



**Bukura v Independent Electoral and Boundaries Commission (IEBC) & 2 others  
(Election Petition E007 of 2022) [2022] KEMC 11 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEMC 11 (KLR)

**REPUBLIC OF KENYA  
IN THE MANDERA LAW COURTS  
ELECTION PETITION E007 OF 2022  
PW WASIKE, SRM  
NOVEMBER 23, 2022**

**BETWEEN**

**ABDIWELLY HAJI BUKURA ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION  
(IEBC) ..... 1<sup>ST</sup> RESPONDENT**

**UNITED DEMOCRATIC MOVEMENT ..... 2<sup>ND</sup> RESPONDENT**

**ABDOW BISHAR MAALIM ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The election petition herein was filed on 6/10/2022. The petition was fixed for pretrial the 3<sup>rd</sup> Respondent indicated that they had filed a notice of Preliminary objection (hereinafter where appropriate referred to as the P.O). Subsequently the Petitioner filed an application dated 4/11/2022. The court on 9/11/2022 gave directions to the effect that both the 3<sup>rd</sup> Respondents P.O and the Petitioners application herein be heard together and shall be disposed by way of written submissions.
2. The matter came up on 18/11/2022 where the respective parties confirmed having filed their appropriate responses to the application, and submissions to the application and the PO together or separately.
3. The PO and the application are on the same subject matter of security for costs. The 3<sup>rd</sup> Respondent vide the PO argue citing section 78 of the *Elections Act* to the effect that nonpayment of security for costs within timeline stipulated under the Act is fatal to the petition, while the Petitioner is seeking for extension of time to have the security deposited out of time be deemed as duly paid.
4. The 3<sup>rd</sup> Respondents Notice of Preliminary Objection dated 24<sup>th</sup> October, 2022 is based on two grounds:



- i) The petition offends the mandatory provisions of section 78 of the [Elections Act](#) 2011.
- ii) The petition is fatally defective and ought to be forthwith dismissed with costs to the 3rd Respondent.

The 3rd Respondents submissions to Notice of Preliminary Objection dated 24<sup>th</sup> October, 2022.

### **3rd Respondents Submissions in respect of the P.O**

5. The PO is hinged on non-compliance with the Provision of Section 78 the [Elections Act](#), 2011. It is the 3<sup>rd</sup> Respondents submissions that Section 78 is couched in mandatory terms as follows:
  - (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 act.
  - (2) A petitioner who presents a petition to challenge an election shall deposit –
    - (a) One million shillings, in case of a petition against a presidential candidate;
    - (b) Five hundred thousand shillings, in case of a petition against a member of Parliament or a county governor;
    - (c) One hundred thousand shillings, in 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 payments of the respondent’s costs. “
6. That Section 78 of the [Elections Act](#), 2011 is mirrored in Rule 13 of the [Elections \(Parliamentary and County Elections\) Petition Rules, 2017](#) which provides that:
  - (1) Within ten days of the filing of the petition, a petitioner shall deposit security for the payment of costs in compliance with section 78(2)(b) and (c) of the Act.
  - (2) The security for costs deposited under sub-rule (1) shall –
    - (a) be paid to the Registrar,
    - (b) be for the payment of costs, charges or expenses payable by the petitioner; and
    - (c) subject to the directions of an election court, be vested in, and drawn upon from time to time by, the Registrar for the purposes for which security is required.”
7. The 3<sup>rd</sup> Respondent submitted that the law in very express terms, made it mandatory for the payment of security of costs within 10 days of filing an Election Petition. That Electoral regime in Kenya is sui generis one, that is strictly governed by the dictates of the [Constitution](#) as read together with the [Elections Act](#), and the rules thereunder. That this Election Court, is bound to strictly uphold and enforce such rules in order to ensure that there is legal certainty and that electoral disputes are resolved in the quickest way possible as envisaged by the Law. That Petitioners should not pick which rules they want to observe and which ones they can disregard at will.
8. The 3<sup>rd</sup> Respondent drew an analogy in respect of Article 87 (2) of the [Constitution](#) of Kenya as read with Section 76 (1) (a) of the [Elections Act](#) that dictates that persons who intend to challenge election results declared by the IEBC, other than that of the President, must do so by filing a Petition within



28 days from the declaration of results. The 3<sup>rd</sup> Respondent asked what is the effect of the failure to present a Petition within the stated twenty-eight days' period?

9. He submitted that non-compliance here is substantive and cannot be cured under Article 159 (2) (d) of the Constitution and rule 5 (1) of the Rules.
10. That the Petition is dated 1<sup>st</sup> October, 2022 and was filed on 6<sup>th</sup> October, 2022. Ten (10) days from the 6<sup>th</sup> October, 2022 when the Petition was lodged is 16<sup>th</sup> October, 2022. That as far as 3<sup>rd</sup> respondent is concerned no deposit had been rendered by this date. That failure to deposit the security for costs as directed by Section 78 of the Elections Act and read together with rule 13 of the rules thereunder, rendered the Petition dated 1<sup>st</sup> October, 2022 a nullity.
11. He submitted that Section 78(1) of the Elections Act is couched in mandatory terms and does not even give this Court the lee-way to excuse non-compliance therefore election petition dated 1<sup>st</sup> October, 2022 is a nullity and of no consequence and this Court lacks jurisdiction to continue with the hearing of this Petition.
12. The 3<sup>rd</sup> Respondent cited *Ibrahim Ahmed v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR where the Court was stated that:

“In the present petition, this court is of the opinion that the requirement for the deposit of security for costs is mandatory as provided under Section 78(1) of the Elections Act. Section 78 of the Act does not give a Petitioner who has not deposited the requisite security for costs leeway to choose when to pay the security for costs. The security for costs must be paid within ten days of the lodgement of the petition.... In the premises therefore, this court holds that the failure by the Petitioner to deposit security for costs within the stipulated statutory period of ten days after filing the petition renders the petition fatally defective ...”

13. That the above position has been held in held in other cases including Tom Onyango Agimba -vs - IEBC & 2 Others Nairobi HC Election Petition No.18 of 2017, Robert Mwangi Kariuki -vs- IEBC & 2 Others Nyeri HC Election Petition No.1 of 2017.
14. In Milton Kimani Waitinga -vs- IEBC & 2 Others Kiambu HC Election Petition No.2 of 2017, the Court pointed out at para 17 that:

“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.”

15. Lady Justice Njoki Mwangi in Omari Juma Mwakamole v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR upheld the decision of the Supreme Court in Moses Mwicigi and 14 others vs IEBC and 5 Others [2016] eKLR and declared that:

“The sum total of the failure by the petitioner to deposit security for costs and to plead the election results in his petition renders the petition incurably defective and irredeemable. Section 78 of the Elections Act provides for dismissal and not the striking out of a petition where deposit of security for costs is not made. The only consequence therefore is to dismiss the petition which I hereby do.”



16. The court was urged to be guided by the Supreme Courts dicta in *Lemanken Aramat vs Harun Metamei Lempaka and 2 Others* [2014] eKLR where the Court elevated the primacy of compliance with timelines in the settlement of electoral disputes. That the Court held that:

“69. We have to note that the electoral process, and the electoral dispute resolution mechanism in Kenya, are marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by the *Constitution* and the electoral law. The jurisdiction of the Court to hear and determine electoral disputes is inherently tied to the issue of time, and breach of this strict scheme of time removes the dispute from the jurisdiction of the Court. This recognition is already well recorded in this Court’s decisions in the Joho case and the Mary Wambui case. (emphasis ours)

134. The critical question, clearly, rests on the relationship between timelines as laid down in the electoral law, and the issue of jurisdiction. In our Ruling in the Raila Odinga case, on 3<sup>rd</sup> April, 2013 we expunged a new affidavit from the record, for non-compliance with timelines, in these terms: “... The parties have a duty to ensure they comply with their respective timelines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.”

17. The Court was urged to down its tools and dismiss the Petition. I note that the 2<sup>nd</sup> Respondent opposes the PO while the 1<sup>st</sup> Respondent supports the P.O.

### **1st Respondent’s Submissions to the P.O**

18. The 1<sup>st</sup> respondent submitted that the P.O challenges non-compliance with provisions of section 78 of the *Elections Act*. He cited section 78 and submitted that this section does not give a petitioner who has not deposited security for costs any leeway. 1<sup>st</sup> respondent cited case of Ibrahim Ahmed vs IEBC, 20170 eKLR, and Milton Kimani Waithiga vs IEBC and 2 others (already cited extensively by the 3<sup>rd</sup> Respondent). That the discretion conferred to court in ordinary disputes settlements is not available. That filing of a petition and payment of deposits of security for costs are conjoined. He cited Ferdinand Waititu vs IEBC and others on tyranny of time.
19. The court was urged to hold that the petitioner’s failure to pay security for costs within 10 days of filing petition rendered it incurably defective and removed it from the jurisdiction of the court.

