



REPUBLIC OF KENYA



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**Kenta & another v Independent Electoral and Boundaries Commission (IEBC) & 3 others
(Election Petition E001 of 2022) [2023] KEHC 666 (KLR) (6 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 666 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
ELECTION PETITION E001 OF 2022**

TM MATHEKA, J

FEBRUARY 6, 2023

**IN THE MATTER ARTICLE 1(1); 2(2); 3(1); 4(2); 10; 21(1) 22(1);
23, 38(3); 46(2); 48; 81(A); & 82(2) (B); 84; 86; 87(2) & (3); 88(5);
165(3) (A) AND (E) & 180(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTION 75, 76, 80 AND
82 OF THE ELECTIONS ACT NO. 24 OF 2011**

AND

**IN THE MATTER OF THE POLITICAL PARTIES ACT NO. 11 OF
2021 AND IN THE MATTER OF LEGAL NOTICE NO. 128 OF 2012,
ELECTIONS (GENERAL REGULATIONS (2012) AS AMENDED**

AND

**IN THE MATTER OF LEGAL NOTICE NO. 72 OF 2017, THE ELECTIONS
(GENERAL) AMENDMENT REGULATIONS, 2017 AND IN THE MATTER OF
THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION
RULES, 2017 AND IN THE MATTER OF LEGAL NOTICE NO. 126 OF 2012,
(THE ELECTIONS REGISTRATION OF VOTERS) REGULATIONS, 2012**

BETWEEN

RICHARD MOITALEL OLE KENTA 1ST APPLICANT

WILLIAM KENTEIYIA OLTETIA 2ND APPLICANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 1ST RESPONDENT**

**NAROK COUNTY RETURNING OFFICER (DR NAMULUNGU R I
SIDNEY) 2ND RESPONDENT**



PATRICK KETURET OLE NTUTU 3RD RESPONDENT

TAMALINYE KOECH 4TH RESPONDENT

RULING

1. Following the general elections held on the August 9, 2022, the the Independent Electoral and Boundaries Commission, IEBC the 1st respondent through the Narok county returning officer the 2nd respondent, declared Patrick Keturet Ole Ntutu the 3rd and Tamalinye Koech, the 4th respondent as the duly elected governor and deputy governor of Narok county respectively.
2. The petitioners Richard Moitalel Ole Kentaand William Kenteiyia Olteitiawho were also among the contestants for the seats of governor and deputy governor respectively were aggrieved by those results. Consequently, they filed the election petition dated September 7, 2022 seeking the following: -
 1. Inspection of ballot boxes, scrutiny, recount and re-tallying of the votes cast and recorded as having been cast in the said election in Kilgoris constituency, Emurua Dikirr constituency, Narok East constituency, Narok North constituency, Narok West constituency and Narok South constituency.
 2. A declaration that Patrick Keturet Ole Ntutu, the 3rd respondent herein and Tamalinye Koech, the 4th respondent herein were not validly elected on August 9, 2022 general elections as the Narok governor and deputy governor respectively.
 3. An order cancelling the certificate of declaration of results of governor of Narok county election,2022, form 37D issued to the 3rd respondent, the certificate of declaration of results of deputy county governor of Narok county election,2022 and form 37D issued to the 4th respondent.
 4. A declaration that the election of the 3rd and 4th respondents as Narok county governor and deputy governor respectively was null and void.
 5. A declaration the 1st and 2nd petitioners were duly elected governor and deputy governor respectively of Narok county on the general elections of August 9, 2022.
3. The petition was accompanied by a motion dated September 7, 2022 under certificate of urgency seeking a raft of interim orders as seen from this quote from the ruling viz:
 - i. The preservation and safekeeping of all the KIEMS kits used for all the polling and tallying centers with respect to the gubernatorial election of Narok county held on August 9, 2022 by IEBC and the county returning officer. This is repeated word for word at paragraphs 9 & 21, 10 & 22, 11&23, 12&24, 13&25, 14&26
 - ii. The delivery into safe keeping and custody of the court as evidence of all the election materials used in that election including ballot boxes, written statements by presiding officers, under the provisions of the *Elections Act*, printed copy of the register used during the elections sealed in tamper proof envelope, copies of results of each polling station in which the results are contested: packets of:- spoilt papers, counterfoils of used ballot papers, counter ballot papers, rejected ballot papers, the marked copy of the register, polling day diary, statements showing the number of rejected ballot papers, KIEMS kits used for all polling stations and all other electoral materials. This is to be found in paragraphs 3&15, 4&16, 5&17, 6&18, 7&19, 8&20



