Kiriinya v Independent Electoral and Boundaries Commission & 2 others (Election Petition E001 of 2022) [2022] KEMC 17 (KLR) (22 December 2022) (Ruling)

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REPUBLIC OF KENYA

IN THE MERU LAW COURTS

ELECTION PETITION E001 OF 2022

D NYAMBU, CM

DECEMBER 22, 2022

ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017

THE ELECTIONS ACT, 2011

ELECTION PETITION NO. E001 OF 2022

IN THE MATTER OF ARTICLES 22(1) & (2)(B)(C), 23, 24, 38, 82, 252, 253(B), 258, 260 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE CONTRAVENTION AND VIOLATIONS OF ARTICLES 10(2) (B), 27(4)(6), 54, 55, 56, 90, 177, 193 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF SECTIONS 34, 35, 36 AND 37 OF THE ELECTIONS ACT

IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT, 2011

BETWEEN

SOLOMON KATHUKUMI KIRIINYA ..... PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1ST RESPONDENT

AMINA JASHO ..... 2ND RESPONDENT

FELIX GITHINJI MWIRIGI ..... 3RD RESPONDENT

RULING

1 Directions were taken in this matter on the 23rd November, 2022 and the court directed that the 1st and 2nd Respondents Notice of Preliminary Objection dated 10th November 2022, the 1st and 2nd respondents' application dated 20th September, 2021 and the 3rd Respondents Notice of Preliminary Objection dated 17th November, 2022 be disposed off contemporaneously and that parties herein file written submissions within three days. The respondents filed submissions within time but to date the Petitioner has not filed his submissions.

2 Briefly, the Petitioner was an Independent candidate for the position of the Member of the County Assembly seat in Ruiru/Rwarera Ward, Buuri constituency, Meru County in the general elections held on 9th August, 2022. The Petition dated 7th September, 2022 was filed on the 8th of September, 2022. The Respondents have all filed their replies to the Petition.

3 The issues for determination before me are: -

i. Whether the Election Petition is fatally and incurably defective for offending the mandatory provisions of Section 76(1) of the *Elections Act*; namely that it was filed outside the Twenty-Eight (28) days statutory stipulated time frame.

ii. Whether the Petition offends the mandatory provisions of Rule 12 of the *Elections (Parliamentary and County Elections) Petition Rules* by failing to serve the Respondents at all or within the seven (7) days statutory stipulated time frame.

iii. Whether the Petition offends the mandatory provisions of Section 78 of the *Elections Act* and Rule 13 *Elections (Parliamentary and County Elections) Petition Rules* for failure to deposit the mandatory security for costs on or before the 17th September, 2022 or 10 days after filing of the Petition.

iv. Whether this court had jurisdiction to hear and determine this Petition by virtue of non-compliance with the mandatory provisions of the law.

v. Whether the petition filed on the 8th September, 2022 should be struck out and /or whether the petition is fatally defective; incompetent frivolous; vexations and ought to be dismissed with costs.

4 The Petitioner herein has not filed any response to the 1st and 2nd Respondents Application or to the Notices of Preliminary Objections. He has also not filed any Affidavits of service in this matter. On the 15th November, 2022, the Petitioner was given a further 7 days to deposit the security for costs but to date he has not done so.

Issue no. 1: Whether the Election Petition is fatally and incurably defective for offending the mandatory provisions of Section 76(1)(a) of the Elections Act; namely that it was filed outside the Twenty-Eight (28) days statutory stipulated time frame.

5 Section 76 of the *Elections Act* provides thus:

> Presentation of petitions
>
> (1) A petition—

(a) to question the validity of an election shall be filed within twenty-eight days after the date of declaration of the results of the election and served within fifteen days of presentation;

(b) to seek a declaration that a seat in Parliament or a county assembly has not become vacant shall be presented within twenty-eight days after the date of publication of the notification of the vacancy by the relevant Speaker; or

(c) to seek a declaration that a seat in Parliament or a county assembly has become vacant may be presented at any time.

(2) A petition questioning a return or an election upon the ground of a corrupt practice, and specifically alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his agent may, so far as respects the corrupt practice, be filed at any time within twenty-eight days after the publication of the election results in the Gazette.

