



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION APPEAL NO 5 OF 2013

JOEL NYABUTO OMWENGA.....1ST APPELLANT

DANIEL MUNYAO NZWILI.....2ND APPELLANT

ROSE WAMBUI MUNGAI.....3RD APPELLANT

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION1ST RESPONDENT

DANIEL MBUGUA MARI.....2ND RESPONDENT

RULING

INTRODUCTION

1. The Appellants herein a Memorandum of Appeal on 20th September 2013. This was in respect of a ruling that was delivered by Anthony K Mwicigi, Acting Principal Magistrate on 21st August 2013.
2. Parties' advocates appeared before Majanja J on 14th October 2013 and 23rd October 2013 whereat he directed that the matter be mentioned before this court on 15th November 2013 for directions.
3. When the said advocates appeared before this court on 15th November 2013, they indicated that they had all agreed that they proceed by way of written submissions which could be highlighted on a later date. This went well until counsel for the 1st Respondent pointed out that the Appellants had not yet paid the costs in the lower court and that they should deposit a sum of Kshs 500,000/= as security for costs in the appeal herein. Counsel for the 2nd Respondent associated himself with the 1st Respondent's counsel's submission.
4. After hearing lengthy oral submissions by the said advocates, this court directed the Respondents to file formal applications for security for costs for determination by the court by 29th November 2013. The court also issued the time lines within which parties were to file and serve their respective submissions. Highlighting of the submissions was therefore reserved for 29th January 2014.
5. When the matter came up on 29th January 2014, counsel for the 1st Respondent informed the court that they were not ready to proceed as they needed more time to file their written submissions. He explained that they did not file their application seeking for security for costs by 29th November

- 2013 as had been directed by the court as their deponent was away on annual leave which also caused a delay in filing of their submissions. Counsel for the Appellants did not file their written submissions as they were not served with any written submissions.
6. On hearing counsel's oral submissions, this court declined the 1st Respondent's application for adjournment and ordered parties to proceed by way of oral submission. The refusal for adjournment was based on the ground that there are time lines within which this court is expected to determine the appeal herein. Allowing parties more time to put in written submissions would have eaten into the time prescribed in Section 75 (4) (b) of the Elections Act, 2011 (hereinafter referred to as "the Act") for hearing and determining the substantive issues in the appeal herein.
 7. The court also deemed the 1st Respondent's Notice of Motion application dated and filed on 9th December 2013 as having been duly filed despite the same having been filed out of the stipulated time as the court found that the Appellants were not likely to suffer any prejudice having filed their respective Replying Affidavits before 29th January 2014 when the present application was scheduled for hearing.
 8. In arriving at the said decisions, this court was guided by the provisions of Rules (4) and (5) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 (hereinafter referred to as "The Rules") which mandate the court to bear in mind the overriding objective of the rules being to facilitate just and expeditious, resolution of election petitions under the Constitution and Act in any case not beyond time lines provided in the Constitution and Act with respect to election petitions.
 9. Having set out the facts of this case, the court now wishes to turn to the 1st Respondent's Notice of Motion application dated and filed on 9th December 2013. It was brought under the provisions of Sections 78 and 84 of the Act, Order 26 Rule 1 and Order 51 Rule 1 of the Civil Procedure Act Cap 21 (laws of Kenya) and all other enabling provisions of the law. It sought the following orders:-
 - a. **That Security of costs tendered by the Appellant be enhanced to Kshs 3,000,000/= and or as may be determined by this Honourable court.**
 - b. **That costs of this application be provided for.**
 10. The grounds upon which the 1st Respondent's application was based were as follows:-
 - a. **That the Appellant herein was a man of straw and would not be able to raise the costs that may be awarded to the 1st Respondent in case he lost this appeal.**
 - b. **The Appellant had already been ordered to pay to the 1st Respondent the costs of the lower court petition which he was yet to pay and he may be unable to pay this appeal costs if he did not succeed.**
 - c. **The Appellant in the Petition and in this appeal had not disclosed his occupation business status and or source of livelihood.**
 - d. **That it was in the interest of justice and the Act that the Petitioner be ordered to enhance the security for costs to be above Kshs 100,000/= considering the duration the hearing of this appeal would take and the enormous research and complexity of the issues involved.**
 - e. **That Section 84 of the Act was couched on mandatory terms on the issue of costs and directed this court the costs were incidental to a petition or appeal and further stated that would costs shall follow the cause.**