### **2nd Respondent’s Submissions to the P.O**

20. The 2<sup>nd</sup> Respondent submitted that they will demonstrate that the Preliminary Objection is misguided and ought to be dismissed with costs. First they submitted that the Petition before this Court is not an Election Petition strictly speaking as envisioned by section 75(1A) of the *Elections Act*.
21. The court observes that the submissions to the effect that the 3<sup>rd</sup> Respondent had not filed any response to the Petition or had indicated that he will only rely on his Preliminary Objection not relevant to the matter at hand in determining this PO. Similarly, submissions on basis of the merits of the petition are not relevant to the determination of the PO and will equally be disregarded.



22. The 2<sup>nd</sup> respondent submitted that a proper reading of Article 88 (4) (e) confirm that the Constitution contemplates two different types of disputes after elections. It provides that the IEBC has jurisdiction for;
- ‘the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of results.’
23. The 2<sup>nd</sup> Respondent submits that the Petition before this Court is a dispute subsequent to the ‘declaration of results’ and not an election petition strictly speaking.
24. That section 2 of the Elections Act defines “election” to mean a presidential, parliamentary or county election and includes a by-election; “election results” means the declared outcome of the casting of votes by voters at an election; “nomination” means the submission to the Commission of the name of a candidate in accordance with the Constitution and this Act; “party list” means a party list prepared by a political party and submitted to the Commission pursuant to and in accordance with Article 90 of the Constitution and sections 28, 34, 35, 36 and 37; “petition” means an application to the election court under the Constitution or under this Act;
25. The 2<sup>nd</sup> Respondent submitted that though section 78(1) of the Elections Act is couched in mandatory terms, the same is not applicable to disputes relating to nomination vide Party Lists as is in the present Petition. That a reading of sections 2 and 78 (1) of the Elections Act juxtaposed with Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 reveals that the election Petition contemplated under section 78 (1) of the Elections Act is one that involves the casting of votes by voters. That the election by nomination does not fall under the application of section 78(1) as there are no election results involved. That Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules provides for the contents of a Petition and among the requirements is the date when the election in dispute was conducted and the results of the election. This by itself is a clear legislative intent that the Petitions contemplated herein are those that involve voting by the electorate and not nomination by Political Parties through Party Lists.
26. It is the 2<sup>nd</sup> Respondent’s submission that the Election Petitions contemplated under section 78 include such petitions which challenge the outcome of the electoral process and nomination of members to County Assemblies through Party Lists was not intended to be subject to the payment of security for costs.
27. The 2<sup>nd</sup> Respondent invited this Court to look at the rationale for the requirement of security for costs. In the case of *Esposito Franco vs. Amason Kingi Jeffa and 2 others* [2010] eKLR the Court of Appeal while addressing the rationale for payment of security for costs stated as follows;
- “We are in agreement with the respondents that an aggrieved party remits costs for costs upon filing an election petition is to restrict would be vexatious litigants... and ensure that the party coming to court is serious and will be able to pay the costs in the event that he is required to do so.
28. Similarly, in the case of *Patrick Ngeta Kimanzi vs. Marcus Mutual Muluvi & 2 others*[2014] eKLR. Court of Appeal in dealing with the rationale for the deposit of security for costs stated as follows:
- “Security for costs ensures that the respondent is not left without a recompense for any costs or charges payable to him. The duty of the court is therefore to create a level playing ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access justice vis-à-vis the respondent’s right to have security for any costs that may be



owed to him and not to have vexatious proceedings brought against him. (see Harit Sheth Advocate –vs- Shamas Charania – Nairobi Court of Appeal, Civil Appeal No.68 of 2008 [2010] e KLR.”

29. The 2<sup>nd</sup> respondent argued that above decisions reveal that the rationale for the payment of the security for costs is to prevent vexatious Petitions from being filed against a successful candidate in an election. That the Petitioner is not seeking to challenge any election conducted as there are no results declared neither are there winners involved. That it simply deals with the unauthorized and fraudulent alteration of the 2<sup>nd</sup> Respondent’s Party List as gazetted by the 1<sup>st</sup> Respondent vide Gazette Notice No. 10712 published on 9<sup>th</sup> September 2022 to the detriment of the Petitioner.
30. The 2<sup>nd</sup> respondent submitted that 3<sup>rd</sup> Respondent extensive reliance on decisions on filing of a Petition outside the prescribed twenty-eight (28) days is misleading and false as the issue before the court is not whether the Petition was filed within the prescribed timeframe but whether security for costs ought to have been paid in view of the nature of the dispute before the court. That the requirement for the Petitioner to deposit security for costs does not suffice as the nomination dispute is not an election dispute strictly speaking.
31. That the Preliminary Objection raised by the 3<sup>rd</sup> Respondent is without any merit and is premised on a flawed appreciation of the constitutional dispute resolution framework. That the Court is vested with the jurisdiction to determine the Petition dated 1<sup>st</sup> October 2022 and prayed that the Preliminary Objection dated 24<sup>th</sup> October 2022 by the 3<sup>rd</sup> Respondent be dismissed with costs.
32. The 2<sup>nd</sup> respondent further submitted that a reading of section 78 (3) of the *Elections Act* requires the 3<sup>rd</sup> Respondent to file a formal application for dismissal of the Petition on account of late payment of the security for costs rather than filing a Notice of Preliminary Objection. Therefore, the Notice of Preliminary Objection is misconceived and bad in law.
33. The 2<sup>nd</sup> Respondent submitted in the alternative that the Court ought to extend the period within which the Petitioner is to deposit the security for costs. That Rule 19 of the Elections (Parliamentary and County Elections) Petitions Rules 2017 provides as follows;
  - (1) where any act or omission is to be done within such time as may be prescribed in these rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the court may have expired.
  - (2) sub-rule (1) shall not apply to the period within which a petition is required to be filed, heard or determined.”
34. Citing case of Samuel Kazungu Kambi & another vs. Nelly Ilongo County Returning Officer, Kilifi County & 3 Others [2017] eKLR as quoted with approval in the case of Elizabeth Jebet Kibor vs. Isaac Suare Oseur & 5 Others [2020] eKLR the High Court held as follows;

“My understanding is that an election petition can be revived, with the leave of the court, upon payment of the security deposit so long as the period for hearing the petition has not lapsed. Nothing would have been easier for Parliament than to use the language used in Section 96 in Section 78 if the intention was to completely take away the discretion of an election court to enlarge time. I therefore agree with Edward M. Muriithi, J that if sufficient



cause is shown, an election court has jurisdiction to extend the time for depositing security for costs in an election petition.”

35. That in the case of Elizabeth Jebet Kibor (Supra), the High Court opined as follows;

“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.”

36. The 2<sup>nd</sup> respondent submitted that on judiciary e- Filing system the Petitioner has deposited the security for costs though not strictly a statutory requirement. That this Court has the discretion to extend the time for depositing the security for cost and the same already having been deposited, to be considered as deposited within the statutorily prescribed timeline.

### **Petitioners submissions to the P.O**

37. The petitioner highlighted the background as follows:

- i. That the Petitioner filed the Petition dated 1<sup>st</sup> October, 2022 on 6<sup>th</sup> October, 2022 and served the same upon the Respondents on 12<sup>th</sup> October, 2022 seeking to challenge the unauthorized and fraudulent alteration of the 2<sup>nd</sup> Respondent’s Party List as gazetted by the 1<sup>st</sup> Respondent vide Gazette Notice No. 10712 published on 9<sup>th</sup> September, 2022 which resulted in the omission and/or removal of the Petitioner’s name from the 2<sup>nd</sup> Respondent’s party list of Nominated Members of County Assembly under the Marginalized (Persons with Disabilities) category.
- ii. That 3<sup>rd</sup> Respondent filed a Notice of Preliminary Objection dated 24<sup>th</sup> October, 2022 opposing the Petition on ground that this Court does not have jurisdiction to hear and determine the Petition for failure to deposit the security for costs as provided under section 78(1) of the *Elections Act*, 2011.
- iii. That according to the petitioner the said Notice of Preliminary Objection is unfounded and ill-advised. That the Law is silent on timelines within which security for costs is to be deposited. The Petitioner will demonstrate to the Court circumstances that occasioned the late deposit of the security for costs.
- iv. The 3<sup>rd</sup> Respondent’s notice of preliminary objection is only brought to abrogate the Petition herein at the expense of public interest and the Petitioner’s constitutional right.
- v. The Petitioner urged this Court to dismiss the Notice of Preliminary Objection with orders as to costs.

The court has observed that the petitioner raised many issues of fact in their background to the submissions and also in the main submissions on the P.O which goes into the merits of the petition, or have been addressed in the petitioner’s application and will be the subject of ruling together with the PO.

38. The petitioner submitted that in the case of Kakuta Maimai Hamisi -vs- Peris Pesu Tobiko & 2 Others (2013) eKLR the court noted that “So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue is a consideration imposed on courts out of decent respect for economy



and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cul-de-sac. Courts, like nature, must not sit in vain.”

