



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ELECTION APPEAL NO. 30 OF 2014

IN THE MATTER OF ELECTIONS ACT, 2011 AND THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS PETITIONS RULES, 2013)

AND

IN THE MATTER OF MEMBERS NOMINATED TO THE NYERI COUNTY ASSEMBLY AND GAZETTE NOTICE NO. 15096 PUBLISHED IN KENYA GAZETTE DATED 29TH NOVEMBER, 2013)

BETWEEN

MARY WAIRIMU MURAGURI.....1ST APPELLANT

JOSEPH KANYI KING'ORI.....2ND APPELLANT

REGINA WANJIRU MACHARIA.....3RD APPELLANT

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC).....1ST RESPONDENT

THE NATIONAL ALLIANCE PARTY.....2ND RESPONDENT

NAOMI WANGECHI GITONGA.....3RD RESPONDENT

HANNAH WARUKIRA KABUI.....4TH RESPONDENT

ANN NYAMBURA WANG'OMBE.....5TH RESPONDENT

LEAH MUMBI NJOROGE.....6TH RESPONDENT

(AS CONSOLIDATED WITH

APPEAL NO. 31 OF 2014)

BETWEEN

KEZIA WARUINI MWANGI.....1ST APPELLANT
LUCY NYAGUTHI.....2ND APPELLANT
SALOME WAIRIMU KAGO.....3RD APPELLANT
JECINTA WAMBUI WAMAE.....4TH APPELLANT
JOSEPHINE MUTHONI MURIITHI.....5TH APPELLANT
ELIZABETH WAMBUI NJEE.....6TH APPELLANT
LUCY MUGURE WANYITU.....7TH APPELLANT
NANCY WANJIKU GACHICHIO.....8TH APPELLANT
SALIMA ULEDI.....9TH APPELLANT
ANASTACIA WANJIRU NJUKIA.....10TH APPELLANT

VERSUS

IEBC.....1ST RESPONDENT
THE NATIONAL ALLIANCE PARTY.....2ND RESPONDENT
NAOMI WANGECHI GITONGA.....3RD RESPONDENT
HANNAH WARUKIRA KABUI.....4TH RESPONDENT
ANNA NYABURA WANG'OMBE.....5TH RESPONDENT
LEAH MUMBI NJOROGE.....6TH RESPONDENT

(Being appeals from the judgment and decree delivered on 5th June 2014 in Nyeri Chief Magistrates' Court Election Petition No. 2 of 2013 (Hon. Wilproda Juma (Mrs))

BETWEEN

NAOMI WANGECHI GITONGA.....1ST PETITIONER
HANNAH WARUKIRA KABUI.....2ND PETITIONER
ANN NYAMBURA WANG'OMBE.....3RD PETITIONER
LEAH MUMBI NJOROGE.....4TH PETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE NATIONAL ALLIANCE PARTY.....	2 ND RESPONDENT
KEZIAH WARUINU MWANGI.....	3 RD RESPONDENT
LUCY NYAGUTHI.....	4 TH RESPONDENT
SALOME WAIRIMU KAGO.....	5 TH RESPONDENT
JECINTA WAMBUI WAMAE.....	6 TH RESPONDENT
MARY WAIRIMU MURAGURI.....	7 TH RESPONDENT
JOSEPH KANYI KING'ORI.....	8 TH RESPONDENT
REGINA WANJIRU MACHARIA.....	9 TH RESPONDENT
JOSEPHINE MUTHONI MUREITHI.....	10 TH RESPONDENT
ELIZABETH WANGUI NJEE.....	11 TH RESPONDENT
LUCY MUGURE WANYITU.....	12 TH RESPONDENT
NANCY WANJIKU GACHOCHO.....	13 TH RESPONDENT
ANASTACIA WANJIRU NJUKIA.....	14 TH RESPONDENT

RULING

The 3rd, 4th and 5th respondents filed a notice of motion dated 8th October, 2015 under **section 99** of the Civil Procedure Act, **rule 34(1)** of the **Elections (Parliamentary & County Elections) Petition Rules 2013** and all other enabling provisions of the law. The motion sought in the main for an order specifying the total amount of costs payable to the appellants in accordance with **rule 34(1)** of the **Elections (Parliamentary and County Elections) Petition Rules, 2013**; and, order staying taxation of the bill of costs dated 31st August, 2015 or any other bill of costs pending the hearing and determination of the motion.

The motion was based on three main grounds; firstly, that when this court delivered its judgement on 14th July, 2015 and awarded costs to the appellants, it did not specify the amount of costs payable. In the applicant's view, this was contrary to **rule 34 (1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013** which provides that the court shall at the conclusion of an election petition, make an order specifying the total amount of costs payable in addition to specifying the person to whom the costs shall be paid.

Secondly, following this court's judgment, the eighth and ninth appellants filed their bill of costs dated 31st August, 2015 and had set it down for taxation on 9th October, 2015. The taxation, according to the applicants, is an illegality and a procedural irregularity which ought to be corrected.

Thirdly, the omission to specify in the judgment the costs payable and the parties to whom these costs are payable amount to errors apparent on the face of record.

