Kshs. 500,000 as security for costs. It was deponed that the petitioner has since died and the firm of Richard O & Co. advocates cannot continue being sureties of a deceased petitioner and it is only fair and just that the money be released to him.

3. In response, the 2nd and 3rd respondents filed a replying affidavit sworn by Muchai Lumatete Walubengo stating that it is not contested that the Petitioner deposited a sum of Kshs. 500,000 as security for costs through its counsel though it is untrue that the Applicant became a surety of the Petitioner. He stated that the security for costs so deposited was pursuant to Section 78 of the [Elections Act](#) No. 24 of 2011 as read with Rule 13 of [Petition Rules](#) and it is clear that the security for costs is deposited to secure costs payable by the petitioner in the event of an unfavorable outcome. It was further deponed that the petitioner was condemned to pay the Respondents costs in an aggregate sum of Kshs. 3,000,000 thus the respondents have the first right of access to the funds held with the court.

Disposition

4. The application was canvassed by way of written submissions which I have taken into account. The issue for determination is whether the amount deposited as security for costs should be released to the Applicant.
5. The law on deposit of security for costs is found in Section 78 of the [Election Act](#) which provides as follows:
 1. A petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition under this Part.
 2. A person who presents a petition to challenge an election shall deposit-
 - (a) one million shillings, in the case of a petition against a presidential candidate;
 - (b) five hundred thousand shillings, in the case of petition against a member of Parliament or a county governor; or
 - (c) one hundred thousand shillings, in the case of a petition against a member of a county assembly. (Emphasis mine).
 3. Where a petitioner does not deposit security as required by this section, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the respondent may apply to the election court for an order to dismiss the petition and for the payment of the respondent's costs.
 4. The costs of hearing and deciding an application under subsection (3) 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.
 5. An election court that releases the security for costs deposited under this section shall release the security after hearing all the parties before the release of the security.
6. Rule 13 of the [Elections \(Parliamentary and County Elections\) Petitions Rules](#), 2017 on the other hand provides as follows: -
 - i. Within ten days of the filing of a petition, a petitioner shall deposit security for the payment of costs in compliance with section 78 (2) (b) and (c) of the Act.
 - ii. The security for costs deposited under sub-rule (1) shall (a) be paid to the Registrar;



7. From the material placed before me, it is not contested that the sum of Kshs. 500,000 was deposited as security for costs on behalf of the petitioner. The applicant contends that the firm paid the said sum as surety on behalf of the petitioner. From the above provisions of law, it is clear to me that the sum of Kshs. 500,000 paid through the firm of Richard O. & Co. was security for costs for petition. It befuddles me how the same would be paid as surety as suggested by the applicant. This sum in my view was nothing but security for costs as anticipated by Section 78 of the Elections Act and not surety by the applicant. I find no ground to have the same released to the applicant. Further, I do note that there is a consent regarding the same dated 7th June 2023 amongst the Respondents. The same has not been set aside and, or varied and is therefore effective. Amount should be released as per the said consent. The upshot is that the Notice of Motion dated 21st July 2021 fails for lack of merit and the same is dismissed with no orders as to costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 25TH DAY OF JULY, 2024.

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S.M. GITHINJI

JUDGE

In the presence of: -

1. Mr Lumatete for the 2nd and 3rd Respondents.
2. Mr Otara for the Applicant – Absent

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S.M. GITHINJI

JUDGE

25/7/2024

