



REPUBLIC OF KENYA

High Court at Kitale

Election Petition 6 of 2013

DR. NOAH MAKHALANGANGA WEKESA.....PETITIONER.

VERSUS

MR. ALBERT ADOME RETURNING OFFICER, IEBC TRANS NZOIA...1ST RESPONDENT.

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2ND RESPONDENTS.

PATRICK SIMIYU KHAEMBA.....3RD RESPONDENT.

R U L I N G.

Pursuant to the directions given by this court on 30th May, 2013 the application by the petitioner dated 10th May, 2013 was given priority and heard prior to other pending applications dated 3rd May, 2013, 7th May, 2013, 13th May, 2013, 14th May, 2013 and 16th May, 2013.

Basically, the application dated 10th May, 2013 is made under rules 4, 5 and 20 of the Election (Parliamentary and County Elections) Petitions Rules 2013 and Articles 48, 50 and 159 of the Constitution.

The petitioner seeks an order that leave be granted and that there be an extension of time within which to deposit a sum of Ksh. 400,000/= being further security for costs. The main reason for the application is that when the petitioner filed the petition on 8th April, 2013 he was ready and prepared to pay the sum of Ksh. 500,000/= as security for costs but the court registry assessed the amount payable as Ksh. 100,000/= and received the amount accordingly.

The petitioner's advocate, **Mr. J.M. Wafula**, in his supporting affidavit dated 10th May, 2013 contended that he was informed by the court registry staff that the deposit payable had been reduced from Ksh. 500,000/= to Ksh. 100,000/= on the basis of a checklist for filing petitions.

In arguing out the application, **Mr. J.M. Wafula** assisted by **Mr. Mukele**, submitted that the failure by the petitioner to deposit the required amount of Ksh. 500,000/= was on account of the mistake made by the court registry and if the mistake was extended to the petitioner, then it was unintended and made in good faith.

Mr. Wafula referred to the Constitution and submitted that it allows access to justice by an individual. In particular, the learned counsel cited Article 159 of the Constitution and implored this court not to strictly interpret statute and apply a progressive approach in interpretation of the same.

The learned counsel contended that the objections to this application raised by the respondents are not merited as they are intended to have the petition dismissed before being heard.

Learned counsel urged this court not to shut the door to the petitioner due to the mistake of the court registry and his advocate.

The first and second respondents opposed the application through the learned counsel **Mr. Yego**, on the basis of the averments contained in a replying affidavit dated 15th May, 2013.

In essence, the first and second respondents rely on Section 78 of the Elections Act and contend that the application is brought in bad faith as the checklist referred to by the petitioner related to County Assembly elections and not Parliamentary elections. Further, the Elections Act imposes a mandatory security of Ksh. 500,000/= payable within ten (10) days from the date of presentation of the petition in court. It is the first and second respondent's contention that the Elections Act does not contain provisions for extension of time within which to pay the security deposit. In his submissions, Mr. Yego, reiterated the contents of his supporting affidavit and contended that this court has no jurisdiction to extend time since Rule 20 of the Election Petition Rules relates to matters or acts done under the Rules but not the Elections Act. He submitted that the provisions of section 78 of the Elections Act are meant to be strictly adhered to such that any failure on the part of the petitioner would be fatal and would call for a withdrawal of the petition. Learned counsel went on to submit that even if the court has the power to extend time, the petitioner has not given a plausible reason for his failure to deposit the entire amount of security which was not and ought not be confused with court's filing fees.

In reference to Article 159 of the constitution, Mr. Yego, submitted that the provision was not meant to oust the obligation of parties to comply with the requirements of the law. That, election proceedings are special proceedings such that an infringement of the Elections Act attracts dire consequences.

Learned counsel submitted that a ten (10) day period is given by the Elections Act for deposit of security but herein, the petitioner had a total of forty-five (45) days to raise security (i.e. from the time of the gazettment of the election results inclusive of the ten days window given by the Elections Act) and there being an application for dismissal of the petition for want of security, the question of extension of time should not arise.

The first and second respondents have therefore urged this court to dismiss the application and the petition with costs to all the respondents.

The third respondent associated himself with the submissions made by the first and second respondent but through the learned counsel, **Mr. Sifuna**, added that the issue of extension of time does not arise since the petition was filed on 8th April, 2013 and the payment of deposit was made on 10th April, 2013. In any event, the deposit made herein was the wrong deposit intended for a County Assembly representatives petition and not a Governor's petition.