in the exact same words. One can see that the prayer for preservation and safekeeping by either the court or 1st and 2nd respondent were not sought in the alternative, and one cannot find any explanation for the unimaginable repetition. But it is evident that the applicant was on the outset alive to the fact that it is the duty of the 1st and 2nd respondent to take care of election materials.

- iii. Provision of access to the applicant of all the voter registers, counterfeits and diaries indicating the 1st and last serial number of all ballot papers issued for all the polling stations and tallying centers.

These prayers are with respect to polling and tallying centers set out on the face of the application and the supporting affidavit of the 1st applicant in the six (6) constituencies of Narok county: viz:-

1. Kilgoris
 2. Emurua Dikirr
 3. Narok North
 4. Narok East
 5. Narok South
 6. Narok West
4. Both the petition and the interim application were opposed by the respondents who filed responses to the application and the petition.
 5. The matter went through the pre-trial directions, the interlocutory applications were heard and dealt with and the petition was fixed for hearing.
 6. Through a notice of motion dated November 12, 2022 petitioners sought to withdraw the election petition pursuant to rules 21 and 22 of the [Election \(Parliamentary and County Elections\) Petition Rules 2017](#) on the grounds set out therein, that: -
 1. Upon conferring with their families and community and religious elders, they have on their will and volition chosen to withdraw the petition.
 2. They are apprehensive that the prolonged electoral contestation over the Narok gubernatorial election will be prejudicial to the unity, public interest, cohesion and developmental vision of the Narok people.
 3. After much soul searching and reflection, they have concluded that the time has come for them to sacrifice their political ambition at this time in favour of serving the greater interest and public good of the people of Narok to move on from the 2022 general election.
 4. No agreements or terms of any kind has been made, and no undertaking has been entered into in relation to the withdrawal of the petition.
 5. They undertake to publish in a newspaper of national circulation a notice in the prescribed form of their intention to withdraw the petition.
 6. It is in the interest of justice that the application is scheduled for hearing at the earliest date and the orders sought are granted.
 7. It was their prayer that each party bears its own costs.



8. The application was supported by an affidavit of the 1st petitioner Richard Moitalel Ole Kenta sworn on November 12, 2022. In it he reiterated the grounds for the application as set out in the motion.
9. The respondents were not opposed to the withdrawal of the petition. However whilst the 1st and 2nd respondents had no objection to the application for withdrawal, it was their prayer that an award of costs be made in their favour. In their replying affidavit sworn by Dr Namulungu R I Sidney on November 18, 2022 the respondents deponed to the following facts in support of their prayer:-
 1. Gathering, preparing and filing of response to the election and affidavit dated September 14, 2022 in support thereof.
 2. Filing a replying affidavit dated September 21, 2022 in opposition to the petitioners' application dated September 7, 2022.
 3. Filing an application dated September 19, 2022 seeking leave of the court to file affidavits out of time; a notice to provide further and better particulars dated October 21, 2022; an application dated October 27, 2022 seeking an order for review of part of the court's decision dated October 18, 2022; an application dated November 5, 2022 seeking to strike out part of the petitioner's documents which were illegible; and a total of 18 affidavits by 5 county returning officers & 13 presiding officers .
 7. Collecting, photocopying all forms 37 A, Forms 37 B, and Form 37 C and certifying and filing them with the deputy registrar; retrieving all the 883 SD Cards, converting the data into PDF, printing the same and certifying the print outs, filing and serving them upon all the parties' advocates; participating in a three days' exercise of opening all the presidential ballot boxes in respect of three constituencies, namely Kilgoris, Narok North and Emurua Dikir & retrieving the manual/printed registers and depositing with the deputy registrar; participating in a two days' exercise of facilitating the petitioners to place extra seals in all the ballot boxes from 883 polling stations; and filing a statement of issues pursuant to the court's ruling dated October 18, 2022.
 8. Participating and responding in interlocutory applications i.e application dated September 7, 2022 by the petitioners seeking preservation of election materials; application dated October 6, 2022 by the petitioners seeking leave to file additional affidavits; application dated November 4, 2022 by the petitioners seeking an order to commit him to civil jail for alleged contempt of court; application dated November 12, 2022 by the petitioners seeking leave of court to withdraw the petition; application dated September 30, 2022 by the 3rd respondent seeking an order to be provided with better particulars; application dated September 30, 2022 by the 3rd respondent seeking leave to file additional affidavits; & application dated October 4, 2022 by the 4th respondent seeking leave to file additional affidavits.
 9. Hiring two advocates who appeared before court on October 18, 2022, November 7, 2022 and November 14, 2022.



