



IN THE HIGH COURT OF KENYA

AT NAKURU

Election Petition No. 1 Of 2013

THE ELECTION ACT, 2011

**ELECTION FOR THE MEMBER OF NATIONAL ASSEMBLY OF KURESOI SOUTH
CONSTITUENCY**

BETWEEN

SIMON KIPRONO SANG.....PETITIONER

VERSUS

- 1. ZAKAYO K. CHERUIYOT**
- 2. JOHN COX LORIONOKOU (RETURNING OFFICER FOR KURESOI SOUTH
CONSTITUENCY)**
- 3. THE INDEPENDENT ELECTORAL & BOUNDARIES
COMMISSION.....RESPONDENTS**

RULING

Following the General Elections of 3rd March, 2013, the 2nd Respondent declared Zakayo K. Cheruiyot (1st Respondent) as the winner in the race for Member of National Assembly for Kuresoi South Constituency. The Petitioner was one of the candidates for the position of Member of National Assembly for Kuresoi South Constituency. Subsequently, the Petitioner filed this petition on 2/4/2013 challenging the said declaration. The petition was gazetted on 19th, April, 2013 in the Kenya Gazette Notice No. 5381. The 2nd and 3rd Respondents (hereinafter referred to as the **Respondents**) saw the said Gazette Notice and without being served with the petition, requested the Deputy Registrar, Nakuru High Court, vide a letter dated 22nd April, 2013 to be supplied with photocopies of the petition, affidavits and other documents filed in the petition. Thereafter, the Respondents filed a response to the petition on 7th May, 2013. On 10th May, 2013, the Respondents filed an application to strike out the petition for failure by the Petitioner to deposit security for costs.

On 13th May 2013, when the petition came up for mention, Counsel for the Petitioner, Mr. Gekonga indicated that he had received a text message from the Petitioner that he wished to withdraw the petition and requested for two weeks to enable him file a formal application because the Petitioner works in Mombasa.

Mr. Kahiga, Counsel for the Respondents contended that the Petitioner ought not to be given audience for

the reason that he had not deposited security and there was an application seeking to strike out the petition. This court then allowed Mr. Gekonga leave to file the instant application. (For purposes of this ruling **the Elections Act, No. 24 of 2011** and **the Elections (Parliamentary and County Elections) Petition Rules, 2013** shall hereinafter be referred to as '**the Act**' and '**the Rules**' respectively).

The application is premised on the grounds that:-

- i. **In the best interest of the constituency, the Petitioner has opted to withdraw the petition as issues regarding the parliamentary election will stand resolved.**
- ii. **Peace and stability will be fostered and/or maintained in the constituency.**
- iii. **To allow the constituents to move forward from the election atmosphere and focus on developing the constituency irrespective of whom they voted for.**

The Petitioner swore an affidavit in support of the application on 21st May, 2013 and a supplementary affidavit on 11th June, 2013. He avers that he has come to realise that it would be in the best interest of the entire constituency of Kuresoi South that he withdraws the petition; that he has consulted his supporters and fellow constituents and they have concluded that proceeding with the petition will prolong the election anxiety in the constituency and work against the need to maintain peace and stability and derail development and inter-relations between the constituents. He urged that the issue of costs only arises in the event the Respondents had been served with the petition.

Mr. Gekonga disputed the issue of costs raised by the Respondents stating that the Respondents had not been served as provided for under **Rule 13(1)** of the **Rules** and **Section 77 (2)** of the **Act**. He added that **Article 87(3)** of the **Constitution** requires the Petitioner to serve directly; that there is no provision allowing a party to get pleadings from the court and allege that he was served, and Kenya Gazette Notice was not a mode of service. He urged that if a party is not served, the court moves and invites parties. Mr. Gekonga submitted that the case of **Kumbatha Naomi Cidi v. County Returning Officer, Kilifi and 3 others (2013) e KLR** is distinguishable from the instant case since in the above case, the parties had been summoned by the court or served with a Notice of Motion. He urged that each party should bear its own costs.

