



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CIVIL (ELECTION) APPEAL NO. 6 OF 2018**

**ABDIWAHAB SHEIKH OSMAN HATHE ..... APPELLANT**

-VS-

**MOHAMED ALI SHEIKH ..... 1<sup>ST</sup> RESPONDENT/APPLICANT**

**ABDULLAHI MOHAMED OLLOW ..... 2<sup>ND</sup> RESPONDENT**

**ISAACK MUHUMED MOHAMED ..... 3<sup>RD</sup> RESPONDENT**

**INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

Before me is an application brought under Order 4 and Order 34 Rule 10(should be Rule 4 and 34 ) of the Elections (Parliamentary and County Elections) Petition Rules 2017 by way of a Notice of Motion dated 10<sup>th</sup> April 2018 by the 1<sup>st</sup> respondent Mohamed Ali Sheikh.

The application which was filed with a supporting affidavit of the applicant sworn on 10<sup>th</sup> April 2018 seeks the following substantive order-

**That the appellant /respondent does within seven(7) days, give security for the 1<sup>st</sup> respondent/applicant's costs of Kshs. 500,000 or costs to the satisfaction of this Honourable Court.**

The main ground of the application is that the applicant has reason to believe that the appellant will be unable to pay his costs in the likely event that the applicant is successful in the appeal in view of the fact that the appellant was unsuccessful in the in the petition and there were already in force trial and other costs in the Magistrate's court in favour of the applicant.

The application is opposed through a replying affidavit sworn by the appellant on 17<sup>th</sup> April 2018, whose main contention is that the appellant owns property in Garissa and that there is no legal requirement for provision of security for costs in election appeals before the High Court.

Parties counsel filed written submissions to the application. The applicant's counsel filed written submissions on 4<sup>th</sup> May while the appellant's counsel filed written submissions on 10<sup>th</sup> May 2018.Both counsel relied on a number of case authorities. Mr. Farouk for the applicant and Mr. Nyaga for the appellant relied on the written submissions filed. The application did not affect other parties.

I have considered the application, documents filed and the submissions of counsel on both sides as well as the authorities cited to me. In my view the issues for determination are as follows:-

- 1. Whether the application was brought under the correct provisions of the law.**
- 2. Whether the High court as an election appellate court has jurisdiction to order for provision of security for costs under its inherent jurisdiction.**
- 3. Whether the applicant has made a case for deposit of security for costs.**
- 4. Whether deposit of security for costs is a substantive issue.**

## 5. What orders should the court make?

With regard to the 1st issue as to whether the application was brought under the correct provisions of the law, it is obvious to me that the Orders 4 and 34 cited in the application do not exist under the Elections (Parliamentary and County Elections) Petition Rules—hereafter referred to as the Elections Petition Rules. Counsel must have picked the word ‘Order’ from the Civil Procedure Rules; as there are no Orders under the Election Petitions Rules but only Rules and sub rules. The defect is however curable under Article 159(2)(d) of the Constitution of Kenya 2010 as Rule 4 and Rule 34 cited in the application actually exist in the Elections Petition Rules.

I now turn to the 2nd issue on whether the High Court as an election appeal court has jurisdiction under its inherent powers to order provision of security for costs. Jurisdiction of a court is conferred by the Constitution and statute. Generally, a court also has inherent jurisdiction to grant orders which will facilitate fair and equitable administration of court proceedings and also to avoid abuse of the process of the court where the court has substantive jurisdiction to adjudicate on the matter or subject. Under the Constitution of Kenya 2010 this inherent jurisdiction is grounded under the provisions of Article 159 of the Constitution the relevant parts of which provides as follows:-

**159(1) Judicial authority is derived from the people and vests and is exercised by the courts and tribunals established by or under this Constitution.**

**(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-**

**(a) justice shall be done to all, irrespective of status**

**(b) justice shall not be delayed**

**(d) justice shall be administered without undue regard to procedural technicalities; and**

**(e) the purpose and principles of this Constitution shall be promoted and protected.**

All counsel are in agreement that there is no provision under the Elections Act and the Election Petition Rules for provision of security for costs in election appeals in the High Court unlike the case of election appeals in the Court of Appeal.

Counsel for the applicant has however relied on several cases including the case of Republic vs Public Procurement Complaints Review and Appeals Board, Ex Parte Invesco Assurance Company Ltd [2013] e KLR to support the contention that this court has inherent jurisdiction to order provision of security for costs in election appeals. My understanding is that the inherent jurisdiction of this court is only for making orders that may be necessary for meeting the ends of justice and to enable the court maintain its character as a court of justice and not meant for the grant of substantive orders such as provision of security for costs.

In case I am wrong on the above, I go to the next and 3rd issue on whether the applicant has made a case for deposit of security for costs. As was stated by the Court of Appeal in the case of Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR cited by counsel for the applicant that-

**“the order for security of costs in such a case is not directed towards payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties...”**

It was therefore imperative on the applicant to demonstrate to this court that the appellant was nearly insolvent and unable to pay the costs of appeal. A mere allegation or statement by the applicant will not suffice.

From the record herein, the appellant was the petitioner and paid the deposit of security for costs in the trial court as required by law. He lost the case and has now appealed to this court. In my view, the fact that the appellant paid the deposit of security for costs means that he was not a person without means. In this court also, the applicant has not demonstrated any changed financial status of the appellant. Instead the applicant seems to think that the appellant has the burden of proving that he is wealthy. That with respect, is a misunderstanding of the legal position. The appellant has no burden to prove that he is wealthy and capable of paying costs of the litigation as it is generally presumed that every litigant is capable of paying or meeting the costs of litigation. The burden was on the applicant who made this application for deposit of security for costs, which deposit is not a legal requirement as was the case in the original trial, to demonstrate to this court that the appellant was nearly insolvent and not capable of paying the costs of litigation, which the applicant has failed to do. As such the application cannot succeed.

I now turn to the issue as to whether deposit of security for costs is a substantive issue. I have already mentioned this issue above. It is a substantive not a procedural issue. It is a substantive issue for two reasons. First, once the statute law requires deposit of security for cost such as in cases of election petitions, failure to comply will go to the root of the election petition and the court will refuse to entertain the matter. Secondly, in cases where the court under its discretionary jurisdiction orders deposit of security for costs, if the order is not complied with, then the court will refuse to adjudicate in the matter and instead give orders against the defaulting party.

Lastly, what should be the orders of this court? The application is for dismissal for the reasons stated above, and I accordingly dismiss the same. Costs of the application will follow the results of the appeal.

**Dated and delivered at Garissa this 6<sup>th</sup> June 2018.**

**George Dulu**

**JUDGE**