AFFIDAVIT EVIDENCE

11. Moses Kiplogei, the Legal Officer with the 1st Respondent swore an affidavit on 9th December 2013 in support of the said application. It was his averment that the Appellants had filed two (2) petitions namely Petition Nos 2 and 6 of 2013 which were consolidated and that after the hearing of the said consolidated appeal, the same was dismissed.
12. The deponent further deposed that the Appellants had not liquidated the costs in the lower court and that having not mentioned the kind of work that they were engaged in, the 1st Respondent was

- apprehensive of their ability to pay the costs in the event they were unsuccessful in the appeal herein.
13. It was the 1st Respondent's contention that each person has rights and responsibilities or obligations to avoid vexatious suits crowding or wasting time for the court and other parties. It averred that it was in the interests of justice that the Appellants be ordered to enhance security for costs to Kshs 3,000,000/= considering the duration of the hearing the appeal would take and the enormous research and complexity of the issues that were involved.
 14. The 1st Appellant's Replying Affidavit was sworn and filed on 22nd January 2014. He stated that the sum of Kshs 3,000,000/= quoted by the 1st Respondent was unjustifiably astronomical and only sought to frighten and discourage his quest for justice.
 15. It was his contention that he was a man of means having deposited the security for costs in the sum of Kshs 100,000/= in the lower court. He further stated that there was no legal basis for enhancing the security away from the figures prescribed by the law and that it was inexcusable to peg the same on the complexity of the matter or research.
 16. He also averred that the 1st Respondent's Notice of Motion application lacked merit as it stood deficient of facts and law and that the said application only sought to embarrass this court while at the same time delaying the course of justice. He prayed that the said application be dismissed.
 17. Daniel Munyao Nzwili swore the Replying Affidavit filed on 28th January 2014 on his own behalf and that of the 3rd Appellant. One of the issues that the 2nd and 3rd Appellant felt very strongly about was the late filing of the 1st Respondent's Notice of Motion application, not filing its written submissions as had been directed by the court and service of the said application upon their advocates few days prior to 29th November 2014. In view of the fact that the court deemed the application as duly filed, the said averments are spent.
 18. The 2nd and 3rd Appellants were emphatic that the 1st Respondent had had ample time to file the application seeking security for costs and that doing so at this stage served no other purpose than to delay the expeditious disposal of this matter. They also said that the sum of Kshs 3,000,000/= was high by any standards and more than the deposit that was required in challenging the Presidential election at the Supreme Court. It was their contention that the request for a such high security for costs was tainted with an ulterior motive to block them from accessing justice.
 19. The 2nd and 3rd Appellant were categorical that they were people of means having deposited sums of Kshs 100,000/= each in the lower court and that in any event, the 1st Respondent had not filed any Bill of Costs or made any application in the said court to have the said security released to it.

LEGAL SUBMISSIONS

20. Through its Counsel, the 1st Respondent submitted that this was a different case, hence the prayer for enhancement just in case the appeal failed. He was categorical that the appeal would involve a lot of work and time due to the complexity of the issues. He said that this enhanced figure would be commensurate with the work done.
21. The 1st Respondent pointed out that it was relying on Section 78(2) (c) of the Act which provided that a person who presented a petition had to deposit a sum of Kshs 100,000/= and Section 84 of the said Act which stipulates that costs shall follow the event.
22. It admitted that the Act did not specifically address itself to what would happen in an appeal and that it only addressed itself to what happened in the first instance. It submitted that it was not mandatory that the court award a sum of Kshs 3,000,000/= as it had discretion to order a deposit of any figure.
23. The 2nd Respondent did not file his application for costs but instead associated himself with the 1st Respondent's submissions. Through his counsel, the 2nd Respondent added that this court could exercise its inherent powers as tied with Section 11(I) of the Rules which requires that any person who files a petition must furnish costs. The 2nd Respondent urged the court to consider the "Petition" and "Appeal" on equal basis as far as furnishing of security for costs was concerned for the sake of justice. He asked the court to exercise its discretion judiciously as a petitioner in the High Court must meet a threshold of Kshs 500,000/=.