(3) A petition questioning a return or an election upon an allegation of an illegal practice and alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned, or by an agent of that person, or with the privity of that person or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition, may, so far as respects the illegal practice, be filed at any time within twenty-eighty days after the publication of the election results in the Gazette;

(4) A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented.

(5) A petition filed in respect of the matters set out in subsections (2) and (3) may, where a petition has already been presented on other grounds, be presented as a supplemental petition.

6 The Petition herein was filed on the 8th September, 2022. The relevant law as stated in Section 76 of the *Elections Act* provides that a Petition, such as this one, ought to have been filed not later than Twenty-Eight (28) days from the date that the election results were announced. The parties herein did not disclose the exact date that the results were announced. My research confirms that the results were announced on the 10th or 11th August 2022 and therefore this Petition ought to have been filed at the latest on the 7th September, 2022.

7 The court stated in *Paul Posh Aborwa v Independent Election & Boundaries Commission & 2 others* [2014] eKLR thus:

> In our case section 76 of the *Elections Act* did not at any time prevail over the constitutional provision in Article 87. The hierarchy of norms has always been clear under section 3 of the *Judicature Act*, chapter 8 of the laws of Kenya. All other written laws are subject to the Constitution. The Constitutional provisions rank in priority over statutory provisions. Article 2 of the *Constitution* declares the supremacy of the Constitution. Any law inconsistent with the Constitution is void ab initio. It cannot therefore be said that

any person could legitimately rely or conduct their affairs on the basis of Section 76 of the *Elections Act* in view of the supremacy of the constitutional provision in Article 87. We therefore reiterate that the decision of the Supreme Court did not entail a change in the law and the question of whether that decision has retroactive or prospective application does not arise.

8 The English House of Lord had occasion to deal with this question in the case of *In re Spectrum Plus Ltd (In Liquidation)* [2005] UKHL 41. The judgment of Lord Nicholls is illuminating. We quote at length from his judgment to the extent that we consider his views apply to the case before us. He stated:

> " ...the interpretation the court gives an Act of Parliament is the meaning which, in legal concept, the statute has borne from the very day it went onto the statute book. So, it is said, when your Lordships' House rules that a previous decision on the interpretation of a statutory provision was wrong, there is no question of the House changing the law. The House is doing no more than correct an error of interpretation. Thus, there should be no question of the House overruling the previous decision with prospective effect only. If the House were to take that course it would be sanctioning the continuing misapplication of the statute so far as existing transactions or past events are concerned. The House, it is said, has no power to do this. Statutes express the intention of Parliament. The courts must give effect to that intention from the date the legislation came into force. The House, acting in its judicial capacity, must give effect to the statute and it must do so in accordance with what it considers is the proper interpretation of the statute. The House has no suspensive power in this regard ". [Emphasis added]

9 Regarding the question whether we have jurisdiction to dispose of this appeal on the basis of the preliminary objection when that objection was never canvassed before the Election Court, our answer is that we do. The Supreme Court and this Court have said in many decisions that jurisdiction is everything. In *Tononoka Steels Ltd v The Eastern and Southern Africa Trade and Development Bank* this court took the view that a point of law may be taken for the first time in appeal where an investigation of disputed facts is not involved, where no question of evidence arises and that the court may on its own motion raise a point of law where there is a question of jurisdiction. In our view the fact that the petition was filed outside of the time prescribed under Article 87 of the *Constitution* is not disputed. It is also not disputed that the objection relates to the jurisdiction of this court to entertain the appeal. For those reasons we consider the objection as properly been taken before us.

10 The result of the foregoing is that we uphold the preliminary objection and determine that we have no jurisdiction to hear and determined the appeal emanating as it does from proceedings that are a nullity by reason of having been instituted outside of the time limit set out under Article 87 (2) of the *Constitution* 2010. We accordingly dismiss the appeal with costs to the respondents.

11 The Petitioner herein has not countered the arguments by the Respondents herein. My finding is that this Petition was filed out of time and is therefore incompetent and ought to be stuck out.

