



REPUBLIC OF KENYA



**Amolo v Joseph & 2 others (Election Petition 5 of 2017)  
[2023] KEHC 17235 (KLR) (Election Petitions) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17235 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ELECTION PETITIONS**

**ELECTION PETITION 5 OF 2017**

**HI ONG'UDI, J**

**MAY 12, 2023**

**BETWEEN**

**ELIZABETH ONGORO AMOLO ..... PETITIONER**

**AND**

**FRANCIS KAJWANG' TOM JOSEPH ..... 1<sup>ST</sup> RESPONDENT**

**KAREN WACHERA MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 3<sup>RD</sup>  
RESPONDENT**

**RULING**

1. This is the Notice of Motion dated February 6, 2023, where the 2<sup>nd</sup> and 3<sup>rd</sup> respondents seek the following orders:
  - i. Spent.
  - ii. This Honourable Court be pleased to issue an order for the immediate release of the security for costs deposited by the petitioner herein in the sum of Kenya Shillings Five Hundred Thousand Only (Kshs 500,000/=) to the 1<sup>st</sup> respondent and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in equal shares of Kenya Shillings Two Hundred and Fifty Thousand Shillings Only (Kshs 250,000/=) each pending the taxation of the Party and Party Costs herein awarded on the January 16, 2018 by the Honourable Mr Justice Richard Mwangi.
  - iii. The said amount of Kenya Shillings Two Hundred and Fifty Thousand Shillings Only (Kshs 250,000/=) be accounted for as an adjustment in the final costs as will be taxed by the Deputy Registrar.



- iv. The costs of this Application be provided for.

### **The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents/Applicants' case**

2. The application was supported by the grounds on the face of the application and the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's affidavit dated February 6, 2023 as sworn by their advocate, Donald W Muyundo.
3. He deposed that the instant petition had been filed on September 5, 2017 and as per Section 78 of the Elections Act No 24 of 2011 Ksh 500,000/= had been deposited in Court as security for costs. Justice Mwongo finally dismissed the petition with costs to the respondents on January 16, 2018. That the instruction fees was capped at Kshs 1,500,000/= per certified counsel and the same was to be taxed by the Deputy Registrar. Likewise, that such cost as may be recovered from the security deposit, be deducted therefrom and be paid to the respondents in equal shares.
4. He deposed that following the judgment, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed their Party and Party Bill of Costs on the June 25, 2018 and taxation proceedings fixed for July 17, 2018. The proceedings however did take off because the petitioner's advocate indicated that the firm was no longer representing the petitioner, and that the petitioner's whereabouts remained unknown. The respondents served the petitioner using substituted service through the daily newspapers.
5. He deposed that the petitioner finally appeared in Court on June 14, 2022 for the taxation proceedings. The proceedings were faced with another challenge when the petitioner's newly appointed advocates on November 1, 2022 informed the court that they did not have instructions to proceed. It is deposed that all these acts were delaying tactics to defeat the taxation proceedings. He therefore prayed for the release of the security to cover part of the costs in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

### **The Petitioner/Respondent's Case**

6. The petitioner in response filed a replying affidavit dated March 10, 2023. She deposed that since the delivery of the judgment, she had been unwell and so unable to communicate with her advocates. She stated therefore that her lack of communication had not been out of malice or ill intent. She additionally informed that she had, had a dispute with her former advocates which has since been resolved with the appointment of her new advocates.
7. She further deposed that security of costs can only be released once the costs have been taxed hence the prayer to release the same untenable in law. On the whole she urged this court to dismiss the application with costs.
8. The 1<sup>st</sup> respondent was not opposed to the application and so did not file a response.

### **The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents/ Applicants' Submissions**

9. The firm of DW Muyundo and Associates Advocates filed written submissions dated February 6, 2023. Recapping the contents of their replying affidavit, counsel submitted that the main prayer in the application was the release of the security of costs deposited in court to the respondents pending the taxation of the bill of costs.
10. He argued that this prayer was further grounded on the provisions of the Advocates Remuneration Order, 2014, paragraph 1 (i) of Schedule 6 which provides that the fees for instructions to present or oppose an election petition shall not be less than Kshs 500,000/=. Further that in addition to these fees, a further not less than one-third of the instructions fees shall be charged as getting up fees as per the provisions of paragraph 2 of Schedule 6 of the Advocates Remuneration Order, 2014.