39. The Petitioner submitted that the Petition before this Court does not fall within the provisions of section 78 of the *Elections Act* as the Petition herein is not one that involves the casting of votes by voters. The Election Petitions contemplated under section 78 of the *Elections Act* are that such Petitions that challenge the outcome of an electoral process. The Law is silent on timelines within which the Petitioner is required to deposit the security for costs.
40. That in the case *Esposito Franco Vs Amason Kingi Jeffah & 2 Others* [2010] eKLR the Court of Appeal on the issue of deposit of costs stated that the purpose of the requirement to deposit security for costs is to discourage frivolous or vexatious litigants from challenging the results of an election, which diverts scarce judicial resources from more deserving court business.
41. The other purpose is to provide recompense to respondents who are often constrained to incur expenses in defending hopeless and unsuccessful election Petitions as was held in *Tom Onyango Agimba versus IEBC & 2 others* (2017) eKLR
42. The Petitioner submitted that on 6<sup>th</sup> October, 2022 upon filing the Petition through the Firm of Salah & Company Advocates, the invoice for payment of security for costs could not be accessed on the e-filing portal. That the Petitioner through its Advocates made several attempts to contact the registry in Manderu who stated that the said e-filing portal was having technical challenges and the same could only be accessed remotely at the Judiciary ICT Offices in Milimani. That the Petitioner has no control and/or access of the remote e-filing portal and therefore the said delay cannot be meted upon him. That the Petitioner settled the security for costs as soon as the said invoice could be accessed on the Judiciary e-filing portal.
43. The Petitioner seeks to rely on the case of *Jonas Misto Vincent Kuko Vs. Wafula Wekesa & Another, Kitale Election Petition No. 9 of 2013* where the Court held that an election Court will not strike an election Petition for failure to comply with the requirement for depositing security for costs where it appears that the Court registry has been accepting amounts smaller than what is prescribed under the Law and/or any other administrative technicalities occasioned by the registry.
44. Further in *Seth Ambusini Panyako Vs. IEBC & 2 OTHERS, Kakamega High Court Election Petition No. 14 of 2017*, the Court stated that it will not strike out a Petition where the security for costs is paid in time but the official receipt is issued at a later date due to the delay occasioned by the Court registry.
45. In *Charles Ongódo Were Versus Joseph Oyugi Magwanga & 3 others Homabay Election Petition 1 of 2013* the Court interpreted the rules as follows;

“I would have found favour with this position [I.e. dismissal of the Petition] were it not for the provisions of Section 78(3) of the *Elections Act* which presumes that the Court may exercise discretion in favour of the Petitioner who has not deposited the security and against an objection has been raised. It is only once the objection is not removed that no further proceedings can be taken. Here even before the objection had been taken the deposit had been paid so there will be no issue of removing the objection. For this reason, this Court shall on this occasion save the Petition by not allowing the Preliminary Objection and the Application which both sought its dismissal on the issue of deposit”
46. in the alternative the Petitioner submitted that this Court has the discretion to enlarge the time for depositing the Security for Costs. The authority in *Samuel Kazungu Kambi & Another Versus Nelly*



Liongo, County Returning Officer, Kilifi County and 3 others Malindi Election Petition 4 & 5 of 2017, opined that;

“.....an election Petition can be revived, with the leave of the Court, upon payment of the security for cost so long as the period for hearing the Petition has not lapsed. Nothing would have been easier for Parliament than to use the language in Section 96 and 78 if the intention was to completely take away the discretion of an election Court to enlarge time. I therefore agree with Edward M. Muriithi J, that if sufficient cause is shown, an election court has jurisdiction to extend the time for depositing security for costs in an election Petition.

47. In Patrick Ngeta Kimanzi, Marcus Mutual Muluvi & 2 others[2013] eKLR the court dealt with the rationale for the deposit of security for costs stating:

“Security for costs ensures that the respondent is not left without a recompense for any costs or charges payable to him. The duty of the court is therefore to create a level playing ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access justice vis-à-vis the respondent’s right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him. (see Harit Sheth Advocate –vs- Shamas Charania – Nairobi Court of Appeal, Civil Appeal No.68 of 2008 [2010] e KLR.”

48. That in Samwel Kazungu Kambi & another v Nelly Ilongo County Returning Officer, Kilifi County & 3 Others [2017] eKLR, the court was of the view that with cogent reasons, a court may extend time for payment of security for costs, stating:

“My understanding is that an election petition can be revived, with the leave of the court, upon payment of the security deposit so long as the period for hearing the petition has not lapsed. Nothing would have been easier for Parliament than to use the language used in Section 96 in Section 78 if the intention was to completely take away the discretion of an election court to enlarge time. I therefore agree with Edward M. Muriithi, J that if sufficient cause is shown, an election court has jurisdiction to extend the time for depositing security for costs in an election petition.”

49. 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. That the circumstances that occasioned the delay of payment of security for costs was occasioned by technicalities on the e-filing portal and that the Petitioner will be greatly prejudiced and his rights violated if the 3<sup>rd</sup> Respondent’s Notice of Preliminary Objection is allowed.

50. That the Petitioner paid the Security for Costs as soon the invoice for payment of security for costs was availed on the Judiciary e-filing portal and therefore as held by the Garissa High court in E005/2022 whether the said has been paid or not is an administrative issue and the same can be confirmed court and should not go to the substance of the matter. That the Preliminary Objection dated 24<sup>th</sup> October, 2022 should be dismissed and the Petition be allowed to be heard and determined on merit.

### **Petitioner’s Notice of Motion application dated 8th November 2022**

51. The Petitioner’s application seeks the following orders;

- i. That, this Court be pleased to enlarge the time within which the Petitioner deposits the security for costs.



- ii. That, upon granting Order 1 above, the security for costs reflected on the e-filing portal on 4<sup>th</sup> October 2022 be deemed as having been filed within the statutorily prescribed timeline.
  - iii. That costs abide the outcome of the Petition.”
52. The petitioner’s application is supported by the affidavit of Abdiwelly Haji Bukura and is premised on the following GROUNDS and substantially the same as the averments in supporting his affidavit sworn on 8<sup>th</sup> November, 2022:
- I. That on 6<sup>th</sup> October, 2022 upon filing the Petition through the Firm of Sallah & Company Advocates, the invoice for payment of security for costs could not be accessed on the e-filing portal. THAT through the said Advocates he made several attempts to contact the registry in Mandera who stated that the said e-filing portal was having technical challenges and the same could only be accessed remotely at the Judiciary ICT Offices in Milimani.
  - II. He deponed further that neither himself nor his Advocates had control and/or access of the remote e-filing portal and therefore the said delay cannot be meted upon the applicant petitioner.
  - III. THAT he has settled the security for costs as soon as the said invoice could be accessed on the Judiciary e-filing portal.
  - IV. THAT this Court has the discretion to enlarge time for litigants to deposit security for cost where the same is not deposited within the stipulated timeline and proceed to determine the substantive issues raised in the Petition as long as the period for hearing the Petition has not lapsed.
  - V. THAT, a check on the Judiciary E-Filing system will confirm that I have deposited the security for costs to enable the court expeditiously determine the Petition before it.
  - VI. THAT, the challenges posed by the e-portal should not be visited upon me to dismiss my Petition, since I have complied with the timelines for security for cost only that it had not reflected in the e-portal.
  - VII. THAT, his advocates on record, has and which advice he verily believe to be true, that pursuant to Rule 19 of the Elections (Parliamentary and County Elections) Petitions Rules 2017, this Court has the discretion to enlarge time for litigants to deposit the security for costs in the event that a litigant fails to comply with timeline for payment for security for cost.
  - VIII. He annexed receipt for the deposit of security for costs produced and marked as annexure ‘AHB-1’.
  - IX. THAT, this application has been made timeously and without any unreasonable delay and, it is in the interest of justice, the residents of Mandera County living with disability and the expeditious resolution of dispute that this application is allowed as prayed.

**1st Respondents Reply to the Petitioners Application dated 8/11/2022.**

53. Chrispine O. Owiye advocate, Director Legal services of the 1<sup>st</sup> respondent swore affidavit dated 11/11/2022. He averred that having read and understood the notice of motion application dated 8/11/2022 together with supporting affidavit and documents thereof and on advice of their counsel, that the petitioner was obligated to deposit security for costs within 10 days of filing the petition i.e. 16/10/2022 by dint of section 78 of the Act and rule 13.



54. That failure to do so was fatal as timeliness are strictly provided for and specified and ought to be adhered to. He prayed that the application be dismissed with cost.