The third respondent submitted further that assessment of costs do not apply to deposits and that the question of deposit being a matter of law as opposed to fact, ignorance of the law is no defence as indicated by the petitioner when he implied that his advocate did not know the law.

The third respondent contended that the so called circular or checklist was a useless illegal document and cannot be relied upon as doing so would be to promote an illegality.

It was submitted by the third respondent that by refusing to extend time this court would be upholding rather than defeating the Rule of Law but the position would have been different if the petitioner was

acting in person.

The third respondent took a sweep at the petitioner's lawyers by stating that they are eminent advocates who cannot talk of having made a mistake yet they acted with impunity.

The third respondent submitted that every lawyer who has made a mistake is now relying on Article 159 of the constitution and although the petitioner has not specified which sub-section is being relied on, it would appear to be Article 159 (2) (d) which does not support the application since the application defeats the principle that justice shall not be delayed and in any event, a deposit is a matter of law not technicality.

The third respondent contended that a mandatory legal requirement cannot be a procedural technicality. Further, Article 159 of the Constitution does not contemplate that binding decisions should be disregarded and this being an Election Court, it is bound by special rules.

It is the third respondent's contention that the petitioner was let down by his advocates and although the deposit receipt herein is made in favour of the firm of **Onyancha & Co. Advocates**, they have not filed a supporting affidavit in that regard yet they were the only firm on record at the time.

The third respondent further contended that it is only Mr. Onyancha who could talk about the petition and the deposit and not Mr. Wafula and Mr. Mukele who are strangers in the matter.

The third respondent contended that no letter from the Deputy Registrar was availed to show that the petitioner was misled.

In reference to Rule 11 of the Elections Petitions Rules, the third respondent contended that the Rule refers to a receipt for deposit and does not contemplate several receipts. Therefore, the provision does not allow for payment of deposit by instalments.

In response to the third respondent's submissions, the petitioner through learned counsel, **Mr. Mukele**, submitted that part of the deposit was paid and since the Election Act and rules are silent with regard to such scenario the Civil Procedure Act should apply as it accords with the new Constitution. Further, the petitioner could not have gone to the registry to work against his interest and therefore the talk of impunity by the third respondent was misplaced.

The petitioner submitted that the payment of the part deposit was to safeguard the respondents' interest; it would therefore be harmless to deposit the balance thereof.

In support of their respective submissions and contentions, the petitioner and the respondents relied on the provisions of the Constitution, relevant provisions of the Elections Act and Rules as well as several authorities drawn from the High Court, the Court of Appeal and foreign courts. All these are contained in the respective lists of authorities filed herein and have been considered by this court.

From the arguments by all the parties, two issues emerge prominently for determination. These are:-

(1) Whether this court has the jurisdiction to extend time within which security for costs may be deposited and if it has,

(2) Whether the petitioner is entitled to exercise of discretion in his favour and be granted extension of time within which to deposit security or further security.

Before coming to the issues, may it be pointed out that the court was saddened by the manner in which Counsel for the third respondent took a sweep at his seniors, the Counsels for the petitioner. Counsels may be reminded that they are required and always expected to maintain decorum when appearing in court to present their respective cases. Needless to say that Counsels must always act like the professionals that they are and avoid personal attacks which have no relevance to the case at hand and

which are best reserved for a forum other than a distinguished court. It is nonetheless gratifying to note that Counsels apologized to each other for their respective emotional outbursts while arguing this application which we now return to.

By dint of Article 87 (1) of the Constitution, parliament was mandated to enact legislation to establish mechanisms for timely settling of electoral disputes and in exercise of the mandate Parliament came up with the **Elections Act 2011** under which the **Elections (Parliamentary and County Elections) Petitions Rules 2013** were made.

The Elections Act (herein referred to as the “Act”) is an:-

“Act of Parliament to provide for the conduct of elections to the office of the President the National Assembly, the Senate, County governor and County assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposed.”

In exercise of the powers conferred by section 96 of the Act, the Rules Committee came up with the Elections (Parliamentary and County elections) Petition Rules, 2013 (herein, the Rules) for purposes of regulating the practice and procedure of the High Court with respect to elections disputes.

The overriding objective of the rules is to facilitate the just, expeditious, proportionate and affordable resolution of elections under the Constitution and the Act.

Thus, the Act and the Rules form a complete legal regime with its elaborate procedure concerning the filing, serving, hearing and determination of the Elections Petitions.