The affidavit of **Hannah Warukira Kabui** sworn on 8th October, 2015 in support of the motion largely rehashed the foregoing grounds albeit erroneously since they are essentially issues of law which ought not to be deponed to in an affidavit as if they are issues of fact.

At the core of the dispute is the interpretation of **rules 34 and 35 of The Elections (Parliamentary and County Elections) Petition Rules 2013** on the award of costs at the conclusion of an election petition. These rules state as follows:

34.(1) The court shall, at the conclusion of an election petition, make an order specifying-

(a) the total amount of costs payable; and

(b) the persons by and to whom the costs shall be paid.

(2) when making an order under sub rule (1), the court may-

(a) disallow any costs which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the Petitioner of the Respondent; and

(b) impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not in order to discourage any such expense.

(3) The abatement of an election petition shall not affect the liability of the Petitioner or of any other person to the payment of costs previously incurred.

35. (1) The Registrar shall tax costs of an election petition upon an order of the court in the same manner as the costs are taxed in civil proceedings and in accordance with the Civil Procedure Act.

(2) An order of the registrar under sub rule (1) shall be confirmed in the relevant court.

(3) The court may direct that the whole or any part of any monies deposited by way of security may be applied in the payment of taxed costs.

(4) There shall be paid in respect of all proceedings under these rules the same court fees as are payable in respect of civil proceedings in the High Court or magistrate's court, as the case may be, in so far as the same are applicable.

My understanding of these rules is that rule 34 cannot be read in isolation of rule 35; the former only makes sense if it is read alongside the latter. In my humble opinion, any attempt to interpret rule 34 without reference to rule 35 would lead to an absurd result which is, that a judge presiding over an election petition is turned into a taxing master with the unfettered power to impose on a party or parties any figure as costs without a detailed examination of such aspects of the proceedings as are ordinarily decisive in taxation proceedings and which, as a matter of law, would provide a basis for an award that a taxing master would eventually certify as taxed costs. For instance, before certifying any figure as taxed costs, it is incumbent upon the taxing master to consider such matters as, the instruction fees, getting up fees, drawing of pleadings and the number of folios involved, the complexity of the matter, court attendances and such other relevant factors. The assessment of the amount payable on any of these items is regulated by a remuneration order issued by the Chief Justice under section 44(1) of the Advocates Act, Cap 16.

PART IX – REMUNERATION OF ADVOCATES

44. Chief Justice may make orders prescribing remuneration

(1) The Council of the Society may make recommendation to the Chief Justice on all matters relating to the remuneration of advocates, and the Chief Justice, having considered the same, may by order, prescribe and regulate in such manner as he thinks fit the remuneration of advocates in respect of all professional business, whether contentious or non-contentious.

The whole purpose of a remuneration order is that, in the absence of any agreement between parties or between parties and their advocates, costs must be taxed and certified; they can only be certified as the appropriate costs payable if they are consistent with the scale provided in the remuneration order. Simply put, any sum awarded as costs must have a basis; it follows that a judge, irrespective of whether he is wearing a taxing masters' hat or his substantive hat of a judge, cannot simply pluck a figure from the blue and require a party either to pay or accept it as costs payable without any reference to the scale provided. Such an action appears to me to be irrational and will obviously disadvantage one of the parties who is thereby effectively denied the opportunity to put forth a case for either a lower or a higher figure as the case may be.

As far as I understand **rule 35**, taxation of costs in an election petition is not an alien concept. A plain reading of that rule leaves no doubt that, just like in any civil proceedings under the Civil Procedure Act, costs in an election petition can be taxed. The rule is couched in mandatory terms that the registrar must tax costs of an election petition upon an order of the court in the same manner as costs are taxed in civil proceedings. For avoidance of doubt, taxation of costs as between parties in election petitions is provided for in **schedules 6 and 7 of the Advocates (remuneration)(amendment) order, 2014**. The implication of this is that costs in an election petition are not only subject to scale but they are also subject to taxation in the absence of an agreement between parties or between the latter and their counsel.

In the face of these provisions, I cannot find any basis for the argument that the taxation of appellants' bill of costs was irregular. Neither am I persuaded that the applicants' counsel's argument that the omission by this Honourable Court to specify the costs payable was an irregularity or was an error apparent on the face of record. As noted there would be no basis of specifying the amount until a proper assessment has been done.

As to the question of who the beneficiaries of the costs are, my judgment was clear that the appellants were entitled to costs both in this court and in the magistrate's court. If the applicants were mistaken as to who was entitled to costs they would not have stated, as they did in prayer (2) of their motion that "the honourable court be pleased to make an order specifying the total amount of costs payable to the appellants in accordance with rule 34(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013." The judgment was equally clear that these costs were to be paid by the 3rd to 6th respondents.

The prayer seeking for stay of taxation has obviously been overtaken by events because the evidence available shows that the 8th and 9th appellants' bill of costs was taxed and the appellants are in the process of execution.

In conclusion, I am inclined to find that the applicant's application is misconceived and I hereby dismiss it with costs.

Dated, signed and delivered in open court this 3rd March, 2017

Ngaah Jairus

JUDGE