### 3rd Respondents Reply to the petitioner's application

55. The 3<sup>rd</sup> Respondent Abdow Bishar Maalim vide his replying affidavit averred:

- i. That he had read and understood, and where necessary had explained to by his Advocates on record, the contents and the tenor of the Notice of Motion dated 8<sup>th</sup> November, 2022, the Affidavit in Support thereof sworn on 8<sup>th</sup> November, 2022 by Abdiwelly Ali Bukura together with the annexures thereon.
- ii. That the Application is misconceived, bad in law, and an abuse of this Honourable Court's process as it is a waste of precious judicial time, an afterthought, and an attempt to cure a legal defect that cannot be resuscitated, even with the most skilful (mis)application and (mis)interpretation of the Constitution, the Elections Act and the Rules thereunder.
- iii. That this Court can only exercise powers donated to it either by statute or the Constitution. Neither the Constitution of Kenya nor the relevant statute (in this case the Elections Act) grants this Court the power to enlarge time for depositing security for costs contrary to the express & mandatory provisions of Section 78.
- iv. That first, the Application totally disregards the hierarchy of laws in Kenya. That the Petitioner has just picked a provision of the law, which he thinks will aid his cause, and placed reliance on the same in total disregard of the context of the said rule and whether the same it applies to his situation.
- v. That per advice from his counsel, which he verily believe to be true, that a subsidiary law (the Election Petition Rules, 2017), cannot be used to oust the dictate of a substantive law (the Elections Act). Subsidiary laws are there to supplement the substantive law, and not countermand or contradict their provisions. That for this Court to interpret Rule 19 of the Election Petition Rules, 2017, in the manner the Petitioner intends would result in a legal absurdity, as it would be contrary to what Section 78 of the Elections Act has set out in mandatory terms, a position Superior Courts have upheld and would result in ousting of the intention of lawmakers (Parliament), under Section 78 of the Elections Act.
- vi. That the Petitioner has completely misapprehended the application of the provision of Rule 19 of the Election Petition Rules. Part V of the Election Petition Rules, under which the impugned Rule 19 lies, makes rules for case management, and Rule 19 makes specific reference to the extension of timelines ordered either by the rules themselves (not the Act) or the Elections Court.
- vii. That Section 78 has made it mandatory for depositing security for costs within 10 days of filing an election petition. This position cannot be countermanded by a subsidiary law.
- viii. That the election dispute resolution regime in Kenya is time-bound with express rules on the substantive and procedural requirements. The violation of such requirements, particularly the mandatory ones provided in the Constitution as well as the Act, renders a Petition defective as is the case herein.
- ix. That the excuse the firm of Advocates of Sallah & Company Advocates filed two Petitions E006 and this one seeking the same reliefs against the same Respondents, and that there was an intention to apply for consolidation, is neither here nor there. That it appears that the



Petitioner is casting an aspersion on the professional competence of his former advocate on record yet he is better placed to give sound advice of whom to sue and how to frame pleadings, being an Advocate of the High Court of Kenya.

- x. That this is a party list Election Petition and thus removed from the purview of Section 78 of the *Elections Act*, is also a misapprehension of the law. That Elections, whether by universal suffrage or by nomination through way of party lists, is governed by the same dispute resolution regime. That if the Petitioner has the full conviction that his reasoning is the correct legal position, why has he now deposited the security for costs (out of time) and made this application?
- xi. That this Application has been brought with the ulterior motive of defeating express provisions of the *Elections Act*. That per the judiciary receipt annexed in evidence to the Application, the Petitioner deposited Kshs.100,000/- on 4<sup>th</sup> November, 2022 and filed this Application as an afterthought on 8<sup>th</sup> November, 2022. First, there is no doubt that the Kshs. 100,000/- was deposited way out of the time prescribed by the law. Secondly, the same was deposited without this Court's leave. That nobody therefore knows its purpose. That assuming this Court had jurisdiction to enlarge time, the deposit cannot be that which was envisaged by Section 78 of the *Elections Act*.
- xii. That it is also apparent that the deposit is conditional. At para. 8 of the grounds, the Petitioner says, "In the event that this Honourable Court interprets Section 78... this Honourable Court has the discretion to enlarge time". It is not in doubt that the Petitioner is chancing the Application before Court.
- xiii. That in a totally contradicting twist of narratives, the Petitioner introduces a new excuse for failure to deposit the security within time and blames the judiciary ICT officers. At paragraphs 3 and 4, the Petitioner blames the judiciary e-filing portal and ICT officers at Milimani law courts for what he terms as "technical challenges". The said technical challenges have neither been explained nor supported by an affidavit from any of the officers whom the petitioner contacted.
- xiv. That the excuse of "technical challenges" is not backed by an iota of evidence and is totally false. If there was a problem with the judiciary e-filing system, How comes his advocates were able to pay the filing fees and other court fees within time? How comes all the other parties filed pleadings through the e-filing portal without experiencing it? Isn't it amusing that all of a sudden the judiciary's ICT system became "responsive" after my Advocates filed the Notice of preliminary objection?
- xv. The applicant's grounds in support of his application are not only inconsistent but unfounded and demonstrate a clear attempt to clutch at straws.
- xvi. The annexure marked as AHB-1 purporting to be the deposit for security for costs flies in the face of the *Elections Act* and smirks of arrogance of this Honourable Court's authority to uphold the rules prescribed by the *Elections Act*. The same was paid out of time and without this Honourable Court's leave.

The Petitioner's Written Submissions to the application dated 8<sup>th</sup> November, 2022.

56. The Petitioner submitted that he filed the Petition dated 1<sup>st</sup> October, 2022 on 6<sup>th</sup> October, 2022 and served the same upon the Respondents on 12<sup>th</sup> October, 2022 seeking to challenge the unauthorized and fraudulent alteration of the 2<sup>nd</sup> Respondent's Party List as gazetted by the 1<sup>st</sup> Respondent



vide Gazette Notice No. 10712 published on 9<sup>th</sup> September, 2022. The said unlawful and un-procedural alteration of the 2<sup>nd</sup> Respondent's party list resulted in the omission and/or removal of the Petitioner's name from the 2<sup>nd</sup> Respondent's party list of Nominated Members of County Assembly under the Marginalized (Persons with Disabilities) category prompting the present petition. That the technological hitches in paying security for costs through the judiciary online filing delayed in paying the said costs within the required Ten (10) days window however, the funds in question has fully been deposited once normalcy was restored. That there was no deliberate or inordinate delay in paying the security for costs as the same was paid the earliest possible time even before the first mention.

57. The petitioner submitted in respect of Section 78 of the *Elections Act*, 2011 that a petitioner is to deposit security for the payment of costs within 10 days of filing the election petition in normal circumstances.
58. That in Samuel Kazungu Kambi & Another Versus Nelly Liongo, County Returning Officer, Kilifi County and 3 others Malindi Election Petition 4 & 5 of 2017, opined that; ".....an election Petition can be revived, with the leave of the Court, upon payment of the security for cost so long as the period for hearing the Petition has not lapsed. Nothing would have been easier for Parliament than to use the language in Section 96 and 78 if the intention was to completely take away the discretion of an election Court to enlarge time. I therefore agree with Edward M. Muriithi J, that if sufficient cause is shown, an election court has jurisdiction to extend the time for depositing security for costs in an election Petition.
59. That in Patrick Ngeta Kimanzi, Marcus Mutual Muluvi & 2 others[2013] eKLR the court dealt with the rationale for the deposit of security for costs stating:

“Security for costs ensures that the respondent is not left without a recompense for any costs or charges payable to him. The duty of the court is therefore to create a level playing ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access justice vis-à-vis the respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him. (see Harit Sheth Advocate –vs- Shamas Charania – Nairobi Court of Appeal, Civil Appeal No.68 of 2008 [2010] e KLR.”

60. That the security for costs has been deposited even before the first mention, and that therefore the Petitioner complied with the provision of the law and the Respondents will not suffer any prejudice.
61. That the Bench Book on Electoral Dispute Resolution states that while the depositing of security for costs is an essential prerequisite for the hearing of an election petition, the time within which this must be done is a procedural requirement and, accordingly, courts have a discretion to enlarge the time for depositing the security (Fatuma Zainabu Mohamed v Ghati Dennitah & 10 Others, Kisii Election Petition No. 6 of 2013; Charles Maywa Chedotum & Another v IEBC & 2 Others, Kitale Election Petition No. 11 of 2013). The Court in Samwel Kazungu Kambi & Another v Nelly Llongo County Returning Officer, Kilifi County & 3 Others, Malindi Election Petition 4 & 5 of 2017(consolidated), opined as follows:

[25.] Sub-sections (2) and (3) of Section 96 leaves no doubt as to the fact that unless a deposit of security for costs is made within ten days from the date of presenting the referendum petition, the petition shall be struck out. Unlike Section 96(2) and (3) which commands the striking out of a referendum petition if no security for costs is deposited, Section 78(3) puts an election petition in comatose if no security for costs is deposited. 'My understanding is that an election petition can be revived, with the leave of the court, upon payment of the security deposit so long as the period for hearing the petition has not lapsed.'



‘Nothing would have been easier for Parliament than to use the language used in Section 96 in Section 78 if the intention was to completely take away the discretion of an election court to enlarge time. I therefore agree with Edward M. Muriithi, J that if sufficient cause is shown, an election court has jurisdiction to extend the time for depositing security for costs in an election petition.’

