



**Kiboi v Kilonga & 4 others (Election Petition E006 of 2022)
[2023] KEMC 6 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEMC 6 (KLR)

**REPUBLIC OF KENYA
IN THE NAROK LAW COURTS
ELECTION PETITION E006 OF 2022
SM MWANGI, CM
JANUARY 26, 2023**

**IN THE MATTER OF ARTICLES 1,2,19,27,38,47,90,177
AND 193 OF THE CONSTITUTION, 2010**

IN THE MATTER OF SECTIONS 34,35 AND 36 OF THE ELECTION ACT NO. 24 OF 2011

AND

**IN THE MATTER OF ELECTIONS (PARTY
PRIMARIES AND PARTY LISTS REGULATIONS)2017**

AND

IN THE MATTER OF ELECTIONS (REGISTRATION OF VOTERS RREGULATIONS)2012

AND

IN THE MATTER OF NOMINATED MEMBERS OF THE COUNTY ASSEMBLY FOR NAROK

BETWEEN

PAUL LEMISO KIBOI PETITIONER

AND

SIMON LENGUIYIA KILONGA 1ST RESPONDENT

HENRY TITIMET IOLOLO 2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY 3RD RESPONDENT

JUBILEE PARTY 4TH RESPONDENT

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 5TH
RESPONDENT**



RULING

1. The petitioner lodged this petition dated September 23, 2022 on September 29, 2022 but defaulted in depositing Kshs 100,000/= as security for the costs. The 1st respondent filed an application dated October 22, 2022 pleading that the petition be struck out for failing to comply with the mandatory provisions of section 78(1) of the Elections Act. Subsequently the petitioner filed a motion dated October 25, 2022 seeking extension of time to deposit the security for costs. The 2nd respondent also lodged a preliminary objection (PO) dated October 17, 2022 contending that he was not served with the petition. The court directed that the two motions and the PO be canvassed simultaneously by way of submissions and are now the subject of this ruling

Petitioner's Submissions

2. The petitioner submitted that rule 21(1) of the Elections (Parliamentary and County) Petition Rules, 2017 (The Elections Act No 24 of 2011) - the Election Petition Rules- grants power to the Election Court to extend time. He has also referred to Article 259(9) of the Kenya Constitution which states and I quote:

“If any person or state organ has authority under the Constitution to extend a period of time prescribed under the Constitution, the authority may be exercised either before or after the end of the period, unless contrary intention is expressly mentioned in the provision conferring the authority.”

3. The petitioner proceeded to quote Section 78 of the Elections Act which sets out the amounts of security to be deposited by petitioners in the various seats starting with the presidential, Parliamentary and finally stating that for the County Assemblies the deposit is Kshs 100,000/=. The consequence of failing to make the deposit is also spelt out. He further cited section 59 of the Interpretation and General Provisions Act, Cap 2 which provides that:

“Where in a written law a time is prescribed for doing an act or taking proceedings and power is given to court or other authority to extend that time, the power may be exercised by the court or other authority although application for extension is not made until after expiry of the time prescribed.”

4. The petitioner argued that the depositing of security is a procedural and not a substantive requirement and backed his submission by citing the holding in the case of Yaite Phillip Okoronon v Jakaa Gardy Odara & another [2017] e KLR where the court held that Section 78(3) of the Elections Act only bars further proceeding with the hearing of the petition but not an interlocutory application for the extension of time to make the deposit. He also cited the case of Noah Makhalanga Wekesa v Albert Adome & 2 others [2013] eKLR where only a part of the security had been deposited within the stipulated period and time was extended. He further cited the following cases where time was enlarged: Tom Onyango Agimba v Independent Electoral and Boundaries Commission, Returning Officer, Embakasi West Constituency & another [2017] eKLR and Samwel Kazungu Kambi & another v Nelly Ilongo County Returning Officer, Kilifi County & 3 others [2017] eKLR adding that the petition raises very serious Constitutional issues based on article 177 of the Constitution
5. The petitioner added that the costs can only be deposited directly through the e-filing system after an invoice with the particulars of the account number, pay bill number and amount has been generated but to date the said invoice is yet to be generated. He stated that his advocate has on several occasions



followed up the matter with the judiciary without making any headway. He went further to submit that the 5th respondent was extended time to file its response without any objection from the 1st and 2nd respondents and therefore it would be setting double standards and discriminatory against him to deny him the extension