The Constitution confers jurisdiction to the High court to hear and determine election petitions. This is a special jurisdiction for which the provisions of the Civil Procedure Act and Rules made thereunder do not apply save where expressly incorporated as was held in the case of **David W. Murathe vs. Samuel Kamau Macharia Civil Appeal No. 171 of 1998.**

It therefore suffices to state that in the determination of this application, the court shall derive guidance from the provisions of the Constitution and the electoral laws (i.e. The Elections Act and the Rules made thereunder).

With regard to the first issue for determination i.e. whether this court has the jurisdiction to extend time within which security for costs may be deposited, it may be noted that deposit of security for costs is generally a concept or device to discourage unnecessary litigation on the basis of what is termed the **“Loser pay”** principle which helps in off-loading the burden of expenses incurred in either prosecuting or defending a case and therefore makes the endeavour to safeguard a legal right worthwhile. However, the principle has its main disadvantage in that it may act as a great barrier with regard to litigation especially on matters concerning fundamental rights such that a party may for fear of costs for security be impeded from attempting to enforce his/her Constitutional or Statutory rights. In effect, the principle is a hindrance to the right of access to justice guaranteed by the Constitution.

Be that as it may, the Elections Act provides for resolution of election disputes and connected purposes. A person approaching the court under the Act would most likely than not be pursuing his/her Constitutional right to free, fair and regular elections based on universal suffrage and the free expression of the Will of the electors for any elective public body or office established under the constitution (**See, Article 38 (2)**

Constitution). Further , a party would also be pursuing his/her right to access justice as provided by **Article 48** of the Constitution and the right to a fair hearing of the election dispute as provided by **Article 50 (1)** of the Constitution.

Such, are fundamental rights which invariably are juxtaposed with the electoral laws and become an integral part of the electoral dispute resolution mechanism.

With regard to security for costs, the applicable provisions of the Elections Act is Section 78. Sub-sections (1), 2(b) and (3) of the provision are the most relevant for purposes of this application along with Rules 11 (1) and 20 of the Election Petitions Rules.

Thus, Section 78 (1) provides that:-

“A petitioner shall deposit security for payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition under this part.”

This sub-section provides for a time-frame within which security is to be deposited i.e. ten (10) days.

Section 78 (2) provides that:-

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

(a)

(b) Five hundred thousand shillings, in the case of petition against a member of Parliament or a County governor; or

(c)

This sub-section provides for the amount to be deposited in disputes relating to Parliamentary and County governor elections. The present dispute relates to the election of the governor of the County of Trans Nzoia.

Section 78 (3) provides that:-

“Where a petitioner does not deposit security as required by this section, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition, and the respondent may apply to the election court for an order to dismiss the

petition and for the payment of the respondent's

costs.”

This sub-section provides for the resultant effects of failure to deposit security.

In this present case, the petitioner deposited security in the sum of Ksh. 100,000/= on the 10th April, 2013. The petition was presented on 8th April, 2013. Clearly, the amount deposited was inadequate for purposes of Section 78 (2) (b) of the Act. It turned out to be a negative deposit meaning that there was no deposit made by the petitioner as required by law.

Apparently, it is because of the petitioner's aforesaid omission that this application was made. The petitioner is seeking extension of time within which to deposit the required security in the sum of Ksh. 500,000/= or the outstanding balance thereof.

Although Section 78 (1) of the Act does not expressly provide for extension of time to deposit security, Section 78 (3) of the Act implies that there is a path created for extension of time. This is because the provision ((section 78 (3)) pre-supposes that the failure to deposit security could lead to an objection being raised by the respondent and in the event of such objection, the proceedings would be stayed or put to a halt unless the objection is removed. If the objection is not removed, the respondent would have the liberty to apply to the court for dismissal of the petition and for payment of the respondent's costs.

The wordings of Section 78 (4) of the Act clearly indicate that a petitioner may make an application to the court for the removal of any objection which exists. If there is no objection in place it may be forestalled by a petitioner by necessary application for extension of time to deposit security. Herein, there are objections by the respondents in the form of their respective applications dated 7th May, 2013 and 14th May, 2013 for striking out petition for want of security.

This application was clearly intended to forestall any objection or to remove any existing objection. Section 78 (3) of the Act envisaged applications or objections similar to those raised herein by the respondents.

Invariably, the said applications are dependent on the outcome of this application as the failure to deposit security or adequate security is not a fatal omission leading to an automatic dismissal of a petition.

If the present application is allowed, the objections by the respondents would become a cropper.

It is the considered opinion of this court that Section 78 (3) and by extension Section 78 (4) of the Elections Act confers to the court a veiled jurisdiction to extend time and if that is not the case, then, **Rule 20** of the Rules confers express jurisdiction to the court to extend time.

