



**N’Chizumo v Independent Electoral & Boundaries Commission;  
Jubilee Party of Kenya & 2 others (Interested Parties) (Election Petition  
E001 of 2022) [2023] KEMC 11 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEMC 11 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
ELECTION PETITION E001 OF 2022  
JM OMIDO, SPM  
FEBRUARY 2, 2023**

**BETWEEN**

**FATUMA SALIM N’CHIZUMO ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL & BOUNDARIES  
COMMISSION ..... RESPONDENT**

**AND**

**JUBILEE PARTY OF KENYA ..... INTERESTED PARTY**

**SHIRIKISHO PARTY OF KENYA ..... INTERESTED PARTY**

**KENYA AFRICAN DEMOCRATIC UNION – ASILI ..... INTERESTED PARTY**

**RULING**

**A. Introduction.**

1. The Petitioner herein Fatuma Salim N’chizumo filed the instant Petition dated 6<sup>th</sup> October, 2022 on even date in which the following reliefs are sought:
  - a. An order directed at the Respondent compelling the Respondent to gazette the name of the Petitioner as a duly nominated member of the Kwale County Assembly.
  - b. An order directed at the Respondent compelling the Respondent to allocate more nomination slots to the Kwale County Assembly.
  - c. An order directed at the Respondent compelling the Respondent to allocate the additional nomination slots for Kwale County Assembly to the Interested Parties in their order of priority.
  - d. The Respondents be condemned to pay the Petitioner’s costs and incidentals to this Petition.



- e. Such further, other and consequential orders as this Honourable Court may lawfully make.
2. Service of the Petition, affidavit in support thereof sworn by the Petitioner on 6<sup>th</sup> October, 2022 and the accompanying annexures were served upon the Respondent and the three Interested Parties to the satisfaction of the court.
3. A Response to the Petition was filed by the Respondent on 29<sup>th</sup> October, 2022 together with a replying affidavit sworn on 28<sup>th</sup> October, 2022 by Chrispine Owiye, the Respondent's Director of Legal Services. The Response to the Petition is also dated 28<sup>th</sup> October, 2022. The Respondent prays that the court reaches the following findings:
  - a. The County Assembly of Kwale was duly constituted following the publication of the Gazette Notice No. 10712 of 2022 dated 9<sup>th</sup> September, 2022.
  - b. The gazetted nominees in Gazette Notice No. 10712 of 2022 dated 9<sup>th</sup> September, 2022 were validly elected by way of nomination to the County Assembly of Kwale.
  - c. The Respondent was not in breach and did not contravene the provisions of *the Constitution*, the *Elections Act* or of any other statute in exercising its mandate.
  - d. The Petition lacks merit and ought to be dismissed.
  - e. The Petitioner should bear the costs of the Petition.
4. None of the three Interested Parties responded to the Petition.

#### **B. The Notice of Motion Dated 3<sup>Rd</sup> November, 2022.**

5. On 4<sup>th</sup> November, 2022, the Respondent filed an application by way of Notice of Motion dated 3<sup>rd</sup> November, 2022, expressed to be brought under Section 78(3) of the *Elections Act* No. 24 of 2011 and all other enabling provisions of the Law in which the Respondent sought the following orders:
  1. That this Honourable Court be pleased to dismiss the instant Petition for failure by the Petitioner to deposit security for costs within the stipulated /time.
  2. That in the alternative, this Honourable Court be pleased to dismiss this Petition for being fatally defective as it offends the rules of natural justice.
  3. That costs of the Application and the Petition be awarded to the Respondent.
6. The Motion is premised on eight grounds listed on its face which I reproduce as follows:
  - a. That this Petition was filed on 6<sup>th</sup> October, 2022.
  - b. That the Petitioner was required by dint of Section 78(3) of the *Elections Act* No. 24 of 2011 to deposit security for costs in the sum of Ksh.100,000/= within 10 days thereafter, that is, on or before 17<sup>th</sup> October, 2022.
  - c. That the Petitioner only made payment for security for costs on the 27<sup>th</sup> October, 2022, twenty-one (21) days after the filing of the Petition.
  - d. That the failure by the Petitioner to deposit security for costs within the stipulated statutory period of 10 days after filing the Petition renders the Petition fatally defective.