10. Spending considerable time with their advocates in preparing for the hearing of the matter on two weekends preceding the hearing dates of November 7, 2022 and November 14, 2022 when the matter was to come up for hearing.
10. Considering that this application was unopposed, this court on November 30, 2022 marked the petition as withdrawn. In addition, the petitioners and the 1st and 2nd respondents were given the opportunity pursuant to article 159(2) (d) to negotiate on the issue of costs. Unfortunately, they were unable to settle on the issue and on December 7, 2022 they were directed to file their submissions on costs.

Respondents' Submissions

11. The 1st and 2nd respondents set out the justification for the award of costs in their favour. They began by citing section 84 of the [Election Act](#) which states;

“ An election court shall award costs and incidentals to a petition and such costs shall follow the cause.”
12. They also rely on rule 21 (2) of the [Elections \(Parliamentary and County Elections\) Petitions Rules 2017](#) which empowers the election court to grant leave for the withdrawal of a petition and gives the court discretion on the terms as to the payment of costs.
13. It is argued for the 1st and 2nd respondents that these 2 provisions read together indicate that costs will follow the event, unless the good reason the court exercises its discretion not to award the same. They argue that they are entitled to costs for the following reasons;
 - “ (i) The application for withdrawal of the petition was made too late in the day, to wit, on the eve of the hearing of the petition. The 1st and 2nd respondents had prepared for the hearing and hence earning “getting up fees” as prescribed under the [Advocates Remuneration Order](#).
 - (ii) The 1st respondent has incurred expenses in hiring advocates to represent it in the matter. Together with its advocates, the 1st and 2nd respondents filed a response to the election petition and an affidavit in support of response to the election petition, running to 988 pages.
 - (iii) In addition to filing response to petition, the 1st respondent was constrained to identify presiding officers who had been accused of violating election laws. Subsequently, the 1st respondent filed affidavits by 18 presiding officers spread all over the expansive county of Narok.
 - (iv) The petitioners filed a voluminous petition running to 1474 pages some of which pages were illegible. The 1st respondent identified such illegible pages in the petition and sought to be provided with better particulars thereof.
 - (v) During and after pre-trial conference the court had to deal with a total of eight (8) interlocutory applications. Whereas majority of the applications were compromised by the parties, the court delivered three (3) rulings.
 - (vi) Following the courts pretrial directions, the 1st and 2nd respondents took the following steps in compliance.



- (a) Collected, photocopied and filed in court all forms 37A from the 883 polling stations, forms 37B from the six (6) constituencies and form 37C.
- (b) Retrieved all the 883 SD cards, converted the data into PDF, printed and filed certified copies thereof in court. All parties were served with copies.
- (c) Accessed and opened all presidential ballot boxes (over a period of 3 days) in respect of three (3) constituencies in order to retrieve manual/printed registers which registers were deposited with the deputy registrar.
- (d) Facilitated the petitioners (over a period of 2 days) to place extra seals to all the 883 ballot boxes.”

Petitioner’s Submissions.

