



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**ELECTION PETITION NO. 2 OF 2017**

**HON NATHIF JAMA ADAN.....PETITIONER**

**VERSUS**

**ALI BUNOW KORANE.....1<sup>ST</sup> RESPONDENT**

**COUNTY RETURNING OFFICER, GARISSA COUNTY**

**ANTHONY NJOROGE DOUGLAS ..... 2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION .....3<sup>RD</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. Following the general elections conducted on 08/08/017, the first Respondent was declared a winner of the gubernatorial seat of Garissa County. On 05/09/2017 the instant petition was filed by the Petitioner challenging the election for reasons set in the same petition. On 18<sup>th</sup> September 2017, the respondents filed their responses.
2. The court gave directions on 13/10/2017 and set hearing dates on November 27, 28, 29, December 1, 4, 5, and 6<sup>th</sup> 2017.
3. On 9<sup>th</sup> November 2017, the trial Judge Hon Wakiaga recused himself for reasons best known to him and he referred the matter to the Chief justice to appoint another judge to handle the matter.
4. By a gazette notice of 17<sup>th</sup> November 2017 Mabeya J. was appointed to handle the matter but he declined the appointment on the ground that he heard 2013 Garissa Gubernatorial Election petition.
5. Eventually on 24/11/2017, I was appointed to handle this matter. By the time of the appointment, I was in the thick of hearing the Kibwezi east constituency election petition and thus the dates earlier fixed herein clashed with the later election petition dates.
6. On 27<sup>th</sup> November 2017 the matter was mentioned and hearing dates fixed as the earlier dates were vacated by consent. The following dates were fixed by consent; December 13, 14, 20, 21, 22, 27, 28, 29 2017 and January 2018 3, 4, and 5<sup>th</sup>.

7. Meanwhile parties agreed on a date of 01/12/2017 for hearing of an application dated 31/10/2017. This was a joinder application filed by Mr. Mwenesi's client.
8. Come 01/12/2017 the petitioner via his advocate intimated that he wished to withdraw the petition. The Respondents and the party seeking joinder responded that they had no objection and went further to state that they were not seeking costs provided all procedural requirements were followed.
9. With that understanding the matter was fixed for mention on 11/12/2017 to confirm compliance. On 11/12/2017 the matter was mentioned and there was confirmation that the application for withdrawal was filed on 08/12/2017. It was then agreed that the Respondents were to file requisite affidavits and the Petitioner was to publish the requisite notice as prescribed by the rules. The parties agreed the application then was to be heard on the 02/02/2018.
10. However on 05/01/2018 the Applicants 1 to 4 lodged application for substitution dated 05/01/2018. The same was fixed for directions on 15/01/2018.
11. By the 15<sup>th</sup> January 2018 the Respondents had not filled their affidavits nor had the Petitioner published the notice for withdrawal as prescribed and agreed by all the parties. The parties then agreed to file their papers including submissions and that the two applications be heard on 24/01/2018.
12. The matter came for hearing of the two applications as agreed on 24/01/2018; however the Petitioner and his advocates did not attend court nor send a word as to why they could not attend court. After waiting for about one hour, the court directed the matter to proceed.
13. The applicants in substitution application and the respondents submitted verbally. Only Respondent No 1 filed replying affidavit to the withdrawal and substitution applications. The Respondents No 2 and 3 filed grounds of opposition and submissions.
14. The two sets of the Respondents submitted that in absence of prosecution of the withdrawal application which in any case was pre- mature for failure of the prescribed publication; same could only be dismissed and/or struck out.
15. **Mr Kiragu Kimani** for Respondent no 1 submits that, rule 24(1) Election Petition Rules (EPR) 2017 makes it clear that there can be no discussion regarding substitution before the hearing of application for withdrawal. It is only at the hearing of same that a qualified person can seek to be substituted.
16. In our adversarial system, a party is a driver of his case. He does this by filing and prosecuting it. He can change his mind and ask court to allow him to withdraw his case. It is not enough to present a petition, it has to be prosecuted.
17. The application is thus to suffer only one thing; that is dismissal. Then on its dismissal, two other things flow from that: First, having regard to the dispute in court where we had set hearing date for parties to deal with matters and taking to account petitions have to be to be determined within fixed timelines; the court should not stop at dismissing the application. The court should dismiss the entire petition.
18. If the Petitioner wishes to be absent in court, the court is entitled to conclude, he has abandoned his case.
19. The second consequence of failure to prosecute withdrawal application, the substitution cannot be considered thus, same ought to be dismissed. There can be neither withdrawal nor substitution.
20. Even if court does not agree with him on the 1<sup>st</sup> issue, the withdrawal application must still fail. Reasons being that, there are certain criteria to be met before withdrawal application is considered. See rule 21 EPR.