- e. That the requirement for the deposit of security for costs is a substantive legal requirement and is not a procedural technicality that this court can excuse or extend time to enable compliance to be made.
  - f. That the Petition as well attempts to seek orders against persons who are not parties to the suit contrary to the principles of natural justice that a person should not be condemned unheard.
  - g. That the failure of the Petitioner to include the nominated members of the County Assembly of Kwale whose nomination they seek to overturn as parties to this Petition means that the Petition is fatally defective and should be dismissed in limine.
  - h. That the Petition herein ought therefore to be dismissed with costs to the Respondent.
7. The Motion is supported by the affidavit of Donald W. Muyundo, the Respondent's Advocate on record, sworn on 4<sup>th</sup> November, 2022. In precis, the said Deponent restates and expounds on the grounds reproduced above. He has annexed to his affidavit and marked as DWM-01 a copy of the Judiciary Issued Payment Receipt for Security for Costs paid by the firm of Chimera, Kamotho & Company Advocates LLP. The said receipt shows that the amount of Ksh.100,000/= was deposited in court by the said law firm on behalf of the Petitioner on 27<sup>th</sup> October, 2022 at 1423hrs.
  8. In his affidavit, the Respondent's Advocate has made depositions that the security for costs was deposited out of time and that the Petitioner thus failed to comply with Section 78(1) of the [Elections Act](#) which provides that a Petitioner is required to deposit Ksh.100,000/= as security for the payment of costs that may become payable by the Petitioner not more than ten days after the presentation of a petition.
  9. In the premises, the Respondent takes the position that the Petition should be dismissed under Section 78(3) of the [Elections Act](#) which dictates that where a petitioner does not deposit security as required under Section 78(1) of the [Elections Act](#), 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
  10. The Petitioner resists the Application and to that end filed a replying affidavit sworn on 10<sup>th</sup> November, 2022 by RAphael Chimera Mwinzagu, the Petitioner's Advocate on record. The contents of the said affidavit may be summarized as hereinbelow;
  11. That on 6<sup>th</sup> October, 2022, the Deponent instructed his Pupil one Hudson Sitati Wamukota ("the Pupil") to generate invoices from the Judiciary's Case Tracking System (CTS) for payment of filing fees for the Petition of Ksh.15,100/= and security for costs of Ksh.100,000/=.
  12. The Deponent's Pupil generated two invoices for the two amounts. The invoice for security for costs of Ksh.100,000/= had the reference number EZLTLFQM (Annexure RCM-1).
  13. Subsequently, the Petitioner sent to the Pupil the amount of Ksh.116,000/= to foot the two items.
  14. That on 15<sup>th</sup> October, 2022, upon request by the Petitioner, the Pupil sent to the Petitioner a text or SMS message purporting to be from Kenya Commercial Bank ("KCB") which entity is the Judiciary's



bankers and a screenshot of the invoice, indicating that the Ksh.100,000/= had been paid and/or deposited in Court. The SMS read as follows:

“Confirmed. Your Mpesa transaction QJB8O4ZS80 of Ksh.100,000/= to Kwale Law Courts Revenue Account for account EZLTLFQM on 11/10/2022 at 12:13pm has been received. Dial \*522# to pay your bills.”