Mr. Lawrence Macharia Karanja, an advocate in the firm of the Respondent's advocates filed an affidavit in reply to the application on behalf of the said Respondents. He did not oppose the application for withdrawal save that costs of the petition be borne by the Petitioner.

Counsel further submitted that under **Section 76(a)** of the **Act**, a petition should be served within 15 days; that 15 days lapsed on 17th April, 2013. Under **Section 78 (2) (b)** of the **Act**, a Petitioner is required to deposit security for costs within 10 days of presentation of the petition which days lapsed on 17th April, 2013 without security being deposited; that on 19th April, 2013, the court published in the Kenya Gazette all petitions that were filed and were assigned to judges to hear and places to be heard. Amongst those gazetted was the instant election petition to be heard at Nairobi. The Respondents instructed an advocate and on 22nd April, 2013, the advocate wrote to the court seeking copies of affidavits and the petition filed because they had not been served. He argued that a gazette is a public document and the Respondents having been mentioned, had the right to participate in the petition. He admitted that the Respondents came on record on 26th April, 2013 and by then there was no intention to withdraw; that there was fifty (50) days delay by the Petitioner to bring this application; that it is only after the Respondents filed their application seeking the striking out of the petition that the Petitioner filed a formal application to withdraw the petition. He submitted that **Rule 23 (6)** of the **Rules** has not been complied with for failure to state that no agreement has been entered into in relation to the withdrawal of the election. On this point counsel relied on the authority of **Kumbatha** case (supra), where the Respondents were summoned for pre-trial and it was also held that the purpose of depositing security was to avoid vexatious petitions. That failure to deposit security is not a mere irregularity but a requirement. Counsel stated that even if the Petitioner did not apply to withdraw, the petition was never served and is therefore a nullity and that for that failure, the Petitioners are entitled to costs. Still relying in **Kumbatha** case (supra) he submitted that if the Petitioner had applied to withdraw before the gazettment of the petition, then the Respondents

would not have been entitled to costs. Finally, counsel stated that from the affidavits, it is not clear when the decision to withdraw was made and therefore it is evasive; that considering all circumstances of the case, the application to withdraw was made to defeat the application to strike out the petition. He urged that the Petitioners be condemned to pay costs.

Mr. Gekonga in reply denied that the application was filed to defeat the application to strike out the petition, and that it is upon court to strike out a petition and applying to strike out a petition is usurping the court's powers; that the notice summoning parties to attend pre-trial was issued after the Respondents had already filed papers.

After considering the rival arguments it is not disputed that the court has discretion to grant leave to an Petitioner to withdraw an election petition provided that the Petitioner complies with the provisions of **Rule 23** of the Rules. Under **Rule 23(6)** it is a requirement that in the affidavit in support of the application, the Petitioner depones as follows:-

“To the best of the deponent’s knowledge and belief that no agreement or terms of any kind has been made and that no undertaking has been entered into in relation to the withdrawal of the election petition.”

The Petitioner did not comply with the above provision. Failure to comply with the above provision renders the instant application invalid. The above provision is meant to guard against collusion and corruption.

The Petitioner has not demonstrated that he complied with **Rule 24(2)** which requires the Petitioner to publish in a gazette notice, the withdrawal of an election petition which is done in Form EP6 that is set out in the 1st schedule. This has to be done at the Petitioner's own expense. Such publication is meant to notify the public of the withdrawal of the petition so that if there is anybody else who wishes to come on board as a Petitioner, they can do so. In **Martin Sarakwe Wechuli v IEBC** Elc Pet.7/2013, Omondi j, observed that an Election Petition is not just for the interest of the individual but for the entire public and that is why the public have to be notified of its withdrawal. The Petitioner chose to flout this rule and that too renders the application invalid and incompetent.