**1) Leave to withdraw to be granted.**

**2) The grounds for withdrawal must be set out vide Rule 21(1). What is stated herein is just an attempt to reconcile.**

**3) Rule 22 (2) EPRs withdrawal has to be published. It is mandatory.**

21. **Mr. Nyamondi** submitted that, the court cannot consider unprosecuted application. The court cannot prosecute same application. On cited case of Wajir Gubernatorial E P authority on affidavit which was sustained despite failure of the deponent to attend court, he submits that, the same ruling is correct in that context.

22. In that case the affidavit was supporting a petition which was prosecuted by calling evidence of other witnesses. In our case the affidavit supports an application which is not prosecuted. Since the application was not prosecuted, there is no live which can be breathed in the same affidavit.

23. The cited authority cannot apply. The Petitioner application stands dismissed for non-attendance or non – prosecution.

24. Then, what are the consequences on the substitution application?

25. These two applications are joined at the tip vide Rule 24 EPR which deals with substitution. The word substitute is removal of one and replacing with another. If there is no removal, there can be no replacement in that respect. The petition thus remains.

26. The court has first to deal with Petitioner’s application then deal with substitution application. The court can’t throw Petitioner out for applicants to enter the matter.

27. Mr Simiyu; submitted that, the primary question is whether the parties have complied with rule 24 EPR 2017?

28. Sub-rule 1: Substitution is to be applied during hearing of withdrawal. The application for withdrawal was to be heard on 02/02/2018. The two applications have to be heard together.

29. The other issue applicants are to demonstrate is as to whether applicants are ready to abide with requisite conditions.

30. Rule 24 (3) EPR: As court allows substitution, the terms on deposit of security are set. Applicants have indicated that they are ready and willing to abide by terms which court may set on substitution.

31. He contends that, the applicants are entitled to take position of the current Petitioner in enforcement of the fundamental rights and freedoms (F.R.F) as provided by Art 22 and 38 (political rights). The applications to withdraw and substitute are joined at the tip.

32. The Petitioner and his advocate are absent. He argues that absence notwithstanding the affidavit by Petitioner of 08/12/2017 supporting withdrawal application is not to be disregarded.

33. He cites an authority by **MABEYA J. Petition No 14/2017 A. A Mohamed & another Vs Mohamed** in respect of Wajir County Governor election petition decision. Where the court held that, it was to deal with filed affidavit where witness goes missing.

34. The affidavits must be allowed to stay. There is no provision to dismiss the affidavit. The court has only to look at probative value of such affidavit, thus he urges court to apply same in the circumstance. The court cannot disregard the application thus applicants rights.

35. The overriding objectives under Rule 4 EPR are for driving the process and overlook technicalities. Section 89 of Election Act emphasizes the political rights under Article 38. Also see Article 159 2(b). Thus the absence of Petitioner to prosecute his application is a technicality because he has said he has no

intention to prosecute the petition.

36. The issue of advertisement of notice to withdraw, same is a technicality which should be taken care of by rule 4 (00) (EPR). The court in similar circumstances relied on rule 4(1) (00) (EPR). See **ONCHIEKU -VS- IEBC AND OTHERS**. He urges that, all those are procedural technicalities which cannot override the substance.

37. The Respondent seek to have petition die in court's hands. Thus if Petitioner fails to prosecute it, it will surely die in court hands. Court should not sacrifice substantial justice at the altar of procedural technicalities.