Issue No. 2: Whether the Petition offends the mandatory provisions of Rule 10 of the Elections (Parliamentary and County Elections) Petition Rules by failing to serve the Respondents at all or within the Fifteen (15) days statutory stipulated time frame.

12 Section 77 (2) of the *Elections Act* provides:

> (2) A petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation.

13 Rule 10 of the *Elections (Parliamentary and County Elections) Petition Rules* stipulates as follow:

> Service on the respondent
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> (1) Within fifteen days after the filing of a petition, the petitioner shall serve the petition on the respondent by—
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> (a) direct service; or
>
> (b) an advertisement that is published in a newspaper of national circulation.
>
> (2) Service on the Commission shall be by—
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> (a) delivery at the constituency, county or head office of the Commission;
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> (b) delivery at such other office as the Commission may notify; or
>
> (c) an advertisement that is published in a newspaper of national circulation.
>
> (3) Where a petition is served in accordance with sub-rules (1) (b) and (2) (c), the advertisement shall comply with these Rules if the advertisement is—
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> (a) in Form 3 set out in the First Schedule;
>
> (b) of at least font size twelve; and
>
> (c) captured in dimensions of not less than ten centimetres by ten centimetres.
>
> (4) A person served with a petition shall file and serve upon all the other parties a notice of address for service within five days from the date of such service.

14 Regarding the issue of service of Election Petitions, the court in *Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 others* [2013] eKLR stated thus:

> The background leading to the enactment of these provisions is well known and documented. The provisions of the *Constitution* and *Elections Act*, 2011 regarding the mode of service were intended to ameliorate the rigours imposed section 20 of the then *National Assembly and Presidential Elections Act* (Repealed) and the interpretation given by the courts that personal service of the petition was the best form of service and that other modes of service could only be resorted to when the petitioner had exercised due diligence in effecting personal service on the petitioner. See generally *Kibaki v Moi* [2000] 1 E A 115, *Abu Chiaba Mohamed v Mohamed Bakari* CA Civil Appeal No. 238 of 2003 (2005) eKLR, *M'Mithiaru v Maore and Others* (No. 2) (2008) 3 KLR (EP) 730, *Justus Mungumbu Omiti v Walter Enock Nyambati Osebe and 2 Others*(Supra)and *Nasir Mohammed Dolal v Duale Aden Bare and Others* Nairobi EP No. 28 of 2008 (Unreported).

15 The situation has now changed and the petitioner has the right to elect the mode of service either by way of advertisement in a newspaper of national circulation or by direct service. It is noteworthy that the section 77 of the *Act* uses the term, "personal service" rather than "direct service." In *Abdikham Osman Mohamed and Another v Independent Electoral and Boundaries Commission and others* Garissa

EP No. 2 of 2013 (Unreported), Hon. Justice Mutuku dealt with the issue of direct service envisaged under the Article 87 and section 77 of the *Act* as follows,

> "[8] What is personal or direct service? The Constitution refers to direct service; the Act refers to personal service while the Rules refer to direct service. The Black's Law Dictionary (Eighth Edition) defines personal service as "actual delivery of the notice or process to the person to whom it is directed".
>
> It also states that personal service is termed as actual service. I think I am not wrong to state that personal service and direct service refer to the same mode of service which connotes the physical presence of the person being served."

Likewise Hon. Justice Kimondo in *Steven Kariuki v George Mike Wanjohi and others* Nairobi EP No. 2 of 2013 (Unreported) observed that,

> "Section 77 (2) of the *Elections Act* 2011 and Rule 13 of the *Elections (Parliamentary and County Elections) Petition Rules* 2013 provide for the modes of service of an election petition. They are a departure from the era of personal service touted in *Kibaki v Moi* [2000] 1 E A 115. Now, service can be either personal on the respondent or by advertisement in any daily newspaper with national circulation. In the latter case, the advertisement must be carried within 14 days and conform with the requirements of Form EP 3 in the Rules. Section 77 (2) provides that the petition may be served personally. Rule 13 (a) of the *Petition Rules* states that the petition shall be served by direct service. Article 87 of the Constitution also uses the term direct service. On the face of it, the two terms may seem different but on closer scrutiny direct or personal service is mere tautology: it simply means service personally on the respondent."