6. Turning to the issue of whether there was proper service on the respondents while responding to the PO dated October 17, 2022 by the 2nd respondent, he stated that the 1st and 2nd respondents refused to accept service and referred the process server to their advocate who confirmed instructions and acknowledged receipt of the service. He referred to the affidavit of the process server dated October 19, 2022. He submitted further that the 1st respondent filed a notice of appointment on 3/10/2022 which was just one day after the petition was filed and since he is not disputing having been served, the 2nd respondent is estopped from disputing it on his behalf

1st Respondent's Submissions

7. The 1st respondent associated himself with the 2nd respondent's submissions dated December 19, 2022 on his PO, their application and the petitioner's application and urged the court to strike out the petition. He cited the case of *Franco v Kingi & another* [2009] eKLR where the superior court held on the issue of costs thus;

“We are in agreement with the respondents that the requirement that an aggrieved party remits security for costs to court upon filing an Election Petition is to restrict the would-be vexatious litigants coming to court and ensure that the party who comes to court is serious and will be able to pay the costs in the event he is required to do so.”

He also cited the case of *Kiplangat Richard Sigei & 2 others v Independent Electoral and Boundaries Commission, & another* [2017] eKLR where J Muya held that:

“This mandatory deposit is meant to discourage frivolous and vexatious litigant from challenging election results.”

8. The 1st respondent submitted that failure to deposit the security for costs is mandatory citing the decision in the case of *Patrick Ngeta Kimanzi v Marcus Mutua & 2 others* where J Majanja held that:

“The deposit of security deposit under section 78 of the Act is mandated by the statute in imperative terms, it is not a mere irregularity or technicality” adding that the failure to deposit is therefore fatal to the petition citing the decision in the case of *Kiplangat Richard Sigei (supra)*. He submitted further that the court has no jurisdiction to extend the time relying on the decision in the case of *Esposito Franco v Amason Kingi Jeffah & 2 others* [2010] eKLR where the Court of Appeal while dismissing the appeal stated:

“In our judgment, there was simply no deposit of security made in accordance with the law and the motion before the superior court was properly dismissed on that score, even if the law allowed for extension of time, which it does not.”

9. The 1st respondent also quoted the decision in the case of *Evans Nyambaso Zedekiah & another v Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR to drive home the point that the non-payment of the security for costs deprives the court jurisdiction. While still quoting the same case he added that the statute, meaning the Elections Act, does not make provision for extension of time according to the decision which cited with approval the verdict of J Muriithi in the case of



Kisii HC Election Petition No 6 of 2013 [Fatuma Zainabu Mohamed v Ghati Dennitab & 10 others](#) (unreported) where he stated:

“...the rules cannot legislate a power for extension of time which is not expressly authorized under the relevant section of the statute by the authority of which the rules are made. There is no express provision under the Elections Act 2011 for the enlargement of time to deposit the security for costs. Accordingly, the power to extend time cannot be authorized by the general power under rule 20 of the Election Rules to extend time for the doing of any act under the Rules.”

2nd Respondent's Submissions

10. He cited section 78 of the [Elections Act](#) and rule 13 of the [Election Petition Rules, 2017](#) which provide for the deposit of the security for costs while submitting that the petitioner has not adduced any cogent evidence of the steps which he has taken to have the said invoice generated. He accused him of deceiving the court that he has the amount yet he asked the court to deposit a title deed/log book. He concurred with the 1st respondent that the deposit of the security for costs is a mandatory substantive legal requirement and cited the holding in the case of [Gatirau Peter Munya v Dickson Mwenja Kitbinji & 2 others](#) [2014] eKLR where the rationale was explained thus:

“The rationale for security for costs is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying litigation indefinitely except on conditions that offer protection to the other party.”