62. That in *Charles Ong’ondo Were v Joseph Oyugi Magwanga & 3 Others*, Homa Bay Election Petition No. 1 of 2013), the court explained the rule as follows:

‘... I would have found favour with this position [i.e. dismissal of the petition] were it not for the provisions of s. 78 (3) of the *Elections Act* which presumes that the court may exercise discretion in favour of a petitioner who has not deposited the security and against who an objection has been raised. It is only once the objection is not removed that no further proceedings can be taken. Here even before the objection had been taken the deposit had been paid so there will be no issue of removing the objection. For that reason, this court shall on this occasion save the petition by not allowing the preliminary objection and the Notice of Motion which both sought its dismissal on the issue of the deposit.’
63. According to the petitioner 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
64. That even the courts have adopted more liberal and lenient interpretation and accepted part payments/ installments as was in the case *Jonas Misto Vincent Kuko v Wafula Wekesa & Another*, Kitale Election Petition No. 9 of 2013)
65. The petitioner submitted that the purpose of the requirement to deposit security for costs is to discourage frivolous or vexatious litigants from challenging the results of an election, which diverts scarce judicial resources from more deserving court business (*Esposito Franco v Amason Kingi Jeffah & 2 Others*, Nairobi Civil Appeal No. 248 of 2008; and *Tom Onyango Agimba v IEBC & 2 Others*, Milimani High Court Election Petition 18 of 2017). The other purpose of the requirement is to provide recompense to respondents, who are often constrained to incur expenses in defending hopeless and unsuccessful election petitions.
66. Further, that the Petitioner seeks to rely on case of *Nicholas Kiptoo Arap Salat vs. IEBC & 7 OTHERS* Supreme Court Civil Application No. 16 of 2014 where the Supreme Court gave guiding principles that a Court should consider in exercising its discretion when determining applications for extension of time;
  - a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
  - b. A Party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
  - c. Whether the Court should exercise the discretion to extend time is a consideration to be made on a case to case basis;
  - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - e. Whether there would be any prejudice suffered by the Respondents if the extension is granted;
  - f. Whether the application has been brought without delay; and



- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
67. That in *Fatima Zainabu Mohamed v Ghati Dennitah & 10 others* [2013] eKLR, the court was of the view that section 78 is a procedural law and therefore the trial magistrate had jurisdiction to extend the time for compliance.
68. The petitioner cited Section 4 of the Rules on the objective of the Rules being to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions and that an election court shall, in the exercise of its powers under the *Constitution* and the Act, or in the interpretation of any of the provisions in these Rules, seek to give effect to the objective specified above and Article 159 of the *Constitution* that justice shall be done without undue regard to procedural technicalities. That the delay in paying security for costs was occasioned by failure of the judiciary online-filing system and the same should not be visited against the Petitioner. That the Respondents will not suffer any prejudice if the Application herein is allowed.
69. That the Application herein was filed expeditiously under under Rule 17(2) of the *Elections Act* 2012 (Parliamentary and County Elections) Petition Rules. 2017 . That Petition herein is of public interest and it is only fair that the Petitioner’s application be allowed and costs abide the outcome of the Petition.

### **1st Respondents Submissions**

70. I note that the 1<sup>st</sup> Respondent filed joint submissions dated 14/11/2022 in respect of the Petitioners application and the 3<sup>rd</sup> Respondents PO and which I have already referred to above and will revert to them as appropriate.
- The 2<sup>nd</sup> Respondent’s Submissions to Notice of Motion application dated 8<sup>th</sup> November 2022)
71. The 2<sup>nd</sup> Respondent does not oppose the application filed by the Petitioner. They associate with the submissions filed by the Petitioner in support of the said application.
72. The 2<sup>nd</sup> respondent submitted on Section 78(1) of the *Elections Act* as read together with Rule 13 (1) of the Elections (Parliamentary and County Elections) Petitions Rules which provide that a Petitioner shall deposit security for costs not more than ten (10) days after the filing of an Election Petition. That though the provision is couched in mandatory terms, this Court has the jurisdiction to enlarge time for carrying out any action set out under the *Elections Act* or the subsidiary legislation.
73. They also submitted on Rule 19 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 extension and reduction of time. That the court’s jurisdiction and discretion in enlarging time is t broad save for the exception set out in Rule 19 (2). The 2<sup>nd</sup> Respondent submits that this exception does not apply to the Petition before the court as the Petition was filed on time.
74. The 2<sup>nd</sup> Respondent further submitted that a Petition that seeks to challenge the nomination of a candidate does not have the same requirement as a Petition seeking to challenge the election of a candidate at a general election. That the law is not clear on the requirement of payment of security of costs on such a Petition. In the event that this Court finds that security of costs is required, the 2<sup>nd</sup> Respondent submits that this Court has the discretion to extend time for the depositing of the security for costs and the late payment does not render the Petition defective. The court was urged to look at the



rationale for the requirement of depositing the security for costs as stated in the case of Patrick Ngeta Kimanzi vs. Marcus Mutua Muluvi & 2 others the High Court explained as follows:

“Security for costs ensures that the respondent is not left without a recompense for any costs or charges payable to him. The duty of the court is therefore to create a level playing ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access justice vis-à-vis the respondent’s right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him. (see Harit Sheth Advocate –vs- Shamas Charania – Nairobi Court of Appeal, Civil Appeal No.68 of 2008 [2010] e KLR.”

75. The 2<sup>nd</sup> Respondent submitted that from the foregoing, the rationale for the payment of the security for costs is to prevent vexatious Petitions from being filed against a successful candidate. The 2<sup>nd</sup> Respondent relied on the holding in the case of Fatuma Zainabu Mohamed vs. Ghati Dennitah & 10 Others the High Court in allowing a similar application for enlargement of time to deposit security for costs stated that;

“I consider that if section 78 (3) of the Elections Act were construed as not allowing for any good cause an extension of time to deposit security for costs, it would unreasonably restrict the right to approach the court for a determination whether one has been elected to hold office, inconsistently with the constitutional right under Article 38 (3) (c) of the Constitution for “every adult citizen has the right without unreasonable restrictions to be a candidate for public office or office within a political party of which the citizen is a member and if elected to hold office”. Accordingly, I find that the time prescribed for deposit of security for costs is a matter of procedure rather than substance of the right to petition the court on election dispute, which is granted by the Constitution itself..

Having determined that power to enlarge time for deposit of the security exists under the proper construction of section 78 of the Elections Act being a provision to give effect to the constitutional right to vote and access court for determination of election disputes under Articles 38, 87 and 105 of the Constitution, and further weighing the constitutional rights of the Petitioner and the Respondent, respectively, the Petitioner’s voting right to a determination of the election dispute as to whether she was elected to the office and the Respondent’s entitlement to a timely settlement of the dispute within the 6-month period of which four (4) months still remain, I think that the Respondent’s interest in the protection offered by security for costs and in expedited disposal of the dispute will still be met even if a short extension of the time for the deposit of the security for costs is ordered. I have also noted the circumstances, in which the Petitioner’s default in making the deposit in time occurred and I do not consider the delay of 6 days after the expiry of the prescribed 10-day period to be inordinate delay in the circumstances. The Petitioner is ready to deposit the security for costs so the Respondent’s interest in the protection against unrecoverable costs in that regard is well covered.”

76. The 2<sup>nd</sup> Respondent further placed reliance on the holding in the case of Samwel Kazungu Kambi & Another vs. Nelly Ilongo County Returning Officer, Kilifi County & 3 Others where the court held that as long as cogent reasons were given, a court could exercise its discretion and permit the payment of security for costs.
77. Further reliance was placed on In the case of Elizabeth Jebet Kibor vs. Isaac Suare Oseur & 5 Others, the High Court opined that “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.”

78. This Court was referred to case of Patrick Ngeta Kimanzi (Supra) stated as follows;

“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. 27. 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.”

79. The 2<sup>nd</sup> Respondent further relied on the holding of the Supreme Court in the case of Raila Odinga & 5 Others vs. Independent Elections and Boundaries Commission & 4 Others where the court while addressing itself on its discretion to extend timelines stated;

“It may be argued that the Supreme Court ought to apply the principle of substantial justice, rather than technicalities, particularly in a petition relating to Presidential election, which is a matter of great national interest and public importance. However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and Rules relating to the Constitution, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity.”