15. That subsequently, the Deponent logged into the Judiciary CTS system which showed that the invoice for the security for costs was still unpaid. Inquiries to the Judiciary help desk confirmed that the amount of Ksh.100,000/= had not been deposited. Nevertheless, the Pupil was emphatic that the money had been paid to the Judiciary account.
16. That the Deponent later learnt from the CTS system that another invoice reference number EZLD4MBT (annexture RCM-2) for Ksh.100,000/= was generated on 14<sup>th</sup> October, 2022 and it became apparent to the Deponent that the Pupil was not truthful and had not properly appropriated the amount of Ksh.100,000/=. That prompted the Deponent to personally deposit the security for costs of Ksh.100,000/= on 27<sup>th</sup> October, 2022, vide invoice reference number EZLD4MBT.
17. That on 25<sup>th</sup> October, 2022, it became apparent to the Deponent that his Pupil had swindled the Petitioner which then prompted the Deponent to advise the Petitioner to report the matter to the Police. A report was made to Diani Police Station vide Occurrence Book Number 54/25/10/22 (annexture RCM-3). The station acknowledged receipt of the report. Following the misconduct of the Pupil, the Deponent disengaged from the pupilage arrangement.
18. The Deponent makes a deposition that this Court is permitted under the law to extend the time within which security for costs may be deposited and that the circumstances of this case are sufficient to invoke the discretion of the court to extend the said period.
19. That the Respondent stands to suffer no prejudice as the security for costs has in any event already been deposited in court.
20. That the Petitioner has not sought any adverse orders against any person who is not a party to the Petition and that in any event, the only mandatory party in an Election Petition is the Independent Electoral & Boundaries Commission (“IEBC”).
21. That it is in the interests of justice that the Motion be dismissed and the Petition proceeds to full hearing.
22. With the concurrence of both Counsel on record, this Court directed that the Motion proceeds by way of written submissions and both the Respondent and the Petitioner filed their respective submissions and lists of authorities.

### **C. The Respondent’s Submissions.**

23. In the submissions filed by the Respondent, it is urged that the failure by the Petitioner to deposit security for costs of Ksh.100,000/= within the stipulated statutory period under Section 78(1) of the [Elections Act](#), which is ten days from the date of filing the Petition renders the Petition fatally defective.
24. The Respondent further submits that the requirement for the deposit of security for costs is a substantive legal requirement and is not a procedural technicality that this Court can excuse or extend time to enable compliance to be made. The Respondent states that under Section 78(3) of the [Elections Act](#), where a Petitioner fails to deposit security for costs within the stipulated time, no further



proceedings shall be taken in the Petition and the Respondent may apply to the court for an order for the dismissal of the Petition with costs, hence the instant application.

25. The Respondent relied on the High Court decision of *Milton Kimani Waitinga v Independent Electoral & Boundaries Commission & 2 others* [2017] eKLR in which Joel Ngugi J. (as he then was) expressed himself in part, as follows:

“13. Consequently, our decisional law has consistently concluded that the requirement that a Petitioner pays security for costs is not a technical requirement but a substantive question that goes to the root of the Court’s jurisdiction.”

26. The court in the same case went on to state thus:

“14. Further, our case law is categorical that the payment of the prescribed amount of security of costs within the stipulated time is an essential prerequisite for the hearing of election petitions. Hence, Justice Muriithi explained in *Kisii Election Petition No.6 of 2013 – Fatuma Zainabu Mohamed – vs- Ghati Dennita & 10 Others* (unreported) on an application for extension of time to make the deposit. The Learned Judge noted that the law commands that where no security for costs is given, “whether it is ordered in exercise of discretion by the court or by statutory requirement” then no further proceedings in the matter should be undertaken by the court. He concluded the matter by saying the following:-

“Accordingly, security for costs, whether it is required by statutory provision or order of the court, must be taken as going to the root of the jurisdiction of the court to entertain the dispute. If no security for costs is deposited, then the petition or other proceeding though validly lodged before the court in accordance with the applicable procedure rules cannot proceed to hearing and determination as further proceedings are prohibited. As such, the provision for security for costs is, in my view, a substantive requirement underpinning the jurisdiction of the court to deal with the dispute in the proceeding in which the security for costs is required, and is based on the sound principle for the protection of the defendant from unrecoverable costs.”

27. The conclusion that the court reached on the failure to comply with Section 78 of the *Elections Act* was as follows:

“The clear requirement of the statute and subsidiary legislation is that a Petitioner is required to deposit security for costs within ten days of filing their Petition. This did not happen here. Indeed, more than thirty-seven (37) days later (at the time of arguing the Application), the Petitioner had not paid the security deposit. The Petitioner had, also, not made any efforts to get the leave of the Court to deposit the security for costs out of time. What is more is that in this case the Court had instructed the Petitioner to respond to the Application seeking to strike out the Petition and he failed to do so. The clear indication is that the Petitioner is not serious about prosecuting the Petition. There is simply no good reason to keep this Petition alive. As I have already indicated, failure to pay security deposit in Election petitions goes to



the root of the jurisdiction of the Court to hear the Petition. The logical conclusion, then, is that the Court has no jurisdiction to take any further action in the Petition.”