### **ISSUES AND DETERMINATION**

38. The court has gone through the pleadings record and the submissions and thus finds the issues arising are;

**A. In light of non-publication of the notice of withdrawal of petition application and non-prosecution of the same, what are the appropriate orders to make?**

**B. What is the status of the substitution application?**

**C. What is the order as to costs?**

39. The Petitioner filed an application for withdrawal dated 8<sup>th</sup> December, 2017 under Rule 21 of the Elections (Parliamentary and County Elections) Petition Rules, 2017.

40. The withdrawal of an election petition is not granted as a matter of course but the leave of Court is a prerequisite before a Petition can be marked as withdrawn. The Elections (Parliamentary and County Elections) Petition Rules, 2017 underlies an intricate procedure on the withdrawal of an Election Petition.

41. This position was stated in the case of **Peter Gatirau Munya -vs- Independent Electoral and Boundaries Commission, Meru County Returning Officer & Kiraitu Murungi (2017) eKLR** ; where the Court stated thus:-

**“Under rule 21 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 (hereafter Election Petitions Rules, 2017) no petition shall be withdrawn unless with the leave of the court. This is because elections petitions are sui generis litigation and is inherently a suit in public interest- not purely a private suit of the petitioner- and therefore cannot simply be withdrawn at the instance of the petitioner or even on the consent of the parties. This explains the elaborate procedure for withdrawal set out in PART V of the Election Petitions Rules, 2017.”**

42. In considering an application for withdrawal, the Court in the case of **Ombati Richard -vs- Independent Electoral and Boundaries Commission & 2 others (2017) e KLR** stated that in the withdrawal of an election Petition, the electoral laws must be strictly observed. The Court stated as follows:-

**“...It is because of the special nature of an election petitions that the law makers deemed it necessary to enact strict provisions to be adhered to by anyone wishing to withdraw an election petition.”**

43. Rule 22(2) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provides that upon the service of an application for withdrawal on the Respondents, the Petitioner must publish a Notice of Intention to Withdraw in a Newspaper of national circulation. It reads as follows:-

**“The petitioner shall publish in a newspaper of national circulation a notice of intention to**

**withdraw an election petition in Form 6 set out in the First Schedule and the petitioner.”**

44. The above provision is couched in mandatory terms such that an application for withdrawal cannot be said to have crystallized unless the Petitioner has published such an intention for withdrawal in a national newspaper.

45. The Court in the case of **Sarah Mwangudza Kai –vs- Mustafa Idd Salim & 2 Others (2013) e KLR** held that an election Petition can only be withdrawn with leave of Court and upon publication of the intention of withdrawal in a newspaper of national circulation. The Court stated thus:-

**“...a withdrawal of a petition can only be made with leave of the Court and this can only be done after the intention to withdraw has been published in the Kenya gazette.”**

46. The Court in the case of **Ombati Richard -vs- Independent Electoral and Boundaries Commission & 2 others (supra)** allowed the withdrawal of the Petition after the compliance with the provisions on the withdrawal of an election Petition. The Court held:-

**“In the instant case, I find that it was proved, to the required standards, that the petitioner was the author of the notice and application to withdraw the petition herein. The said application for withdrawal is in the prescribed Form 5 set out in the Schedule to Elections (Parliamentary and County Elections) Petitions Rules, 2017 and is supported by an affidavit setting out the grounds on which the petition is intended to be withdrawn. As early as at 3rd October, 2017, all the respondents confirmed that they had been served with the said application and affidavit and that the notice of intention to withdraw the petition had been published at page 10 of the Standard Newspaper of 3rd October, 2017, which is a newspaper of national circulation. Under the above circumstances, one can say that the withdrawal has technically crystallized...”**

47. From the foregoing, as the Petitioner has not made a publication in a national newspaper of its intention to withdraw the Petition, the Petition herein is not withdrawn. The application for withdrawal was also not prosecuted but apparently abandoned.

48. The Applicants made the Application for substitution in place of the Petitioner, on the basis that the Petitioner expressed his intention to withdraw the election Petition in his Application dated 8<sup>th</sup> December, 2017.