I agree with these sentiments.

16 Although the regime of service of election petitions has been liberalised. The requirement of service was not dispensed with. Service of the petition is still a requirement under the *Constitution*, the *Act* and the *Rules*. Without service, the opposite party is denied the opportunity to defend the case. Service is an integral element of the fundamental right to a fair hearing which is underpinned by the well-worn rules of natural justice. As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against him. Elementary justice demands that a person be given full information on the case against him and given reasonable opportunity to present a response. In *Kumbatha Naomi Cidi v County Returning Officer, Kilifi and others*, Malindi EP No. 13 of 2013 (Unreported), Hon. Justice Muchemi dealt with a petition that was not served as follows,

> "The petition was filed within the stipulated period but it was not served. Any pleading filed and not served on the opposite party has no legal force. It cannot be dealt with by the court and no lawful order can be drawn from it. Service of a pleading accords the opposite party the chance to be heard. It is my considered opinion that this petition is a petition that never was."

In *Mohamed Odha Maro v the County Returning Officer, Tana River and others*, Malindi EP No. 15 of 2013 (Unreported) Justice Githua had this to say about service.

> "The purpose of service of a petition is to give notice to the Respondents or persons affected by the petition that a petition had been filed challenging the outcome of the elections and the grounds upon which the challenge had been instituted to enable them prepare their responses and to defend their respective positions regarding the conduct of the contested

> elections. Service provides the Respondents with an opportunity to be heard and goes to the root of the all important tenets of the principle of fair trial and good administration of justice... Failure to serve a Petition is a matter that goes to the very core of the proper and just determination of the petition and cannot be wished away."

I concur with the positions taken by the learned Justices and I find and hold that service of the petition is a mandatory requirement and a petition that has not been served cannot proceed for hearing as the respondent is denied the opportunity to contest the facts in the petition. Mere knowledge of existence of a petition by the respondent can neither cure want of service nor discharge the burden of service imposed on the petitioner by the law. (Emphasis mine)

17. In *Saad Yusuf Saad v Independent Electoral and Boundaries Commission (IEBC) & 2 others* [2017] eKLR the Learned Judge stated:

> In the circumstances I do find that service upon Mohamed the purported agent of the 3rd Respondent is not proper service as contemplated under the law. In so finding, I am guided by the Court of Appeal in the case of *Rozaah Akinyi Buyu case* (*supra*), where it observed:
>
> > "As we have shown, service of the Petition upon the respondents was a fundamental step in the electoral process and resolution of disputes arising therefrom. Failure to serve the petition upon the respondents went into the root of the petition and the petition could not stand when there was failure to serve the same.

18 Having evaluated the evidence and the law relevant in this matter, I draw the conclusion that service of the Petition was not effected upon the 3rd Respondent as required by Rule 10(1) of the *Election Petition Rules*. Secondly, The Petitioner failed to comply with Rule 8(1) (a) (c) (f) and Rule 12(2) (a) (c) and (f) of the *Election Petition Rules*. In the circumstances the finding of this Court is that the Petition herein is incurably defective and the same is hereby struck out

19 The Petitioner has to date not filed an Affidavit of Service of the Petition. There is nothing in the case file that suggests that the Petition was served as required by the law. The Respondents claim that to this date the Petition is yet to be served upon them in the manner prescribed in the rules. I have absolutely no reason to doubt the Respondents.

20 Guided by the case law cited above and submissions by the Advocates for the Respondents, my finding is that there was no service of the Petition upon the Respondents at all. There is absolutely nothing placed before me to suggest that there was service. As stated above no affidavits of service were filed by the Petitioner herein to prove service. When this matter came for pre-trial directions before me on the 15th November, 2022, I asked the Petitioner if they had served the Petition and he said that they did serve on the 14th September, 2022. The only way to prove service is by filing of an Affidavit of service.

21 The Petitioner failed to prove that there was proper service of the Petition upon the Respondents within the prescribed period or at all. This Petition is therefore incurably defective and ought to be struck out.