The Petitioner did not comply with **Rule 11(1)** which provides that the Petitioner do deposit security for the payment of costs that may become payable by the Petitioner. **Rule 11(1)** has to be read with **Section 78(2)** in this case **Section 78(2)(b)**. The said sum must be deposited with the Registrar not more than 10 days after presentation of the petition. The 10 days lapsed on 17/4/2013. The rationale for depositing security was to ensure that access to justice is regulated and that the courts are insulated against abuse of the court process by all manner of petitions and vexatious litigants since every voter has a right to come to court. It also helps protect the Respondent's rights to costs in the event the petition is not successful. (See: **Harit Sheth Advocate v. Shamas Charania, Nairobi Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR**). In the case of **Hon. Johnson Muthama v Minister of Justice and Constitutional Affairs & others**, Petition No. 198 of 2011 (unreported) the court stated:

“Provision of payment of costs by a party coming before the court does not in my view, violate any provision of the constitution. It is a common practice in civil proceedings intended to safeguard the interests of the party against who a claim is brought and to prevent abuse of the court process. Given the nature of elections, it serves a useful and rational purpose of ensuring that only those who have a serious interest in challenging the outcome of an election do so.”

Under **Section 78(3)** failure to comply with the requirement to deposit security bars the court from proceeding with the petition. **Section 78(3)** stipulates as follows:-

“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 petition was filed on 2/4/2013 and when this application was filed on 21/5/2013, over a month since the filing, no security had been deposited. The application is therefore incompetent and unsustainable.

In principle, the Respondents do not object to the withdrawal of this petition. Infact they had filed an application to have the petition struck out by the Notice of Motion dated 10/5/2013. It was filed before the application for withdrawal. The only outstanding issue is one of costs. The Petitioners object to payment of costs for the reason that they did not serve the Respondents with the application. The petition having been filed on 2/4/2013, and gazetted vide Gazette Notice No.5381 on 19/4/2013, this court was assigned to hear the said petition. The Respondents saw the petition gazetted. They filed a notice to appear on 24/4/2013. By then, the Petitioners had not served the petition on any of the Respondents. The question is whether the Respondents should have just ignored the gazettement of the petition because they were not served. Service of a petition is provided for under **Section 77(2)** of the **Act** and **Rule 13(1)**. Service shall be by way of direct service or by publication in a newspaper of national circulation. There is no provision for service by gazette notice. The question then is, having known of the existence of the petition, should the Respondents have folded their hands and sat back. A Gazette Notice is a public document. Even if it was not a mode of service, it provided information to the Respondents that a petition had been filed against them. This court is aware that election petitions are special proceedings whose substantive law is under the Act while the procedure is provided for under the **Rules**. I draw an analogy with the ordinary civil proceedings, if a person approaches the court by way of certificate of urgency ex-parte, and the other side gets wind of the filing of the said application and approaches the court, even at that ex-parte stage the court cannot fail to hear the other side. Similarly, in this case, I am satisfied that though not served with the petition, but having known of the filing of this petition through the gazette notice, a diligent party would have acted like the Respondents did, to come and get the documents from the court or the Petitioner and respond. In my view, the Respondents exercised due diligence in coming on record to safeguard their position in case they were caught off guard. If the Petitioner was not keen on prosecuting the petition, he should have withdrawn it before gazettement or soon thereafter. But after gazettement on 19/4/2013, the Respondents filed appearance over five days later, on 26/4/2013. The excuse given by the Petitioner that the Respondents should have enquired from them makes no sense. It is the Petitioner who had filed the petition and had the duty to ensure it was served or withdrawn. Even after intimating that he wanted to withdraw the petition, it took the Petitioner from 13/5/2013 to 13/6/2013 to have the application prosecuted. Petitions have to be heard and determined within 6 months. Time is therefore of essence.

For reasons that the Petitioner did not comply with **Section 78** as read with **Rule 11(1)**, **Rules 23(6)** and **24(2)**, this application is incompetent and cannot be granted. In the circumstances, I will strike out the petition. The Petitioner cannot run away from his responsibility by hiding behind non service. I am satisfied that the Respondents were lawfully on record having been attracted and drawn to court by the filing of this petition and are therefore entitled to costs. This petition is hereby struck out with costs to the 2nd and 3rd Respondents.

DATED and DELIVERED this 8th day of July, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

N/A for the Petitioner

Mr. Wanganyo holding brief for Mr. Karanja for the Respondents

Kennedy – Court Clerk