28. In the decision of the High Court (Matheka, J) in *Robert Mwangi Kariuki v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR, which the Respondent also relied upon, in considering the timelines provided under and the scope of Section 78 of the *Elections Act*, the Court held as follows:

“What is not in doubt is the clarity of Parliament’s intention in Section 78 and the consequences of noncompliance. That failure to make that deposit would render the petition dead on arrival. There can only be one outcome, failure to make the deposit in time is fatal to the petition with costs to the respondents.”

29. It is the position of the Respondent that this Court does not have jurisdiction to extend the timelines provided under Section 78(1) of the *Elections Act* as the said statutory provision on depositing security for costs is mandatory and failure to adhere to the same renders the Petition fatally defective and only liable to be dismissed with costs.

30. However, being alive to the fact that Election Courts have on some occasions held that such timelines may be extended, the Respondent takes the view that the issue of extension is currently not for consideration before this court as no application has been made by the Petitioner specifically seeking the leave of the Court to extend the time within which the security for costs ought to have been deposited.

31. Further reliance is placed by the Petitioner on the case of *Milton Kimani Waitinga* (supra) in which the High Court addressed on the issue itself as follows:

“16. There are questions whether an Election Court can extend the time for depositing the costs for security under Rule 19 of the Elections (Parliamentary and County) Elections Regulations, 2017. Some Courts have expressed the view that a Court can so extend the 10-day period stipulated in the law in appropriate cases where the Court is properly moved while others have indicated that no such extension is possible since the requirement is statutory. In any event, that question is not before me as the Petitioner has not filed any properly enunciated application for extension of time.”

32. The Court in the above cited authority went on to conclude as follows:

“In the circumstances, given the clear stipulation of Section 78(2)(b), Rule 13 and our decisional law, it follows that the Notice of Motion dated 21/09/2017 must succeed. The clear requirement of the statute and subsidiary legislation is that a Petitioner is required to deposit security for costs within ten days of filing their Petition. This did not happen here. Indeed, more than thirty-seven (37) days later (at the time of arguing the Application), the Petitioner had not paid the security deposit. The Petitioner had, also, not made any efforts to get the leave of the Court to deposit the security for costs out of time. What is more is that in this case the Court had instructed the Petitioner to respond to the Application seeking to strike out the Petition and he failed to do so. The clear indication is that the Petitioner is not serious about prosecuting the Petition. There is simply no good reason to keep this Petition alive. As I have already indicated, failure to pay security deposit in Election petitions goes to



the root of the jurisdiction of the Court to hear the Petition. The logical conclusion, then, is that the Court has no jurisdiction to take any further action in the Petition.”

33. There is also the authority of the High Court in *Elizabeth Jebet Kibor v Isaac Suare Oseur & 5 others* [2020] eKLR that is relied upon by the Respondent where the Court carefully considered the issue of extension of time and proceeded to make the following holding:

“ 38. The above decisions support the position that payment of security for costs is a condition precedent to a viable and competent petition. Section 78(3) makes it plain that in the event of non-compliance and where the issue is raised, if the party is not removed, there should be no further proceedings. That in itself suggests that the election court cannot proceed with the petition and where the respondent challenges that petition, the court may dismiss it and order payment of costs.

39. The court may however exercise its discretion and extend time within which the petitioner may deposit security for costs if on application by the petitioner, sufficient reason or cause is shown. What is clear from section 78(3) is that the petition cannot be heard if security for costs has not been paid.

40. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not deposit security for costs. They did not even apply for extension of time to comply with the law. The trial court heard the petition due to shortage of time but did not make a definitive determination on whether the petition was properly before it or it could hear and determine it before payment of security for costs. Although it was not possible to determine that application before hearing the petition due to shortage of time, it was not proper to allow the petition without determining the issue of payment of security for costs.