80. That this Court in considering an application for extension of time for lodging an appeal arising from an Election Petition the Supreme Court in Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others held that “From the above case law, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

81. The 2<sup>nd</sup> Respondent further submitted that the Supreme Court set down the guiding principles to be applied when considering an application for extension of time. The Supreme Court held as follows;

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;



- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - vi. Whether the application has been brought without undue delay; and,
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
82. That the Petitioner has laid out sufficient reasons occasioned by downtime on the Judiciary E-filing System. This downtime resulted in the invoice for the security for costs not reflecting on the E-Filing Portal on time. That the delay in depositing the security for costs is excusable and a sufficient basis for the exercise of the court's discretion.
83. The 2<sup>nd</sup> Respondent further submitted that the Petitioner moved this Court without delay as the Petition is yet to be set down for hearing as such no prejudice shall be occasioned on the other parties if the application is allowed.
- 3<sup>rd</sup> Respondent's Submissions to the Petitioner's Notice of Motion Application Dated 8<sup>th</sup> November, 2022,
84. The 3<sup>rd</sup> respondent submitted that petitioner's Notice of Motion Application dated 8<sup>th</sup> November, 2022 seeks that this Court leave to enlarges time to permit him to deposit security for costs yet the Applicant argues that Petitions of this nature, do not require any deposit for security for costs. That why would he make such an Application, and make a deposit which he purports to be security for costs, yet he believes that by law, he ought not to be subjected to the Provisions of Section 78 of the [Elections Act](#).
85. That the Application before Court is a knee-jerk reaction prompted by the Notice of Preliminary Objection filed by the 3<sup>rd</sup> Respondent, and not out of genuine belief in this Court's jurisdiction to extend time per Section 78 of the [Elections Act](#) .
86. That even if this Court had the discretion to extend the timelines set out under Section 78 of the [Elections Act](#), which jurisdiction is not admitted by the 3<sup>rd</sup> Respondent, the Applicant would not be befitting of the exercise of such discretion for above reasons . The 3<sup>rd</sup> Respondent reiterated his Notice of Preliminary Objection dated 24<sup>th</sup> October, 2022 and his submissions dated 6<sup>th</sup> November, 2022.
87. The 3<sup>rd</sup> Respondent raised and addressed what he called four (4) key issues as follows:
- i. Whether Elections Petitions arising from Party List Nominations are exempt from the provisions of Section 78 of the [Elections Act](#)?
  - ii. Whether this Court has jurisdiction to enlarge time for the deposit of security for costs despite the mandatory provision of Section 78 of the [Elections Act](#)?
  - iii. Whether Rule 19 of the Elections Petition Rules can be applied to oust the Provisions of Section 78 of the [Elections Act](#)?
  - iv. Whether the Petitioner has advanced sufficient reasons for non-payment of the deposit for Security for costs within the stipulated time?
  - v. What are the appropriate reliefs?



88. On Whether Elections Petitions arising from Party List Nominations are exempt from the provisions of Section 78 of the [Elections Act](#)? He submitted that a look at Section 78 of the [Elections Act](#) the 3<sup>rd</sup> Respondent does not see any exemption for Petitions arising from Nominations by way of Party Lists. That the Elections dispute resolution regime in Kenya does not recognize separate dispute resolution mechanism for the different types of elections in Kenya. That it is a fact that our electoral architecture recognizes elections in the conventional way (universal suffrage) as well as elections by way of nominations through party lists (party list elections). He conceded that Section 2 of the [Elections Act](#), defines “election results” is defined as “means the declared outcome of the casting of votes by voters at an election but that that this definition is narrow, vague and is only applicable to elections by way of universal suffrage. That definition does not mean/ imply that elections by way of nomination pursuant to party lists do not yield election results.
89. The 3<sup>rd</sup> Respondent submitted that elections whether by universal suffrage or nomination, must yield results, and such result is what can only trigger an election petition. This submission finds forte in the now infamous Supreme Court case of Moses Mwigigi & 14 others vs Independent Electoral & Boundaries Commission & 5 Others (2016) eKLR where the court held as that : .it is plain to us that the [Constitution](#) and the electoral law envisages the entire process of nomination for the special seats, including the act of gazettment of the nominees’ namely by the IEBC, is an integral part of the election process. The Gazette notice in this case, signifies the completion of the “election through nomination”, and finalizes the process of constituting the Assembly question. On the other hand, an “election by registered voters”, as was held in the Joho case, is in principle, completed by the issuance of Form 38, which terminates the returning officer’s mandate...”
90. That an election must have a result whether by universal suffrage or nomination not conformity to the provisions of Section 2 of the Act. That in the absence of express provisions in the [Elections Act](#) or rules thereunder which exempt Party List Elections from the provisions of Section 78, the 3<sup>rd</sup> respondent submitted that all Election Petitions are subjected to the same rules.
91. On Whether this Court has jurisdiction to enlarge time for the deposit of security for costs despite the mandatory provision of Section 78 of the [Elections Act](#)? The Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd (1989) was cited and stressed that once a court establishes it does not have jurisdiction to adjudicate a dispute, it has no choice but to down its tools. That jurisdiction can only be derived from the [Constitution](#) or statute. The Supreme Court in Samuel Kamau Macharia v Kenya Commercial Bank (2012) eKLR stated thus:
- “A court’s jurisdiction flows from either the [Constitution](#) or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the [Constitution](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality.”
92. That in Section 78 of the [Elections Act](#), nothing on the said provision alludes to an Election Court’s ability to extend the time-lines set out therein for compliance. That this was deliberately crafted by Parliament and it ought to be interpreted in the same manner as Section 76 (1) (a) of the [Elections Act](#). That nothing could have been easier than for Parliament to include a provision under Section 78 giving this Honourable Court, lee way to extend time.
93. That if the law does not clothe this Court with the jurisdiction to extend strict timelines set by the law, then this Court has no business arrogating itself such jurisdiction because Legislation, the act of making laws, is a preserve of Parliament.



94. This court was referred to the Court of Appeal case *Esposito Franco v Amason Kingi Jeffah & 2 others* [2010] eKLR on the need to uphold the intention of the legislature whether unfair or otherwise as follows:
36. ...We think the message is clear that Parliament intended to elevate the matter of representation of the people in the National Assembly to a special level where the democratic rights of the individual would not be unduly violated. By using peremptory language in Part VI, it eliminated vexatious litigants who cannot provide security and assured expedition of election petitions by setting deadlines. The consequence of non-compliance with the provisions must therefore be to invalidate the petition. Whether the public interest in the speedy determination of elections petitions warrants such a draconian regime is again a matter for Parliament to review....
39. Unlike the case before us, the *Kimutai* case was one where the petitioner conceded that there was no deposit offered or made. It is also evident from the decision that the issue as to whether extension of time was permissible was left undecided but it is the issue now before us. In our view, the tenor of the *Constitution* (now repealed), statutory provisions, and rules relating to petitions, coupled with the absence of any express provision for extension of time, are pointers to the intention of Parliament that time would not be extended. Another pointer to the intention to limit the discretion of the court was the deletion in 1979 (by Act. No. 19/79) of a useful provision in section 21 (4) which donated the power to the court to accommodate poor persons who were unable to raise the security deposit of Sh.5,000 at the time. The upshot is that the terms set for the filing of an election petition are conditions precedent, non-compliance of which attracts the irreversible consequence of nullifying the petition.
40. There is also considerable force, backed by authority, in the submissions of the respondents on the second issue of law, that the failure to comply with the provisions of section 21 is not curable under section 23 (1) (d) of the Act which is invoked in this matter. Section 21 enacts substantive legal requirements and non-compliance with those provisions is not a mere technicality. Nor are the provisions of the *Civil Procedure Act* and the rules thereunder available to address the situation.”
95. That *Esposito’s Case* the provision in contention was whether the Court had the discretion to extend time contrary to the provisions of Section 21 of the National Assembly and Presidential *Elections Act* (now repealed) which provided as follows:
- (1) Not more than three days after the presentation of a petition, the petitioner shall give security for the payment of all costs that may become payable by the petitioner.
  - (2) The amount of security under this section shall be two hundred and fifty thousand shillings and shall be given by deposit of money.
  - (3) If no security is given as required by this section, or if an objection is allowed and not removed, no further proceedings shall be had on petition, and the respondent may apply to the election court for an order directing the dismissal of the petition and for the payment of the respondent’s costs; and the costs of hearing and deciding that application 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.”
96. That the provisions above are similar to the ones currently in force vide Section 78 of the *Elections Act* and this being the Court Appeal this Court is bound to uphold.