14. The petitioners submitted that pursuant to provisions of rule 21 of the *Election (Parliamentary and County Elections) Petitions Rules 2017* the issue of whether or not any costs may be paid is entirely at the discretion of the election court. They argued that the wide discretion of the election court on the issue of costs is further underlined under rule 30(2)(a) that contemplates that the court may even order a successful party to pay costs.
15. The petitioners argued that the order for withdrawal of costs be accompanied by an order of no orders as to costs on the following grounds: -
 1. They have moved to withdraw the petition at the earliest stage possible before commencement of the hearing of the petition.
 2. The election petition is not a dispute to them or a chose in action unique to them but it is in the nature of a representative action or public interest litigation seeking to ensure compliance with the principles of electoral system set out under articles 81 and 86 of the *constitution*.
 3. The reliefs sought in the petition were not meant to be for their sole benefit but for the benefit of the entire electorate of Narok county by ensuring that their rights to vote and universal suffrage based on the aspiration for fair representation and equality of the vote is upheld.
 4. The instant petition was only necessitated not merely by their election loss but by failures and omissions on the part of the 2nd respondents to uphold the principles and standard of the electoral system demanded by the *Constitution* and the law as particularized in the petition.
16. It was the petitioners’ submissions that a sum of Ksh 200,000/= would suffice as costs to the 1st and 2nd respondents. To support this proposition, they cited *Ombati Richard v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.
17. The petitioners while relying on *Philip Kyalo Kituti Kaloki v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR cited with approval in *Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others* [2018] eKLR urged this court to be guided by principles of fairness and justice while capping the costs awardable to the respondents.



18. They argued that costs should not be extremely excessive or punitive and urged this court to be guided by the holding in *Dickson Daniel Karaba v Kibiru Charles Reubenson & 2 others* [2018] eKLR where the court stated that:-

“...a balance must be drawn on the issue of costs where successful litigants are awarded costs but those who lose in electoral disputes should not appear to be punished by award of costs that may send the wrong message that a party shall not approach the court if they feel aggrieved in the manner elections are conducted.”

19. They submitted that there were only three physical court appearances and two virtual court appearances by counsel before the petition was withdrawn.

20. The petitioners further urged the court to take guidance from the moderate amount of Ksh 500,000/= set under section 79 of the *Election Act* as security for costs that may become payable by the petitioner after an election petition. It is argued that this was the legislative guide that costs arising from election petitions ought not to be excessive, unbearable or prohibitively high.

Respondent's Response

21. Responding to the petitioner's submissions, the 1st and 2nd respondent faulted them for submitting on the merits of the petition; for causing the change of venue of announcing the results through violence which led to a security breach. They also argued that the petitioners must have, upon being supplied with all form 37As and data from the SD cards, realized that their petition was based on misinformation hence their decision to withdraw

22. Counsel argued that from the petition and proceedings, by the time of withdrawal, parties had urged 75% of the petition, and that this should form the basis for the capping of costs.

23. It was argued that the case of *Ombati Richard v IEBC & 2 others* [2017] eKLR relied upon by the petitioners distinguishable because it was about the election of a member of parliament, non-gubernatorial, and the withdrawal was before pre-trial conference.

24. In support of the amount of costs sought, counsel cited *Dickson Daniel Karaba v Kibiru Charles Reubenson & 2 others* [2018] eKLR, which was a senatorial election dispute. The application for withdrawal was allowed with costs of Ksh 5,000,000/= for each respondent. On appeal, the Court of Appeal reduced it to 2.5 m for each respondent stating,

“Applying these principles to the matter at hand, we think that the award of a total of Ksh 10,000,000/= by the election court to the respondents was excessive and we are entitled to interfere with the same as such an award does not appear to be fair, just or aimed at promoting access to justice. We think that reducing the same by half will be a reasonable approach to this matter. The final orders we make therefore are that both appeals are dismissed with costs to the 1st, 2nd and 3rd respondents. Costs awarded in the High Court are varied to the extent that costs in respect of the 1st respondent are capped at Kshs 2,500,000/= and those to the 2nd and 3rd respondents are capped at Kshs 2,500,000/= both subject to taxation.”