Issue No. 3: Whether the Petition offends the mandatory provisions of Section 78 of the Elections Act and Rule 13 Elections (Parliamentary and County Elections) Petition Rules for failure

to deposit the mandatory security for costs on or before the 17th September, 2022 or 10 days after filing of the Petition.

22 Section 78 of the *Elections Act* states: -

Security for costs

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

(2) A person who presents a petition to challenge an election shall deposit-

(a) 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.

23. Rule 13 of the *Elections* Provides:

Deposit of security for costs

(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;

(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.

(3) The Registrar shall—

(a) issue a receipt for the deposit under this rule;

(b) shall file the duplicate of the receipt issued under paragraph (a) in a record kept by him or her;

(c) keep a record of deposits in which shall be entered from time to time the amount of a deposit and the petition to which the deposit relates;

(d) allow any person concerned with the petition to examine the record of deposits.

24. The petitioner herein has to-date not deposited the security for costs of Ksh. 100,000/=. To use the words of Counsel for the 3rd Respondents, the court has been more than gracious and benevolent by granting the Petitioner an extra seven days from the 15th November, 2022, to deposit the costs. On the 23rd November, 2022, the Petitioners advocate submitted that they were willing to pay costs, this cannot be true, if indeed the Petitioner was willing to deposit security for costs how would have done so within the mandatory ten (10) days period provided after filing the Petition or within the extra seven (7) days that the courts had allowed. Failure to deposit the mandatory security for costs renders this Petition fatally defective. This is the position that the courts have taken. The following authorities are relevant in this regard.

A. *Ibrahim Ahmed v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR the courts stated:

> This court has carefully considered the arguments put forward by the parties to this application. Whereas the Petitioner is of the view that even at this stage of the proceedings this court can exercise its discretion and extend time for the Petitioner to make the deposit for the security for costs, the Respondents are of a contrary view. They have submitted that failure by the Petitioner to make the deposit for security for costs within the stipulated period of ten days after the filing of the petition renders the petition fatally defective and unsustainable. Several courts of concurrent jurisdiction have rendered conflicting opinions on this issue. In *Fatuma Zainabu Mohamed v Ghati Dennitah & 10 Others* [2013] eKLR and *Samuel Kazungu Kambi v Nelly Ilongo & 2 Others* [2017] eKLR, the courts held that failure by the Petitioner to deposit security for costs within the stipulated statutory period was not fatal to the petition and therefore amenable to the court's discretion to extend time to enable the Petitioner comply with the requirement for the deposit of security for costs. In *Evans Nyambaso Zedekiah & Another v Independent Electoral and Boundaries Commission & 2 Others* [2013] eKLR the court (Sitati J) held thus:
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> > "This issue was considered by Muriithi J in Kisii HC Election Petition No.6 of 2013 – *Fatuma Zainabu Mohamed v Ghati Dennitah & 10 others* (unreported) on an application for extension of time to make the deposit. The Learned Judge noted that the law commands that where no security for costs is given "whether it is ordered in exercise of discretion by the court or by statutory requirement" then no further proceedings in the matter should be undertaken by the court. He concluded the matter by saying the following:-
> >
> > > "Accordingly, security for costs, whether it is required by statutory provision or order of the court, must be taken

> as going to the root of the jurisdiction of the court to entertain the dispute. If no security for costs is deposited, then the petition or other proceeding though validly lodged before the court in accordance with the applicable procedure rules cannot proceed to hearing and determination as further proceedings are prohibited. As such, the provision for security for costs is, in my view, a substantive requirement underpinning the jurisdiction of the court to deal with the dispute in the proceeding in which the security for costs is required, and is based on the sound principle for the protection of the defendant from unrecoverable costs." (Emphasis mine)

Other courts have held that failure to deposit security for costs within the stipulated statutory period renders the petition fatally defective and therefore liable for striking out. These cases include: *Tom Onyango Agimba –vs – IEBC & 2 others* Nairobi HC Election Petition No.18 of 2017 (unreported), *Milton Kimani Waitinga v IEBC & 2 Others* Kiambu HC Election Petition No.2 of 2017 (unreported) and *Robert Mwangi Kariuki v IEBC & 2 Others* Nyeri HC Election Petition No.1 of 2017 (unreported). In *Milton Kimani Waitinga* (*supra*) Joel Ngugi J held thus:

> "In the circumstances, given the clear stipulation of Section 78(2)(b), Rule 13 and our decisional law, it follows that the notice of motion dated 21/09/2017 must succeed. The clear requirement of the statute and subsidiary legislation is that a petitioner is required to deposit security for costs within ten days of filing their petition. This did not happen here. Indeed, more than thirty-seven (37) days later (at the time of arguing the application), the petitioner had not paid the security deposit. The petitioner had, also, not made any effort to get the leave of the court to deposit security for costs out of time."

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 lodgment of the petition. The Petitioner argued that he had made effort to pay the said deposit but was unaware that the cheque that he had deposited for the said deposit had been returned unpaid due to lack of funds in his account. This explanation is not persuasive. It was the duty of the Petitioner to ensure that his account had sufficient funds to cater for the cheque that he intended to deposit as security for costs. Further, this explanation does not hold in light of the fact that the deposit was supposed to be made with the Registrar of the court who was required to issue a receipt for the said deposit to the Petitioner. The Petitioner's explanation that he made the deposit directly to the Judiciary's account beggars belief. In any event, the Judiciary no longer accepts personal cheques for any payments made to the court. It was clear to this court that the Petitioner did not make the said deposit as he has alleged.

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. The requirement for the deposit for security of costs is a substantive legal requirement and is not a procedural technicality that this court can excuse or extend time to enable compliance to be made. The petition herein is therefore struck out with costs to the Respondents. (Emphasis mine)

Rule 5 of the *Election Rules* provides;

> "The effect of any failure to comply with those rules shall be a matter for determination at the courts discretion subject to the provisions of Article 159 (2) (d) of the *constitution*".

The petition herein was not served upon the respondents at all. Further, the petitioner failed to furnish security as is mandatorily required by The *Election Act*. Even if the court were to decline to allow withdrawal of the petition for want of compliance with Rule 24 of *Election Rules*, it is my considered view that the entire petition stand no chance of survival. In the case of *Chelaite v Njuki & Others* No. 3 2008 2KLR 2009 Poll 5A (as he then was) stated.

> "once the election court is satisfied that due to failure to serve the petition within the time prescribed by the law, the petition has become a nullity it surely has the power to strike it down without any mere ado".

B. In *Evans Nyambaso Zedekiah & another v Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR the court stated:

> .....In the *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* (*supra*), 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. (see *Harit Sheth Advocate v Shamas Charania* – Nairobi Court of Appeal, Civil Appeal No.68 of 2008 [2010] e KLR."

I entirely agree with the learned judges in holding that the deposit of security for costs is a substantive issue that goes to the root of the proceedings as non-payment of the same deprives the court of the jurisdiction to deal with the matter further. I also agree 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. There is no argument that a court which has no jurisdiction cannot move one single step in a matter that is before it. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1.