11. Turning to issue of the service of the petition dated 26/9/2022 he cited the definition of service in the [Black's Law Dictionary](#), 6th Edition and article 87(3) of the [Constitution of Kenya, 2010](#) while submitting that the petitioner ought to have served the respondents either directly or through advertisement within seven (7) days of the filing of the petition. He said he learnt of the petition from the 1st respondent and filed Notice of Address adding that he was actually served on October 14, 2022. He quoted the decision in the case of [Elvis Anyimbo Sibenga v Orange Democratic Movement & 4 others](#) [2018] eKLR where the court emphasized that because of the special nature of election petitions and the strict time lines the parties must comply with the sections of the law as well as the rules which are couched in mandatory terms
12. He submitted that the petitioner failed to deposit the security for the costs in time and the petition should therefore be dismissed and relied on the decision in the case of [Ibrahim Ahmed v Independent Electoral and Boundaries Commission & 2 others](#) [2017] eKLR, [Zainabu Mohamed](#) (*supra*) and [Evans Nyambaso Zedekiah](#) (*supra*). He was emphatic that the failure to serve the petition went to the root of the petition and the same cannot stand where there was failure to serve the same citing the decisions in the case of [Patrick Ngeta](#) (*supra*) and [Aluodo Florence Akinyi v IEBC and 3 others](#)- Kisumu HC Election Petition No 4 of 2017
13. Turning to the issue of costs he cited Section 84 of the [Election Act, 2011](#) which states:

“An Election Court shall award the costs of and incidental to a petition and such costs shall follow the cause.”

and rule 30(1) of the [Elections \(Parliamentary and County Elections\) Petitions Rules, 2017](#) which stipulates that at the conclusion of the election petition the court shall make an order specifying the total amounts of costs payable and the person by and to whom the costs shall be paid



5th Respondent's Submissions

14. The 5th respondent referred to section 7(3) *Elections Act* aforesaid and submitted that the deposit of the security for costs is a substantive and not a technical requirement which goes to the root of the court's jurisdiction citing the decision in the case of *Milton Kimani Waitinga v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR, *Ibrahim Mohamed (supra)*, *Fatuma Zainabu (supra)* and *Evans Nyambaso (supra)* more or less echoing the submissions of the 1st and 2nd respondents. The 5th respondent also took issue with the reason given by the petitioner of the failure to get the invoice to enable him deposit the security for costs

Determination

15. The following are the issues for determination taking in to account the said applications lodged by the said parties:
- a. Whether this court is clothed with jurisdiction to enlarge the time for the deposit of the security for the costs
 - b. Whether the security is limited to money or can include deposit of title deed/log book
 - c. Whether the petition was served properly on the respondents
 - d. Who should bear the costs of the PO and the applications
16. There is no dispute on the fact that the petitioner did not furnish the security for costs within ten days after filing the petition as required by the cited Section 78 of the *Elections Act* and Rule 30 which prompted the 1st respondent to file the motion dated October 22, 2022 seeking orders to strike out the petition. Apparently, this jolted the petitioner to file the application dated October 25, 2022 praying for extension of time to comply by depositing the security for the costs.
17. The issue which calls for determination first in my opinion is whether the petition was properly served on the respondent. As rightly pointed out by the petitioner, only the 2nd respondent is disputing the service and he contends that he learnt of the petition from the 1st respondent and proceeded to file a notice of address. The petitioner relies on the affidavit of service dated October 19, 2022 sworn by his advocate who has deponed that she effected service on the advocates identified by the 1st and 2nd respondents' on September 29, 2022 and they appended their stamp and acknowledged receiving the pleadings on behalf of the 1st and 2nd respondents. The advocate has sworn in detail how she met the 1st respondent at Maralink Hotel and he referred her to their advocate adding that the said respondent also called the 2nd respondent and she also talked to him on the cell phone number which she has specified and he also referred her to the same advocate namely Parseen Masikonde of Masikonde & Company Advocates on who the petition and other pleadings were served. She stated that the 3rd respondent was served on 4/10/2022
18. The 2nd respondent did not deem it fit to respond to those averments which would have paved the way for the court to ascertain the position by even summoning the said advocate to appear and clarify the issue. There is no denying the fact that he is represented by the same advocates who are representing the 1st respondent and the latter has not disputed having been properly served. This more or less buttresses the averments by the petitioner's counsel who personally effected the service on the 1st respondent but was directed to serve the same on the said advocates. This puts the issue to rest
19. Turning to the issue of the failure to deposit the security for costs on time the petitioner has anchored his application on the decision in the case of *Noah Wekesa (supra)* where part of the security had been