97. That neither the Constitution nor statute, has given this Court the power to extend strict timelines set under the Act, specifically that which has been set out under Section 78. He tied this to the applicability of Rule 19 of the Election Petition Rules, 2017 and submitted that it does not donate to this Court the power to extend the timelines set by Section 78. That Rule 19(1) only applies to timelines provided by the Rules themselves or by the Court and not by the Act.
98. That the rules are subservient to the Act and cannot supplant what is expressly provided by the Act. That the provisions of the Constitution and the Elections Act override the rules thereunder citing Gideon Mwangangi Wambua & Another V Independent Electoral And Boundaries Commission & 2 Others [2013] eKLR cited with approval the holding in David Wakairu Murathe vs. Samuel Kamau Macharia Civil Appeal No. 171 of 1998 in which it was held that “the rules promulgated by the Rules Committee cannot override express provisions of an Act of Parliament.”
99. Whether the Petitioner has advanced sufficient reasons for non-payment of the deposit for Security for costs within the stipulated time? The 3<sup>rd</sup> respondent submitted that the Petitioner advanced three excuses which are conflicting, contradictory and unsupported. First, the Petitioner blames his former Advocate for filing two Petitions seeking similar reliefs and as such, he did not pay the security for costs, as he was awaiting their consolidation so that he only pays security for costs in the consolidated suit. Secondly, he contends that he did not pay security for costs because he verily believed that Petitions of this nature (Party List Petitions) do not have this requirement in law. Thirdly, he blames “technical challenges” on the e-filing portal maintained by the judiciary as what thwarted his efforts to make the payments in time. That the above grounds are inconsistent and conflicting with each other. On one hand, the Petitioner had the intention of paying but was merely awaiting consolidation with the other similar matter, on the other, he argues that payment of security for costs is not a mandatory requirement for Petitions of this nature. The Petitioner blames the judiciary’s web services which hindered him from accessing the Portal. That this position is in conflict with grounds one and two above. That additionally, he did not attach any evidence of communication to the judiciary (executive officer) expressing this challenge and seeking a resolution. Moreover, how comes payment of the same became possible only after the Notice of Preliminary Objection dated 24<sup>th</sup> October, 2022 was filed?
100. That the Petitioner made a deposit without seeking this Court’s leave. That the payment was made on 4<sup>th</sup> November and the application, four days later on 8<sup>th</sup> November, 2022. That what the Petitioner has simply done is to box this Court in a position that it has to give in, into the whims of the Application dated 8<sup>th</sup> November, 2022
101. The 3<sup>rd</sup> respondent submitted that even if this Court had jurisdiction to enlarge time, the grounds advanced are so weak, escapist and disdainful, that no Court exercising its discretion would give in. That the only remedy therefore is dismissal with costs to the third Respondent.

### **Court’s Determination**

102. The 3<sup>rd</sup> Respondent is seeking dismissal of the petition vide the P.O on basis that the security for costs was not paid within time per section 78 of the Act. The Petitioner on his part does not dispute that security for costs was paid outside the 10 days of filing of the petition but has sought extension of time as prayed in the application.
103. For a start I have read and considered the authority in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR where the supreme court laid down rules for extension of time. The supreme court reiterated that time is of more essence in election matters where the people’s sovereign power to elect their legal representatives is involved hence Article 87 of the Constitution provide for the time frames within which election matters have to heard and determined .



The supreme court noted that a party may, encounter some delay and the time within which he was to perform an act lapses. The supreme court stated that presently, extension of time has now been given statutory backing with various legislations providing courts with the power to extend time as a discretion which should be exercised with abundant caution, care and fairness; it should be used judiciously in compliance the principles enshrined in our Constitution . Reiterating Raila Odinga vs Independent Elections and Boundaries Commission & others, Petition No. 5 of 2013 while addressing itself on discretion to extend timelines stated the supreme court noted that

“It may be argued that the Supreme Court ought to apply the principle of substantial justice, rather than technicalities, particularly in a petition relating to Presidential election, which is a matter of great national interest and public importance. However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and Rules relating to the Constitution, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity. The Rules and time – lines established are made with special and unique considerations.”

104. The law on deposit of security for costs is found in Section 78 of the Election Act which provides as follows: of the Elections Act provides as follows:

- (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) one million shillings, in the case of a petition against a presidential candidate;
  - (b) five hundred thousand shillings, in the case of petition against a member of Parliament or a county governor; or
  - (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.

107. Rule 13 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 on the other hand provides as follows: -

- (1) Within ten days of the filing of a petition, a petitioner shall deposit security for the payment of costs in compliance with section 78 (2) (b) and (c) of the Act.
- (2) The security for costs deposited under sub-rule (1) shall (a) be paid to the Registrar;

108. From the able and extensive written submissions filed by the respective parties, I find that the following are issues for determination which will effectively dispose the 3<sup>rd</sup> respondent's P.O and the Petitioners application all together.



109. Whether Elections Petitions arising from Party List Nominations are exempt from the provisions of Section 78 of the Elections Act? It was the petitioner and the 2<sup>nd</sup> respondent's submission and contention that Party List Nominations are exempt from the provisions of Section 78 of the Elections Act but the 1<sup>st</sup> and 3<sup>rd</sup> respondent submitted and argued that 78 of the Elections Act applies. It appears the borne of contention is not within section 78 but is in the definition in Section 2 of the Elections Act, which defines "election results" as "means the declared outcome of the casting of votes by voters at an election;" I concur with the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to the effect that our electoral architecture recognizes elections by universal suffrage as well as elections by way of nominations through party lists (party list elections). Having looked at section 78 as it is, there is no where it refers to election results but to an election and that being the case and even by judicial pronouncements from the courts party lists nominations is part of the election process. Elections cannot therefore be restricted to where there are "election results" i.e. the declared outcome of the casting of votes by voters at an election;" The cited authority from Supreme Court case in *Moses Mwigigi & 14 others vs Independent Electoral & Boundaries Commission & 5 Others* (2016) eKLR is very illustrative as follows:

“.....it is plain to us that the Constitution and the electoral law envisages the entire process of nomination for the special seats, including the act of gazette of the nominees' namely by the IEBC, is an integral part of the election process. The Gazette notice in this case, signifies the completion of the "election through nomination", and finalizes the process of constituting the Assembly question. On the other hand, an "election by registered voters", as was held in the *Joho* case, is in principle, completed by the issuance of Form 38, which terminates the returning officer's mandate...”

110. That being the case as in current petition, Party List elections petitions are bound by the provisions of Section 78. I hold and find that indeed the dispute herein is properly an election petition covered under section 78 of the Act and this court having been duly gazette by the Hon CJ has jurisdiction to hear and determine this matter.

111. The 2<sup>nd</sup> the question as to Whether the petitioner complied with the dictates of Section 78 (1) &(2) (b) of the Election Act and rule 13(1) and (2) (a) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 is therefore is in the negative. The petitioner in his supporting affidavit to the application as well as in the written submissions agrees that he did not pay the security deposit within 10 days of filing the Petition. I note that there is on record an e-receipt printout receipt no. DEX 0000255 issued on 4/11/2022 for Kshs 100,000/- indicated on face of the receipt as Deposit for Security for costs . It further shows the deposit was made on 4/11/2022 at 15.40hrs. It is a fact that the petition was filed on 6/10/2022.

The Next question is what is the effect of non-compliance with Section 78 (1) &(2) (b) of the Election Act and rule 13(1) and (2) (a) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 and Further whether the court can extend or enlarge time to pay the security of costs out of time as sought by the petitioner or whether the failure to pay the security of costs out of time is fatal to the petition and should suffer the fate as sought under the PO?

112. Having read the authorities availed in this court by the respective parties in support and in opposition to the P.O and the application, I observe that there are two emerging conflicting schools of thought.

One school of thought which is the position now held by the 1<sup>st</sup> and 3<sup>rd</sup> respondents in this petition is that the deposit of security for costs is a substantive issue that goes to the root of the proceedings. That non-payment of the security for costs deprives the court of the jurisdiction to deal with the matter further. The court was referred to many authorities holding this position led by *Eposito Franco v.*



Amason Kingi and 2 Others. Court of Appeal Civil Appeal No. 248 of 2008 the germane holding is that the court has no power to extend the time for deposit of security for costs. Ibrahim Ahmed v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR, Tom Onyango Agimba –vs – IEBC & 2 Others Nairobi HC Election Petition No.18 of 2017, Robert Mwangi Kariuki – vs- IEBC & 2 Others Nyeri HC Election Petition No.1 of 2017, Milton Kimani Waitinga –vs- IEBC & 2 Others Kiambu HC Election Petition No.2 of 2017. Omari Juma Mwakamole v Independent Electoral & Boundaries Commission& 2 others [2017] eKLR