25. And in *Japheth Muroko & Anor v IEBC & 2 others* [2018] eKLR the election court struck out a petition with respect to a governor for want of prosecution and awarded Ksh 2.5 m for each respondent.



26. From these 2 authorities the 1st and 2nd respondent seek an award of Ksh 3,000,000/= each since these cases were determined in 2018.

Issues For Determination.

27. The only issue in contention is whether the 1st and 2nd respondents should be awarded costs of the suit, and how much those costs should be.

Analysis & Determination

28. This court has discretion to order payment of costs upon leave to withdraw being granted. In election petitions costs follow the event as stated in section 84 of the [Elections Act](#). Section 84 of the Act provides that

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

29. Rule 36(1) that provides

“That the court shall at the conclusion of an election petition make an order for the total costs payable and the person by and to whom costs shall be paid.’

30. Rule 23 provides that the court shall grant leave on such terms as to the payment of costs or as the court may consider fit and just.

31. Rule 34 (1) (a) of the Election Petition Rules grants this court jurisdiction to cap the total amount of costs that shall be paid in respect of the petition.

32. The court in the case of [Philip Kyalo Kituti Kaloki v Independent Electoral and Boundaries Commission and 2 others](#) [2018] eKLR citing its decision in *Martha Wangari Karua (supra)* stated on the issue of costs:

“It is up to the election court to determine whether a party would be awarded costs or not and in doing so the court must be guided by the principles of fairness, justice and access to justice”.

33. I have considered all the submissions by counsel. I have considered each of the grounds set out for justification for the costs sought and I have this to say.

34. It is true the petition and the interlocutory application ran into more than a thousand pages together with the annexures. For instance even the manner in which the pleadings were bound made the volume so high that I could not read while seated. Some of the documents were illegible. I and the respondents did point out this and repetitiveness of the pleading and the tedium in going through them, a fact counsel for the petitioner acknowledged.

35. There were interlocutory applications made and in some the parties and their counsel were gracious to agree to the encouragement of the court guided by the provisions of art 159(2) (d) to settle some of the issues by consent. However, three applications were argued, the 1st and 2nd respondents filed their submissions. Costs were directed to abide the petition.

36. Hence there is no doubt that the 1st and 2nd respondents incurred costs in defending this petition whose withdrawal came on the 1st day scheduled for the hearing. They duly filed their responses to the petition



and participated in all interlocutory applications before court as well demonstrated by their averments contained in their relying affidavits. They diligently complied with orders pursuant to applications by the petitioners which required their time and resources.

37. The petitioners have strongly submitted that election petitions are not personal and are in the nature of public litigation for the purpose of ensuring compliance with the principles of electoral system set out under articles 81 and 86 of the Constitution, and in this case that the petition was in the interests of the electorate of Narok county.
38. While I do agree with the submission it is also true that it has a personal element as the position of governor or deputy governor is ultimately held by the person who wins the election or is declared winner out of the petition. I am alive to the fact that costs are there to compensate the respondent(s) to the petition for their expenses and not to enrich them.
39. Comparing the case and that of *Ombati Richard cited* above by the petitioners it is clear that it is distinguishable. I have seen that Gikonyo J in Mombasa election petition No E002 of 2022 *Dziwe Pala Zuma & Anor v IEBC & 2 others* capped the costs at Ksh 3,000,000 for all the respondents leaving the exact prorate share to be determined by the taxing master.
40. Guided by the principles of justice, fairness and access to justice and the principle that public litigation should not be stifled by award of huge amount of costs, and taking into consideration the work done in preparation for the hearing;
 - a. I award costs to the 1st and 2nd respondents
 - b. The costs are capped at Ksh 2,500,000 for both respondents to be taxed by the deputy registrar.
 - c. The security deposited in court by the petitioners shall be used as part payment of the certified costs to the 1st and 2nd respondents.
 - d. Orders accordingly

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 6TH DAY OF FEBRUARY 2023.

MUMBUA T. MATHEKA,

JUDGE.

CA Edna

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