24. Counsel for the 1st Appellant was emphatic that Section 84 of the Act provided that costs follow the cause. The 1st Appellant submitted that the application herein contravened Article 48 of the Constitution of Kenya. He argued that the state had a responsibility of ensuring access to justice to all and that fees must be reasonable and not impede justice. It was his argument that the 1st Respondent had not made out a good case for enhancement of the security for costs.
25. In addition, he submitted that the amounts in Section 78 of the Act were calibrated on the election petition that was being challenged and this being petition for a country representation the said Section contemplated that a deposit of Kshs 100,000/= would also cover an appeal.
26. Through their counsel, the 2nd and 3rd Appellants contended that the application herein had no legal basis as Section 78 of the Act applied to Petitions and not Appeals.
27. They contended that the present application was brought under the wrong provisions of the law. They argued that if the Legislature had intended that Appellants deposit costs prior to lodging of appeals, nothing would have been easier than for it to have said so.
28. They were categorical that a court can only interpret the law but not create it except in very special circumstances stated in Section 3(1) of the Interpretation and General Provisions Act Cap 2 (Law of Kenya). They relied on the case of **Mbuzi vs Omar and 2 Others (2008) 2KLR (EP)** in this regard.
29. It was also the 2nd and 3rd Appellant's submission that Order 26 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules were misplaced as Civil Procedure Rules were not applicable in election petitions. They referred the court to the case of **Murathe vs Macharia (2008) 2KLR (EP), Ahmed vs Twaha and 2 Others (2008) 2KLR (EP) and Karauri vs Mbogo and Another (2008) 1 KLR (EP)** which was the holding in all courts.
30. They further submitted that, in any event under Civil Procedure Rules, it was the Defendant who furnished the Plaintiff with security for cost and by analogy, it followed that the Respondents were the ones who would be required to furnish security for costs as being the Appellants, they were an equivalent of Plaintiffs in civil matters.
31. Thus they urged this court to find that this was not a good case where it could exercise its discretion in view of the many delays by the 1st Respondent and urged it to proceed as mandated under Rule 4 of the Rules.
32. It was also their argument that although the burden lay on it, the 1st Respondent had not been able to discharge its burden showing that they were men of straw. They therefore asked the court to dismiss the application herein.
33. In response thereto, counsel for the 1st Respondent said that the costs were being enhanced to Kshs 3,000,000/= as the 1st Respondent was being represented by two (2) firms of advocates. He denied that the application contravened Article 48 of the Constitution and contended that this court had a discretion to give special interpretation.
34. In support of the 1st Respondent's submissions counsel for the 2nd Respondent referred the court to Article 22 (3) (d) of the Constitution of Kenya which provides that the court shall not be unreasonably restricted by procedural technicalities but rather it should be bound by substantive justice. He reminded the court that the decision **Mbuzi vs Omar and 2 Others** (Supra) was merely persuasive on this court and not binding. He therefore urged the court to allow the 1st Respondent's application as prayed.

LEGAL ANALYSIS

35. Right at the outset, this court wishes to point out that Article 50 (1) of the Constitution of Kenya, 2010 is very clear. It provides that:- **“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**
36. Article 48 of the said Constitution further stipulates that:-

“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice”.

37. It is therefore correct as counsel for the Appellants have submitted that no party should be denied access to justice. The converse is also true. The 1st Respondent also has a right to bring any matter before any court or other independent tribunal or body for just determination.
38. This court has found it necessary to first address the issue of the parties' rights. The 1st Respondent did not contravene Article 48 of the Constitution of Kenya as was contended by counsel for the 1st Appellant. This application is therefore properly before this court. The question of whether or not the said application is merited is a different matter altogether.
39. The applicability of the Civil Procedure Rules in election petitions was an issue that was raised by counsel for the 2nd and 3rd Appellants and also requires to be determined. Counsel for the 2nd Respondent had urged the court to disregard technicalities and instead be bound by substantive justice. He relied on Article 22 (3) (d) of the Constitution of Kenya which provides as follows:-

“the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities”.