11. Considering this, counsel argued that the minimum fees for presenting or opposing an election petition are pre-determined as per the law and so the same cannot be deemed to be under the discretion of the Deputy Registrar. He therefore contended that the Deputy Registrar's discretion in taxation of a Bill arising out of this issue could only be exercised to enhance the sum based on taxation considerations and not reduce it.

### **The Petitioner/Respondent's submissions**

12. On behalf of the petitioner the firm of Mukele Ngacho and company advocates filed written submissions dated March 15, 2023. On whether the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were entitled to the orders sought, counsel submitted that according to Rule 31 of the *Elections (Parliamentary and County Elections) Petitions Rules, 2017* the Deputy Registrar is required to tax the cost of a petition on the order of the election court. As a result an election court may direct that the whole or any part of any money deposited by way of security be applied in the payment of taxed costs. In view of this, he argued that taxation must precede release of the funds deposited as security of costs. He therefore termed the instant application as premature and prayed for its dismissal plus costs.

### **The 1<sup>st</sup> Respondent's submissions**

13. The 1<sup>st</sup> respondent in support of the application filed written Submissions dated March 14, 2023 through the firm of Ongoya and Wambola Advocates. Counsel stressed that as per the judgment dated January 16, 2018 Hon. Justice Richard Mwongo ordered that the awarded costs may be recovered from the security deposit and paid to the respondents in equal shares. In view of this counsel decried the 5 year delay in release of the share due to the 1<sup>st</sup> respondent. This is despite multiple letters to the Deputy Registrar and follow ups.
14. In support of the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's case, he argued that it was immaterial that their Bill of costs was yet to be taxed. This is since the instructions fees as set out in the judgment are already above the Ksh 250,000/- to be recovered from the security of costs. Further that it was evident that they had made efforts to have their bill taxed. He therefore urged the court to allow the application and release the security of costs to the respondents.

### **Analysis and Determination**

15. I have analyzed the instant application and perused the pleadings of the parties as submitted. I have also considered the issues underscored in the application. As a result I find that the only issue that arises for determination is:

Whether the security for costs deposited in the Court in the amount of Ksh 500,000.00 should be released to the respondents pending taxation of the Bill of Costs dated June 25, 2018.

16. While the respondents urged that the security for costs be released, owing to the circumstances highlighted in this case, the petitioner opposed the application stating that the law dictates that the security for costs can only be released after the taxation of the bill of costs.
17. The law on the security for costs is established under Section 78 of the *Elections Act, 2011*. With reference to this case, Section 78(2)(b) provides that:

A person who presents a petition to challenge an election shall deposit-



- (b) five hundred thousand shillings, in the case of petition against a member of Parliament or a county governor.

18. The importance of security for costs in an election petition was discussed in the case of *Evans Nyambaso Zedekiah & another v Independent Electoral and Boundaries Commission & 2 others* (2013) eKLR where the Court citing a number of authorities with approval opined as follows:

“

“78. This issue was considered by Muriithi J in Kisii Election Petition No 6 of 2013 *Fatuma Zainabu Mohamed vs Ghati Dennitali & 10 Others* (unreported)....as follow:

“...the provision for security for costs is, in my view, a substantive requirement underpinning the jurisdiction of the court to deal with the dispute in the proceeding in which the security for costs is required, and is based on the sound principle for the protection of the defendant from unrecoverable costs.”

79. In the Patrick Ngeta Kimanzi case above, Majanja dealt with the rationale for the deposit of security for costs. Applying the principle in the Esposito case (*supra*), the judge said that:-

“Security for costs ensures that the respondent is not left without a recompense for any costs or charges payable to him. The duty of the court is therefore to create a level playing ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access justice vis-à-vis the respondent’s right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him. (see *Harit Sheth Advocate vs Shamas Charania* – Nairobi Court of Appeal, Civil Appeal No 68 of 2008 [2010] e KLR.”