49. The Application for substitution is made under Rule 24 of the Elections (Parliamentary and County Elections) Petition Rules, 2017. At this juncture, of relevance to this Court is **sub-rule (1)** which provides as follows:-

**“At the hearing of the application for the withdrawal of a petition, a person who is qualified to be a petitioner in respect of the election to which the petition relates may apply to the election court to be substituted as the petitioner in place of the petitioner who has applied to withdraw the petition.”**

50. The Court understands the import of the aforesaid provision by looking at the preceding provisions which require the following conditions to be met before a party can make an application for substitution:-

**a. An application for withdrawal of an election Petition under Rule 21 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 to be lodged.**

**b. Publication of a notice of intention to withdraw an election petition in a national newspaper under Rule 22 of the Elections (Parliamentary and County Elections) Petition Rules, 2017; and,**

**c. Issuance of a notice of hearing of an application to withdraw an election Petition under**

**Rule 23 of the Elections (Parliamentary and County Elections) Petition Rules, 2017.**

51. Thus substitution of a Petitioner can only be granted upon the crystallization of a withdrawal by the Petitioner. Such withdrawal not having been lawfully done to completion, the substitution of the Petitioner remains unripe.

52. Additionally, **Rule 24(2) of the Elections (Parliamentary and County Elections) Petition Rules, 2017** gives this Court the discretion to either grant or deny an application for substitution.

53. The Applicants advocate submit that The issue of advertisement of notice to withdrawal, is a technicality which should be taken care of by rule 4 on overriding objectives (00) (EPR) 2017 and relies on the case of **ONCHIEKU –VS- IEBC AND OTHERS** which allowed application for substitution filed before publication to proceed on merit.

54. However the publication in that case was done before the application for substitution was canvassed. In our instant matter the notice of intended withdrawal was never published and in any case the application was abandoned. The court cannot and would not sustain unripe application nor prosecute party's application.

55. It follows therefore, that the request for substitution cannot be granted as the same has been made prematurely.

56. The ultimate question is thus what is the fate of the Application to withdraw and the petition?

57. Mr. Kiragu Kimani submitted that the acts of the Petitioner as disclosed in affidavit supporting the withdrawal application, failure by petitioner to comply with procedure on withdrawal, breach of court directions and absenting himself and his advocate in court, can be interpreted to mean abandonment of the petition.

58. The petition timelines expires on 4<sup>th</sup> March 2018. The witnesses to be called by Petitioner were indicated to be 30, for first respondent several about 14 in number. The Respondents 2 & 3 have paraded one or so witnesses. The court cannot force party to prosecute his case. He concludes that, the time left now is barely a month to hear the matter.

59. It has been held that, where a Petitioner conduct discloses disinterest in prosecuting his petition, the court is entitled to strike out petition. See **NAI PET NO 23 OF 2017 JAPHET MUROKO AND ANOTHER VS IEBC AND OTHERS**. In this case the Petitioners filed application to withdraw petition but failed to take action on same and showed disinterest in prosecuting same and the petition.

60. **In the matter MSAGHA J** stated that;

**“...the court intended to avoid the Petitioners being driven out of the seat of justice without a hearing. As matter stand now, they are no longer interested in taking advantage of that right (of hearing) and the court cannot force them to proceed with the matter that they have lost interest in. For now this court is left with no alternative but to order that the petition filed by the 2 Petitioners shall be and is hereby struck out for want of prosecution.”**

61. The court finds that the aforesaid authority circumstances obtains herein and thus; Makes the following orders;

**A. Both the application to withdraw and the petition be and are hereby struck out accordingly for want of prosecution.**

**B. The substitution application is also hereby struck out for being unripe with no orders as to costs.**

**C. On costs of the withdrawal application and the petition, I note that the Respondents had conceded to have the matter withdrawn with no orders as to costs. The court thus orders the parties to bear their own costs.**

**D. A certificate of this determination in accordance with section 86(1) of the Elections Act, 2011 shall issue to the Independent Boundaries and Electoral Commission and the Speaker of the Senate.**

**E. The cash deposit made herein by the Petitioner to be released to the Petitioner.**

**F. The IEBC 2<sup>nd</sup> Respondent to collect its materials in custody of the Deputy Registrar constitutional & judicial review division assigned to keep them by court order issued in relation to this matter.**

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF FEBRUARY 2018.**

**C KARIUKI JUDGE**

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