- deposited on time and leave was granted to deposit the balance. In the case of *Yaite Phillip (supra)* the holding was that a petitioner may be extended the time to deposit the security for the costs and the same is echoed in the case of *Tom Onyango Agimba (supra)* and *Samwel Kazungu Kambi (supra)*
20. These authorities on the face of it appear to contradict the decision in the authorities which have been relied on by the respondents namely *Evans Nyambaso Zedekiah (supra)*, *Milton Kimani Waitinga v Independent Electoral and Boundaries Commission, & 2 others* [2017], *Ibrahim Mohamed (supra)*, *Fatuma Zainabu (supra)*, *Evans Nyambaso (supra)*, *Esposito Franco v Amason Kingi (supra)* and *Patrick Ngeta Kimanzi (supra)*. These authorities appear to leave no room for extension of the time to make good the deposit
 21. While the jury may seem to be still out on which position should hold sway, it is important not to lose sight of the decision in the authorities cited by the petitioner on how the extension should be handled. The authorities are categorical that the extension should only be granted on condition that the petitioner establishes sufficient cause for the non-compliance (emphasis added). In the instant case the petitioner has averred that the failure to comply was occasioned by his failure to have the invoice generated to enable payment of the deposit.
 22. He has submitted further that his advocate has engaged the judiciary to have the problem sorted out in vain. He has not expounded on what or who he means by “the judiciary” (emphasis added) whereas it is clear that the Court Administrator is the person who has been charged by the Honourable Chief Justice with the duty of ensuring that election petitions are filed and proceed seamlessly through the e-filing platform. He is the person to be contacted in case of any filing obstacle and the guidelines on the expeditious disposal of the petitions are clear on the issue
 23. It goes without saying that the petitioner has succeeded in filing and making payments for all the other pleadings and it is rather difficult to believe him when he says that it is only the payment for the deposit for the security for costs which has to date failed to go through. This takes me to the next limb of his prayer since he is seeking leave to deposit a title deed/log book. This is an express departure from the clear and mandatory terms of the said Section 78 of the *Elections Act*.
 24. I reiterate the rationale for the deposit of the security for the costs as highlighted in the case of *Gatirau Peter Munya (supra)* which is to recompense a party where the unsuccessful litigant cannot pay him due to poverty and secondly

“it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying litigation indefinitely except on conditions that offer protection to the other party.”
 25. The petitioner herein is seeking leave to deposit title deed or log book which may properly be interpreted to mean that from the word go he had no money to deposit as submitted by the respondents. The deposit of title deed or a log book does not require the generation of any invoice since no cash is been paid and if the petitioner was really honest in taking this path of departing from depositing the Kshs 100,000/= as the security for the costs, he ought to have filed the application for such leave simultaneously with the petition and try his luck instead of waiting for the 1st respondent to apply for the petition to be dismissed which appears to have prompted him to file the application for the extension
 26. His reasons that the e-filing system failed him is not therefore cogent or sufficient for him to secure the extension and leave to deposit the alternative security which in any case is not provided by the law. He has therefore failed to establish sufficient cause for the non compliance by establishing cogent and convincing reason to warrant the order for the extension. His two-plonged prayer first for the extension



of time to deposit the security for the costs fails for failure to establish sufficient cause and secondly because the second limb to deposit title or log book is not provided for anywhere by the Election Act and the Rules on which his application is anchored

Conclusion

27. The upshot of all the above is the following orders:
- a. The preliminary objection dated October 17, 2022 by the 2nd respondent is dismissed with no orders as to costs.
 - b. The application dated October 22, 2022 by the 1st respondent is also dismissed with no orders as to costs.
 - c. The application dated October 25, 2022 by the petitioner seeking extension of time to deposit alternative security is dismissed with no order as to costs.
 - d. The petition dated September 23, 2022 is dismissed with costs to the 1st , 2nd and the 5th respondent.

Orders to issue accordingly

RULING DELIVERED DATED AND SIGNED IN OPEN COURT BY HON SM MUNGAI, CM TODAY 26TH JANUARY, 2023 VIRTUALLY IN THE PRESENCE OF:

Petitioner rep by Ms Nkurrurah

1st Respondent-Absent

2nd Respondent rep by Ms Moraa and Tuya

3rd Respondent-Absent

4th Respondent-Absent

5th Respondent-Absent

Crt Asst.-Muraguri

HON SAMWEL M.MUNGAI

CHIEF MAGISTRATE NAROK