80. I entirely agree with the learned judges in holding that the deposit of security for costs is a substantive issue that goes to the root of the proceedings as non-payment of the same deprives the court of the jurisdiction to deal with the matter further. I also agree that the requirement for deposit of security for costs keeps away from the court corridors some busy bodies who file cases in court while knowing that such cases have no chance of succeeding and also while knowing that they have no intention of paying the costs once they lose their cases. “

19. From the law and the authorities cited above it is clear that one of the purposes for security for costs is protection of the respondents’ interests in the event of an unsuccessful petition. This is to compensate the respondents, who are often constrained to incur expenses while defending election petitions that lack merit. The *Elections (Parliamentary and County) Petition Rules*, 2017 under Rule 11 make clear provision for this. At the conclusion of the election petition, the parties are required to pursue the taxation and recovery of costs under Rule 33 of the said *Rules*. The procedure is well set out under the said Rule.

20. The Rules are silent on the issue of release of the security of costs prior to taxation of the party’s bill of costs. This is also indicative in the orders issued by the trial court. Nevertheless, with reference to the security of costs the Honourable Judge visibly directed that the same be paid in equal share to the respondents. This in essence in my view, set out the conclusive manner in which the security of costs would be utilized even before the taxation of the bill of costs.



21. For clarity Mwongo J ordered as follows:
  - a. Costs shall be borne by the petitioner except as otherwise specifically allocated herein or ordered during the proceedings or in interlocutory rulings.
  - b. Instructions fees are hereby capped at shillings 1,500,000/- per certified counsel.
  - c. Costs shall be taxed by the Deputy Registrar.
  - d. Such costs as may be recovered from the security deposit, shall be deducted therefrom and may be paid to the respondents in equal shares.
22. Additionally what is unquestionably clear as seen in the cited authorities, which this Court agrees with, is that the sole purpose of security of costs, where a petitioner loses his/her case is to protect the respondents' rights in defending of their suit against the petitioner. This is by compensating them at the end, as the court directs. I believe therefore that this right becomes due and owing to the respondents at the conclusion of an unsuccessful petition.
23. This Court is enjoined to ensure that the administration of justice is done in a just manner to all parties. This justice as dictated under Article 159 (2)(b) of the *constitution* should not be delayed. Judgment in this case was delivered on January 16, 2018 which is over five (5) years ago. The 1<sup>st</sup> respondent's party & party bill of costs dated February 1, 2018 was taxed on February 21, 2019. However the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents' bill of costs dated June 25, 2018 has never been taxed to date. Even the 1<sup>st</sup> respondent's taxed bill has never been settled to date.
24. The petitioner/respondent in her replying affidavit avers that the cause of the delay in appearing for the taxation of the bill of costs is two fold. First is her ill health and second is her disagreement with her then lawyers. She annexed two documents dated November 18, 2020 & June 29, 2021 (Annexure EOA 1) by Prof John FO Ating'a a medical consultant showing she was on treatment. The bill of costs was filed in 2018. She does not explain what prevented her from attending court or her lawyer between 2018 – early 2020 and mid-2021 to date. The bill of costs is not a matter that required her personal attendance, unless she was coming to testify on something. I find the reasons given by the petitioner/respondent for the delay of over five (5) years not to be justifiable.
25. As stated in the Patrick Ngeta Kimanzi case (*supra*) the duty of the court is to create a level playing ground for all the parties involved, that is the proportionality of the right of the petitioner to access justice vis-à-vis the respondent's right to have security for any costs that may be owed to him. In the instant case the petitioner having had her day in court and lost, I find it prudent for this court to exercise its discretion in favour of the respondents.
26. The upshot is that the application dated February 6, 2023 has merit and is allowed. The following orders do issue:
  - i. The Deputy Registrar to release the Kshs 500,000/= deposited by the petitioner/respondent as security for costs to the respondents as follows:  
1<sup>st</sup> respondent – Kshs 250,000/=  
2<sup>nd</sup> & 3<sup>rd</sup> respondents Kshs 250,000/=.
  - ii. The party and party bill of costs dated 25<sup>th</sup> June 2018 to be set down for hearing and determination within 90 days.



iii. Costs of this application to be met by the petitioner/respondent.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 12<sup>TH</sup> DAY OF MAY 2023 IN OPEN COURT AT MILIMANI, NAIROBI.**

**H. I. ONG'UDI**

**JUDGE OF THE HIGH COURT**