40. While that may be so and that further Article 159 (2) (d) of the Constitution of Kenya also mandates the court to be guided by the principle that justice shall be administered without undue regard to technicalities, the court cannot ignore what is clearly provided for in legislation enacted by Parliament.
41. As was rightly pointed out by counsel for the 2nd and 3rd Appellants, the Civil Procedure Rules are inapplicable in election petitions as they have a separate, distinct and elaborate elections legislation. This court is thus persuaded by the said counsel that Orders 26 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules are inapplicable herein.
42. The court will now proceed to consider the parties' oral submissions as regards Sections 78 and 84 of the Act.
43. Section 78 of the Act is very clear that:-

(2) A person who presents a petition to challenge an election shall deposit (emphasise mine)

- a. **One million shillings, in the case of a petition against a presidential candidate;**
- b. **Five hundred thousand shillings, in the case of petition against a member of Parliament or a country governor; or**
- c. **One hundred thousand shillings, in the case of a petition against a member of a country assembly.**

44. It is therefore indisputable that security for costs must be deposited at the time a Petitioner presents a petition to challenge an election. That section is couched in mandatory terms.
45. Rule 34 of the Rules provides that the Memorandum of Appeal shall be filed within fourteen (14) days from the date of the judgment. Within twenty one (21) days upon filing the Memorandum of Appeal, the Appellant is required to file the following:-

(a) Memorandum of Appeal;

(b) pleadings;

(c) typed and certified copies of the proceedings;

(d) all affidavits, evidence and documents put in evidence before the magistrate; and

(e) signed and certified copy of the judgment appealed from and a certified copy of the decree.

46. The discretion that the 1st Respondent wants this court to exercise in enhancing the deposit by the Appellants made in the Applicants court has to be anchored on some provision of the law. It cannot be exercised in a vacuum and must be exercised judiciously.

47. The court finds that the use of the word “Petition” and Appeal” is not a matter of semantics as the process of presenting a Petition and lodging an appeal are different as night and day. There is no mention of a deposit of security of costs in the appellate court or enhancement of security for costs deposited in the court which heard the Petition. It would thus be presumptuous for this court to hold that a deposit would be required in the appellate court. As has been above, a deposit is not one of the requirements at the time of lodging an appeal.
48. The Constitution of Kenya, 2010 is very clear about separation of powers in the three (3) arms of government. None of those arms of government should encroach in each others domain. As was again rightly submitted by the 2nd and 3rd Appellants, this court can only interpret and not create the law. If it was the intention of Parliament to have required security for costs when lodging an appeal, nothing would have been easier than for it to have said so. It is on the basis of the doctrine of separation of powers that this court finds and holds that it cannot include provisions that parliament, which has the mandate to make laws, did not include.
49. The court finds that the timelines given in the Rules in respect of the filing of the Memorandum of Appeal, the lodging of Record of Appeal and giving of directions as to the manner in which evidence and exhibits would be presented in court and the hearing of the appeal appear to have contemplated that a very short time would have been taken in determining an appeal from an election petition so as not to warrant the colossal deposit amount that had been sought by the 1st Respondent.
50. In the absence of any or any specific provision, if at all, in the Act, the Rules or the Elections (General) Regulations 2012, that Appellants **can** or **should** deposit security for costs before hearing of the appeal, this court holds that the 1st Respondent would not have any limb to stand on or color of right to seek a deposit for security for costs of any amount. The question, therefore, of whether or not the 1st Respondent’s prayer for Kshs 3,000,000/= would fetter the Appellants’ right to access is justice would not arise and this court will say no more on this.
51. The 1st Respondent’s option to have two (2) firms of advocates represent it where two (2) election petitions were consolidated is a matter of choice and cannot be used to penalise the Appellants to make a deposit for security for costs herein.
52. Having carefully considered the affidavits in support and against the 1st Respondent’s Notice of Motion application dated and filed on 9th December 2013 and having heard the oral submissions by counsel for all the parties, this court has come to the conclusion that an Appellant is not required to deposit security for costs at the appellate stage and there is no principle of enhancement of costs that had been deposited in the court that heard the petition. Ordering such security would be unlawful, unjustified and illegal.
53. This court therefore finds and holds that it has no legal basis to exercise its discretion to enhance the costs that had been deposited as security in the lower court before the Appellants can prosecute their appeal herein and thereby upholds the Appellants submissions.

DISPOSITION

54. For the foregoing reasons, this court finds that the 1st Respondent’s Notice of Motion said application is not merited and the same is hereby dismissed with costs.
55. Orders accordingly.

DATED and DELIVERED at NAIROBI this 11th day of February 2014

J. KAMAU

JUDGE