The Rule provides that:-

“Where any matter is to be done within such time

as provided for in these Rules or granted by the court,

the court may for purposes of ensuring that no

injustice is done to any party, extend the time within

which the thing shall be done with such conditions

as it may consider fit even though the period initially

provided or granted may have expired.”

The Rule would apply to acts done under the Rules and the Act as the requirements imposed by Section 78 of the Act with regard to security are “imported” into the Rules by virtue of Rule 11 (1) of the Rules.

Therefore, with regard to the first issue for determination, this court finds that it has the necessary jurisdiction to extend time within which security for costs or part thereof may be deposited.

The second issue for determination is whether the petitioner is entitled to exercise of discretion in his favour by extension of time to deposit the outstanding balance of security i.e. Ksh. 400,000/=.

Basically, no satisfactory reason has been offered by the petitioner and/or his advocates for the failure to deposit security in the entire sum of Ksh. 500,000/=. They cannot be heard to say that they were misled or misguided by the court registry staff who allegedly pointed out to them a so called “checklist” which required that they pay Ksh. 100,000/=. The said checklist was insignificant and had no force of law. In any event, it was expected that the petitioner's advocate knew the law and that it required that a sum of Ksh. 500,000/= be deposited in respect of an election petition relating to the seat of County Governor.

The fact that the petitioner's advocates allowed him to deposit Ksh. 100,000/= instead of Ksh. 500,000/= was a pointer to their ignorance of the electoral laws and lack of due diligence. However, the advocates mistakes ought not be visited upon the petitioner.

The requirement to deposit security is a matter of law rather than procedural technicality. In that regard, the petitioner without reasonable cause breached the law by failing to deposit the required security. However, the fact that he deposited part of the security (i.e. Ksh. 100,000/=) and has by this application requested for time to deposit the outstanding balance of the amount is a strong indication of his seriousness in pursuing his Constitutional rights to access justice and fair-hearing of the petition as well as the right to free and fair elections.

The Constitution is the Supreme Law of the land. It's provisions and in particular those relating to fundamental rights must, in disputes such as the present one, be interpreted in a broad and liberal manner if the circumstances so allow.

With regard to this application, this court is inclined to look at it more from a constitutional rather than a statutory perspective.

Consequently, it is this court's opinion that the petitioner may suffer injustice if he is not allowed to deposit the outstanding balance of the security and have his petition heard on the merits. The respondents will not suffer prejudice if the petitioner is indulged accordingly.

With regard to fair hearing in elections petitions, the Constitutional Court of Uganda stated in the case of **Baku vs. A.G. [2005] 2EA5** that:-

“The significance of having fair hearing in elections petitions cannot be overemphasized. The resolution of electoral disputes not only affects the perception of the population on the independence of the judiciary but also on the fairness of the electoral process in the Country.”

It is therefore the finding of this court with regard to the second issue for determination that the petitioner

is entitled to exercise of discretion in his favour by this court to the extent that he is allowed time within which to deposit the outstanding balance of the security (i.e Ksh. 400,000/=). In that regard, the amount be deposited in court forthwith and in any event, not later than midday on the 7th June, 2013.

Finally, as a resultant effect of this ruling, the respective applications by the respondents dated **7th May, 2013** and **14th May, 2013** for dismissal of petition for want of security are hereby treated as having been overtaken by events.

The issue pertaining to the petitioner's representation in this matter by the learned counsels Mr. Wafula, Mr. Mukele and Mr. Onyancha is a non-issue in as much as it touches on procedural technicalities which ought not be given undue regard at the expense of substantive law. An additional effect of this ruling is that the pending application by the first and second respondents for extension of time to file their responses to the petition dated **3rd May, 2013** is granted if only to forestall any miscarriage of justice that may be occasioned if the application is heard and disallowed.

The grant of that application dated **3rd May, 2013** invariably renders obsolete the petitioner's application dated **13th May, 2013** for striking out responses to the petition filed by the respondents out of time and the petitioner's preliminary objection dated **16th May, 2013**. It may also be said that the petitioner's said application and preliminary objection have since been overtaken by events such that the responses to the petition filed herein by all the respondents are hereby deemed to have been properly and lawfully filed and served.

In sum, this application is allowed on conditions stated herein above but due to the petitioner's lack of due diligence in presenting the petition without deposit of full security for costs, the respondents costs of this application shall be borne by the petitioner.

Ordered accordingly.

[Read and signed this 6th day of June 2013.]

J.R. KARANJA.

JUDGE.