41. I must add that payment of security for costs is provided for in the principle law and not the rules. It goes to the root of the petition and the jurisdiction of the court to hear the petition. Failure to comply with the law, and making no effort to apply for extension of time to comply with the law, disentitled the 1<sup>st</sup> and 2<sup>nd</sup> respondents the pedestal on which to stand and litigate thus rendered the petition incompetent.”

34. The Respondent asks the court to dismiss the Petition on the further ground that the same seeks adverse orders against persons who have not been joined as parties contrary to the rules of natural justice and is for that reason fatally defective. The Respondent did not address the Court on this ground in the submissions filed.

#### **D. The Petitioner’s Submissions.**

35. In response to the Motion, the Petitioner readily admits in her submissions and Replying Affidavit that the amount of Ksh.100,000/= was deposited in court on 27<sup>th</sup> October, 2022, obviously outside the statutory timeline of 10 days that is provided for under Section 78(3) of the *Elections Act*.

36. The Petitioner however attributes the delay in depositing the security for costs as having been occasioned by her Advocate’s office, whose agent (the Pupil) converted or misapplied the said amount that had been timeously remitted to him by the Petitioner. That the mistake of delay to deposit the cash within 10 days occasioned by the Petitioner’s Advocate should not be visited upon her.



37. To support the above submission that an innocent party should not be punished for the mistake of her Counsel, the Petitioner relies on the Environment and Land Court case of Gabriel Muingai Simiyu v Desterio Barasa Ondwasi [2020] eKLR in which the Court observed and held as follows:

“9. The question whether a litigant should suffer the mistake of his advocate has been discussed in several cases. For instance, in the case of Belinda Muras & 6 others v Amos Wainaina [1978] KLR Hon Madan JA (as) he then was defined what constitutes a mistake as follows:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate.” [own emphasis]

10. Further in the case of Martha Wangari Karua v IEBC Nyeri Civil Appeal No.1 of 2017 the Court of Appeal held as follows:-

“The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be...”

11. In Shah v Mbogo [1968] E.A. 93 the Court had this to say about the purpose of setting aside an ex parte judgment is, “Applying the principle that the court’s discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should be refused”.

38. The Petitioner in urging the above position submits that Section 59 of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya provides to the Court general powers to extend time where a written law prescribes time for doing an act or taking proceedings and that this court is therefore well mandated to exercise the powers and extend the time within which the security for costs was to be deposited.

39. In the Petitioner’s further view, the law, particularly Rule 19 of the Elections (Parliamentary and County Elections) Petition Rules, 2017, does not impose any obligation upon any party to make a formal application for extension of time but that the rule only clothes the Court with the discretion to extend or limit the time, having regard to all the circumstances of the case. The Petitioner thus opines that this court has the discretion to proceed and extend the time on the basis of the reasons provided by the Petitioner that the mistake was on the part of her Advocate’s office.



40. The Petitioner calls upon the court to be guided by the High Court authority of Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 others [2013] eKLR in which the court (Majanja. J.) rendered itself as follows:

- “ 25. Whether the court has jurisdiction to extend time for doing an act or taking a proceeding depends on the actual provision under consideration and whether there the power is express or implied must be determined from the language of the provision.
26. The argument that the decisions in the cases of Rotich Samuel Kimutai v Ezekiel Lenyongopeta and Others (supra) and Esposito Franco v Kingi and Another (supra) belong to the pre-2010 constitutional dispensation and must be considered in light of *the Constitution* principles and values is an attractive one. *The Constitution* is founded on values and principles that are intended to promote, human dignity, human rights, accountability, transparency and other values and national principles articulated in Article 10. At all times the Court is obliged in interpreting the law to give effect to these values and principles. Such interpretation must, however broad, fall within the language of the statute otherwise the Court will assume the role of the legislature. In other words, it is the duty of the court to give effect to legislative intent expressed in the language of the statute to the extent that the language can support the intent of *the Constitution*.
27. Can the intent and objects of *the Constitution* be read into the language of Section 78 of the Act? I must answer in the affirmative. Although Section 78(1) is imperative as to the time of payment of the deposit, the language of Section 78(3) negates the mandatory nature of Sub-section (1). In my view the words, “or if an objection is allowed and not removed” followed by “no further proceedings shall be heard” imply that an objection may be taken by the respondent and allowed by the court if no security is deposited. If that objection is allowed by the Court then no further proceedings may be taken in the matter by the petitioner and the petitioner may apply to dismiss the matter. The phrase, “and not removed” begs the question how is the objection removed. In my view, the objection is removed by the petitioner giving a reason why the deposit was not made within the time provided by Section 78(1). The plain meaning of the provision is that if the objection is allowed, the petition is then permitted to apply to remove it.
28. My reasoning is fortified by the fact that dismissal of the petition is not automatic. Sub-section (3) of Section 78 does not require the court to dismiss the petition upon failure to provide security. On the contrary, the provision merely states that, “no further proceedings shall be heard on the petition.” The fact that the respondent “may apply” to dismiss the petition implies that there is a window for the exercise of judicial discretion to dismiss the matter upon such application.
29. It is to be noted that even where there is leeway for extension of time, such extension is not automatic and discretion must be exercised judicially and this is dependent on the circumstances of each particular case. The burden is thus upon the person seeking the extension to satisfy the court that his