113. The philosophy in Eposito Franco v. Amason Kingi and 2 Others and many other authorities of this genre is that judges are bound by the phraseology in section 78 of the Act. That the court is stripped of jurisdiction as soon as the rules of depositing the security for costs are breached. That consequently without jurisdiction the court downs its tools per Owners of the Motor Vessel “Lillian S” –vs- Caltex Oil (Kenya) Ltd [1989] KLR 1”. The court notes that the decision in Eposito Franco was in respect of the application of timelines under the former(repealed )constitution) and which was very restrictive in its application unlike in the current constitutional settings.
114. . In Elizabeth Jebet Kibor v Isaac Suare Oseur & 5 others [2020] eKLR issue of security for costs was held as fundamental to an election petition and that as payment of security for costs is provided for in the principle law and not the rules. The court noted that a 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 hence the was found petition incompetent.
115. The other school of thought to which now the petitioner, and the to some extend the 2<sup>nd</sup> respondent profess is that courts have discretion to enlarge the time for payment of the security for costs. Several authorities were cited Samuel Kazungu Kambi & another vs. Nelly Ilongo County Returning Officer, Kilifi County & 3 Others [2017] eKLR as quoted with approval in the case of Elizabeth Jebet Kibor vs. Isaac Suare Oseur & 5 Others [2020] eKLR, Seth Ambusini Panyako Vs. IEBC & 2 OTHERS, Kakamega High Court Election Petition No. 14 of 2017.
116. In Henry Okello Nadimo V The Independent Electoral And Bouderies Commission& 2 Others[2013]eKLR, the Judge stated as flows;
- “Given the wording of Section 78 of The Election Act a person who presents a Petition to challenge an election of a Member of Parliament must deposit the security of ksh. 500,000/= not more than ten days after the presentation of the Petition. And although the High Court has recently (see the decision in Kitale High Court Petition No.5 of 2013 – John Lokitare Lodinyo –v-s Mark Lomunokol & 2 others) allowed for deposit to be made after the lapse of ten (10) days, it is unlikely that any Court will allow a Petition to go to main hearing before the entire security is deposited.
117. In Patrick Ngeta Kimanzi, Marcus Mutual Muluvi & 2 others[2013] eKLR the court dealt with the rationale for the deposit of security for costs stating:
- “Security for costs ensures that the respondent is not left without a recompense for any costs or charges payable to him. The duty of the court is therefore to create a level playing ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access justice vis-à-vis the respondent’s right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him.



118. And in *Samwel Kazungu Kambi & another v Nelly Ilongo County Returning Officer, Kilifi County & 3 Others* [2017] eKLR, the court was of the view that with cogent reasons, a court may extend time for payment of security for costs, stating:

“My understanding is that an election petition can be revived, with the leave of the court, upon payment of the security deposit so long as the period for hearing the petition has not lapsed. Nothing would have been easier for Parliament than to use the language used in Section 96 in Section 78 if the intention was to completely take away the discretion of an election court to enlarge time. I therefore agree with Edward M. Muriithi, J that if sufficient cause is shown, an election court has jurisdiction to extend the time for depositing security for costs in an election petition.”

119. I have read and considered the wording in Section 78 (1) of the Act and I note that it does not expressly provide for extension of time to deposit security. Section 78 (3) however 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 being registered, the proceedings would be stayed unless the objection is removed. Consequently if the objection is not removed, the respondent would have the liberty to apply to the court for dismissal of the petition and for costs. In *Charles Ongódo Were Versus Joseph Oyugi Magwanga & 3 others Homabay Election Petition 1 of 2013* the Court interpreted the rules as follows;

“I would have found favour with this position [I.e. dismissal of the Petition] were it not for the provisions of Section 78(3) of the *Elections Act* which presumes that the Court may exercise discretion in favour of the Petitioner who has not deposited the security and against an objection has been raised. It is only once the objection is not removed that no further proceedings can be taken. Here even before the objection had been taken the deposit had been paid so there will be no issue of removing the objection. For this reason, this Court shall on this occasion save the Petition by not allowing the Preliminary Objection and the Application which both sought its dismissal on the issue of deposit”

120. 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. I note that this sub section does not provide nor limit the grounds for removal of the objection. If I strictly apply the wordings of section 78 as invited by the 1<sup>st</sup> and 3<sup>rd</sup> respondent then I hold that there is no bar for a party to seek for extension of time because there is no express restriction in this section as read with rule 19.

121. A comparative reading and interpretation of Section 96 (2) and (3) of the same Act with section the subject section 78 leaves no doubt as to the fact that unless a deposit of security for costs is made within ten days from the date of presenting the referendum petition, the petition shall be struck out. Unlike Section 96(2) and (3) which commands the striking out of a referendum petition if no security for costs is deposited, Section 78(3) stays election petition proceedings. Staying does not legally mean the same thing as dismissal or striking out. It will be absurd if these two provisions dealing with the same issue of deposit for security for costs within the same 10 days’ timelines were to be given the same legal meaning despite their clear different wordings.

122. Section 78 does not expressly provide that the petition shall stand struck out or null and void for nonpayment of security deposit .

123. I don’t find the debate of whether the security for costs in an election petition is a matter of procedure or a substance the key determinant for reasons given above.



124. Furthermore a purposive interpretation of these provisions still persuades me to look at the object of the provision for deposit security for costs which is to protect a likely successful defendant from loss by way of the costs of litigation incurred in defence of the plaintiff's claim. In Patrick Ngeta Kimanzi case above, Majanja J. dealt with the rationale for the deposit of security for costs. Applying the principle in the Esposito case, the judge said that: -
- “Security for costs ensures that the respondent is not left without a recompense for any costs or charges payable to him. The duty of the court is therefore to create a level playing ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access justice vis-à-vis the respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him.
125. Similarly in *Evans Nyambaso Zedekiah & another v Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR, Justice SITATI observed that “ the requirement for deposit of security for costs keeps away from the court corridors some busy bodies who file cases in court while knowing that such cases have no chance of succeeding and also while knowing that they have no intention of paying the costs once they lose their cases.
126. I am persuaded to adopt this second school of thought and precedents which holds the view that the court has a discretion to enlarge the time for the payment of the security for cost. My position is that the Constitution, Statutes and Rules should be interpreted harmoniously and purposefully to meet the purposes, values and principles of the Constitution, advance the rule of law and permit the development of the law and contributes to good governance.
127. Section 78 of the Act envisages an objection to be filed and once done it means that proceedings are effectively stayed. If the objection is not removed then an application for dismissal is contemplated . see Sec 78(1)(3) of the Elections Act 2011. That is the parent section which donates powers to the 2017 Rule 19(3) which it is clarifies what may not be extended by the court or under the rules.
128. I find that the objection by way of a P.O as lodged herein pursuant to section 78 is not meant and cannot have the effect of dismissing the petition but only meant to stay the proceedings until this objection is lifted or an application for dismissal is filed and allowed.
129. All parties and even this court reaffirms that the rules are subservient to the Act and the Constitution but I don't find the reliance on Rule 19 of the Election Petition Rules extensively submitted on by the parties applicable for the foregoing reasons unless in the very limited sense only to clarity as what cannot be extended by court or by the rules i.e. the period within which a petition is required to be filed, heard or determined.
130. As to the effect of the enlargement of time after the fact, Article 259 (9) of the Constitution, as read with section 59 of the Interpretation and General Provisions Act, cap 2 clearly address this issue.
131. Accordingly, I find that the Court has power to enlarge time for the deposit of security for costs in an election petition.
132. . As to Whether the Petitioner has advanced sufficient reasons for non-payment of the deposit for Security for costs within the stipulated time? It is true that the petitioner has advanced three conflicting reasons. First, the Petitioner raised that his former Advocate filled two Petitions seeking similar reliefs and he did not pay the security for costs as he was awaiting consolidation so that he only pays security for costs in the consolidated suit. That he did not pay security for costs because he verily believed this Petitions of this nature of Party List Petitions do not have this requirement in law. Lastly that there was a technical challenge on the judiciary e-filing portal maintained by the judiciary.



133. Having looked at the reasons advanced indeed the petitioner is not firm as to exactly what reasons prevented him from paying the deposit within time I find that having multiple reasons per se is not a reason to disentitle the applicant. I find the first two reasons advanced as insufficient to convince this court to exercise discretion in his favor.
134. The judiciary has made commendable strides in adoption of technology in its processes. In EDR cases all transactions were to be handled online including filing and payments. The court however takes judicial notice that online transactions on e-judiciary platforms have had some challenges as evident from several notices issued from time to time by the ICT department on downtime or upgrades on the system. Whenever an issue of challenges on accessing e-judiciary system are raised a reasonable court ought not overlook it otherwise an irreparable injustice may be occasioned on an innocent party unless a clear alternative mode is permitted or allowed to deal with a real danger of time bar. Technology is an enabler and not a clog to access to justice as per hon Chief justice's vision of social transformation through access to justice. In Raila Odinga vs Independent Elections and Boundaries Commission & others, Petition No. 5 of 2013 the supreme court directed that while addressing extension of time each case must be considered within the context of its peculiar circumstances. This matter is still at pretrial stage and no party has been prejudiced bearing in mind the nature and purpose of security deposit as earlier noted in this ruling, I am inclined to give the petitioner a benefit.
135. In conclusion the court issues the following orders:
- i. The 3rd respondent's preliminary objection dated 24th October, 2022 is dismissed
  - ii. The petitioner's application dated 8/11/2022 is allowed in terms as prayed.
  - iii. Costs of the P.O and the application shall be in the cause.

**Ruling Dated and Read virtually via Teams Platform this 23rd November 2022**

**P.W. Wasike**

**Senior Resident Magistrate**

In the presence of

Court Assistant .....

For the Petitioner .....

For the 1<sup>st</sup> Respondent .....

For the 2<sup>nd</sup> Respondent .....

3<sup>rd</sup> Respondent .....