circumstances are such that they are deserving of the court's exercise of discretion in his favour."

41. The Petitioner further takes issue with the Respondent's Motion and submits that the Respondent has been a beneficiary of this court's discretion to extend time as the Response to the Petition was filed out of the statutory time provided. The Petitioner adds that the Respondent's application to have the time extended was not resisted by the Petitioner and was allowed by the court without much ado and the Response to Petition deemed as filed within the statutory period and properly on record.
42. The Petitioner implores upon the court to reach a finding that the Respondent stands to suffer no prejudice if the application fails as the amount of Ksh.100,000/=, being security for costs has already been deposited in Court by the Petitioner to shield the Respondent in the event that the Petition is not successful.
43. The last point that the Petitioner takes in response to the Motion is to the ground raised by the Respondent that the Petition as filed seeks adverse reliefs against persons who are not joined as parties against the rules of natural justice. In the Petitioner's view, this ground is misplaced as the only mandatory party in an election petition by dint of Rule 9(a) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 is the Independent Electoral & Boundaries Commission and that in any event, the Petition does not seek any or any adverse orders against any other person who is not a party to the instant Petition.

#### **E. ISSUES FOR DETERMINATION.**

44. I have carefully considered the material before me and the issues for determination as is discernible from the record and the documents filed and the submissions by the parties are as follows:
  - a. Whether the Petitioner complied with the provisions of Section 78 (1) and (3) of the [Elections Act](#), and subject thereto;
  - b. Whether the court can extend the time provided for under Section 78(1) of the [Elections Act](#) within which the Petitioner is to deposit security for costs.
  - c. Whether the Petition should be dismissed under Section 78(3) of the [Elections Act](#) for non-compliance with Section 78(1) of the same Statute in so far as the timelines within which to deposit security for costs is concerned.
  - d. Whether the Petition should be dismissed for failure to join persons against whom adverse reliefs (if any) are sought and therefore for offending the rules of natural justice.
  - e. Who should bear the costs of the Application and/or the Petition?

#### **F. DETERMINATION.**

45. I will deal with the above issues seriatim, save for issues (b) and (c), which I will determine together.
46. Issue (a) is whether the Petitioner complied with the provisions of Section 78 (1) of the [Elections Act](#). It is instructive from the record that the Petition herein was filed on 6<sup>th</sup> October, 2022. The amount of Ksh.100,000/= being security for costs was deposited in court by the Petitioner on 27<sup>th</sup> October, 2022, a period of about twenty-one days after the filing of the Petition.
47. What do the relevant provisions of Section 78 of the [Elections Act](#) state in this respect? Let us read the said provision:



78. Security for costs

- (1) A petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition under this Part.
- (2) A person who presents a petition to challenge an election shall deposit-
  - (a) .....
  - (b) .....
  - (c) one hundred thousand shillings, in the case of a petition against a member of a county assembly.
- (3) 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.
- (4) The costs of hearing and deciding an application under subsection (3) shall be paid as ordered by the election court, or if no order is made, shall form part of the general costs of the petition.
- (5) An election court that releases the security for costs deposited under this section shall release the security after hearing all the parties before the release of the security. (Emphasis mine).

48. A look at the said provision, particularly Subsections (1) and 2(c) expressly provide that a Petitioner should deposit Ksh.100,000/= in a Petition such as the instant one within a period of not more than ten days after the presentation of the Petition. There is therefore no doubt that the Petitioner herein, by depositing the said amount after about twenty-one days following the filing of the Petition failed to comply with the express provisions of Section 78(1) and (3) of the *Elections Act*.

49. The second and third issues (b) and (c) are whether the court can extend the time provided for under Section 78(1) of the *Elections Act* within which the Petitioner is to deposit security for costs or conversely, whether the Petition should be dismissed under Section 78(3) of the *Elections Act* for non-compliance with Section 78(1) of the Act in so far as the timelines within which to deposit security for costs is concerned. The answers to these issues are, happily, to be found in the authorities cited to the court.

50. The Petitioner urges that it is on the basis of the mistake on the part of his Advocate's office that the amount of Ksh.100,000/= was not deposited and that she is an innocent victim of that mistake. The Petitioner states that a mistake of the Advocate should not be visited upon her and as seen above, relies on the authority of Gabriel Muingai Simiyu (supra).

51. Indeed, courts have considered situations where mistakes are made by Advocates where their clients are innocent. The cases of Rupa Savings & Credit Cooperative Society v Violet Shidogo [2022] eKLR, J.G. Builders v Plan International [2015] eKLR, Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR, Ghehona v Seventh Day Adventist Church of East Africa Union [2013] eKLR, Itute Ingu & another v Isumael Mwakavi Mwendwa [1994] eKLR and Edney Adaka Ismail vs Equity Bank Limited [2014] eKLR all provide the general jurisprudence that a mistake made by an advocate should not be visited upon an innocent client.



52. It is then my view that the Petitioner cannot be faulted for the acts and/or omissions that occurred at the Petitioner's Advocates' offices that resulted in the amount of Ksh.100,000/= security for costs being deposited late as she did not contribute to the said acts and/or omissions.
53. What then follows is for this court to resolve whether the court has powers to extend the time provided for under Section 78(1) of the [Elections Act](#) within which the Petitioner is to deposit security for costs, having found that the Petitioner is not to blame for the delay in depositing the said amount of Ksh.100,000/=.
54. On this issue, we have seen from the conclusion of the High Court in the authority of Milton Kimani Waitinga (supra) that the requirement that a Petitioner pays security for costs is not a technical requirement but a substantive question that goes to the root of the Court's jurisdiction.
55. It is also clear from the decisions of Robert Mwangi Kariuki (supra) and Elizabeth Jebet Kibor (supra) that failure to make a deposit of security for costs in time is fatal to the Petition and the same may be dismissed with costs to the Respondents.
56. However, the Petitioner urges that this Court has discretion to extend the time within which the security for costs is to be deposited. The Petitioner relies on the authority of Patrick Ngeta Kimanzi (supra) in which the High Court while discussing the import of Section 78 of the [Elections Act](#) held that the Court retains the discretion to consider an application for extension of time and that such discretion must be exercised judiciously, and that is dependent on the circumstances of each particular case. The Court held further that the burden is thus upon the person seeking the extension to satisfy the court that his circumstances are such that they are deserving of the court's exercise of discretion in his favour.
57. Similarly, the Court in Elizabeth Jebet Kibor (supra) held that the Court may exercise its discretion and extend time within which the petitioner may deposit security for costs if on application by the Petitioner, sufficient reason or cause is shown.
58. Considering that I have already reached a finding that the Petitioner herein is not to blame for the delay in depositing the security for costs, my sympathies lean heavily in favour of ordering that the time be extended and the amount deposited be deemed as paid within time under Section 78(1) of the [Elections Act](#), on the basis of the dicta that the court retains such discretion as held in Patrick Ngeta Kimanzi (supra) and Elizabeth Jebet Kibor (supra). However, I am constrained to observe, as correctly pointed out by the Respondent that the Petitioner has not moved the Court by filing a formal application for extension of time.
59. As the record stands, there is no basis upon which this court can grant orders of extension of time as the same have not been sought by the Petitioner through a formal application. I am bound by the decision of Milton Kimani Waitinga (supra) that it is not available to this court to grant prayers that have not been specifically formally sought by a party. The doctrine of stare decisis also dictates that I follow the dictum in Elizabeth Jebet Kibor (supra) that even where the Court has the discretion to extend time, such discretion can only be exercised and the time within which a Petitioner may deposit security for costs extended only where an application for such extension has been filed by that Petitioner and sufficient reason or cause shown.
60. The Petitioner urged this Court to employ Section 59 of the [Interpretation and General Provisions Act](#), and grant an order for extension of time, stating that the Court has general powers to extend time and that on that basis the Respondent's Application should fail.



61. On this point, I need not restate what I have said above that where the Court has powers to extend time, the same can only be done where the Court has been moved by the party seeking such extension with sufficient reason.
62. That notwithstanding, I think that it is appropriate that this Court looks at the above provision of the *Interpretation and General Provisions Act*. The same provides thus:
59. Construction of power to extend time
- Where in a written law a time is prescribed for doing an act or taking a proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed. (Emphasis mine).
63. I understand the provision above to mean that an application to extend time may be made notwithstanding that the period sought to be extended has lapsed. It is clear then and from my emphasis above that the law still envisages that the Court considers an application that is brought by the party seeking such extension. The position that subsists is therefore that an application must be filed for the court to consider extending time.
64. I now turn to issue (d) which is whether the Petition should be dismissed for failure to join persons against whom adverse reliefs (if any) are sought and therefore for offending the rules of natural justice.
65. On this issue, I have stated above that in the submissions filed, the Respondent who is the mover of the motion dated 3<sup>rd</sup> November, 2022 did not address the court on the matter and/or canvass on this issue. In light of that fact and further on the basis of my findings on the other issues above, I will in the circumstances of this case treat this issue (issue d) as spent.
66. Lastly, the Petitioner draws an analogy between compliance of the timelines for filing the Response by the Respondent and the timelines for depositing the security for costs by the Petitioner. She states that the Respondent filed the Response to the Petition out of time but the Court allowed the same to be deemed as filed within time and that in a similar fashion, the Court should deem the amount of Ksh.100,000/= as deposited within time and allow the Petition to proceed.
67. With respect to the Petitioner, the analogy is not ideal to the prevailing position. I say so because unlike the Petitioner who did not file an application for extension of time within which to deposit the security for costs, the Respondent filed an application for extension of time and for the Response to the Petition to be deemed as filed within time. Moreover, the Respondent's application for extension of time was not opposed by the Petitioner.
68. Consequently, for the reasons stated above, the application dated 3<sup>rd</sup> November, 2022 succeeds in the terms below.

## **G. Conclusion and Disposition.**

- a. By failing to deposit security for costs of Ksh.100,000/= within a period not more than ten days after the presentation of the Petition dated 6th October, 2022, the Petitioner failed to comply with Section 78(1) of the *Elections Act*.
- b. Consequently, the Respondent having applied to this Court for an order to dismiss the petition vide the Notice of Motion dated 3<sup>rd</sup> November, 2022, the Petition herein is hereby dismissed in line with Section 78(3) of the *Elections Act*.



- c. The Respondent is awarded the costs of the Notice of Motion dated 3<sup>rd</sup> November, 2022 and the Petition which are capped at Ksh.200,000/= in light of the fact that the Petition did not proceed.
- d. A certificate of this determination in accordance with Section 86 of the [Elections Act](#) shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the County Assembly of Kwale.
- e. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2023.**

**OMIDO, JOE MKUTU**

**SENIOR PRINCIPAL MAGISTRATE**

**ELECTION COURT**

**KWALE.**

FOR PETITIONER: Mr. Mbwiza, Advocate.

FOR RESPONDENT: Mr. Amimo, Advocate.

COURT ASSISTANT: Mr. Kessy.

**OMIDO, JOE MKUTU**

**SENIOR PRINCIPAL MAGISTRATE**

**ELECTION COURT**

**KWALE.**