C. In *Omari Juma Mwakamole v Independent Electoral & Boundaries Commission& 2 others* [2017] eKLR It was stated: -

> I do take note that the foregoing decisions were rendered by courts of concurrent jurisdiction and are therefore of persuasive value to this court. My understanding of the provisions of Section 78(1) of the *Elections Act* is that it sets in mandatory terms the timelines for deposit of security as being within 10 days from the date of filing of a petition. The legislature did not make it mandatory for the deposit of security for costs to be made at the same time as when a petition is filed. This therefore gives a petitioner a grace period of 10 days from the time of filing the petition to the time for deposit of security for costs. This essentially factors in any exogenous factors that may come into play to hinder the deposit of security for costs as at the time of filing the petition. This therefore means that a petitioner who fails to exploit the 10 days' window of opportunity granted under the provisions of section 78(1) of the Elections Act runs afoul of the law. Situations may arise where a deposit of security for costs has been made but not captured on the court records, such a petitioner would have the opportunity to address the court on the said issue under the provisions of section 78(3) of the *Elections Act*, 2011.
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> ..... A petitioner who fails to deposit security for costs puts on hold progression of the petition as no further proceedings can be heard on the petition and by so doing interferes with the timelines set for hearing of election petitions. It is therefore my finding that failure to deposit security within the timelines allowed is not an error that is curable under the provisions of Article 159 (2) (d) of the *Constitution*. Although Counsel for petitioner has cited the provisions of Rule 19(1) of the *Election (Parliamentary and County) Petition Rules*, 2017 which give a court powers to exercise its discretion under the rules or as ordered by the court, I hold that the said provisions are subservient to the provisions of Section 78 of the *Elections Act*. Rule 13 of the *Election (Parliamentary and County) Petition Rules*, 2017 borrows its provisions from section 78 of the *Elections Act* by stating that a petitioner shall deposit security for the payment of costs within 10 days of the filing of a petition in compliance with section 78(2) and (c) of the *Act*. It is therefore clear that section 78 and rule 13 of the *Election (Parliamentary and County) Petition Rules* leave no room for ambiguity on the non-elasticity of the timelines for deposit of security for costs.
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> Counsel for the 3rd respondent aptly cited the case of *Lemanken Aramat v Harun Meitamei Lempaka and 2 Others* (*supra*) where the Supreme Court stated as follows: -
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> > 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*.

> 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 3rd 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." (emphasis added).
>
> In this instance, the petitioner filed the petition on 6th September, 2017 and went to sleep. He only awakened on receipt of the applications by the respondents seeking orders for the court to strike out and/or dismiss his petition. By then, almost 2 months had elapsed since he filed the petition. This in essence shows that the petitioner was not serious in setting the petition in motion. As Mr. Asige so well put it, the petitioner is a busy body and a political idler and if I may add, a spoilsport. His laidback approach to the petition shows a petitioner who was not convinced of the course he had charted. I say this as Section 78(3) of the *Elections Act* is specific that if no deposit for security for costs is made, that 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. Until such a time that courts superior to this are moved by litigants to render themselves on the issue of extension of time for deposit of security for costs, High Court decisions on the same will remain diverse. (Emphasis mine)
>
> ..... 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.

25. The present Petition is very similar to the *Omar Juma Mwakamole*, *supra*, case in that in this matter, the Petitioner filed this Petition and then he went to sleep. He was served with the replies, application and the objections by the Respondents but he never responded. Other than failing to serve his Petition, he did not move the court to fix a date for pre-trial directions or hearing. The court had to fix dates on its own motion and serve the parties. The Petitioner did not deposit the mandatory security for costs. He did not even fie submissions in response to the Objections and the preliminary Objections filed. His laid back approach, using the words in *Omar case* cited above, shows a Petitioner who is not convinced of the course he had charted. The only option left is to dismiss the Petition herein.

Issue No. 4: Whether this court had jurisdiction to hear and determine this Petition by virtue of noncompliance with the mandatory provisions of the law.

26. *Milton Kimani Waitinga v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR

> In the circumstances, given the clear stipulation of Section 78(2)(b), Rule 13 and our decisional law, it follows that the Notice of Motion dated 21/09/2017 must succeed. The clear requirement of the statute and subsidiary legislation is that a Petitioner is required to

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

27. This court has no jurisdiction to keep this Petition alive. Failure to file the Petition within time; failure to serve the same within the prescribed period or at all; and failure to deposit security for costs strips this court of jurisdiction to hear this matter.

Issue No. 5: Whether the petition filed on the 8th September, 2022 should be struck out; and /or Whether the petition is fatally defective; incompetent frivolous; vexations and ought to be dismissed with costs.

28. From the foregoing the court has no option but to determine this matter. There is absolutely no reason to keep this Petition alive.

29. Having evaluated the evidence and the law relevant in this matter, I draw the conclusion that the Petition herein was filed out of time; service of the Petition was not effected upon the Respondents as required by Rule 10(1) of the *Election Petition Rules* and the failure by the petitioner to deposit security for costs renders the petition incurably defective irredeemable and the same is hereby struck out. The Respondents Preliminary Objections are merited and the same are allowed. Similarly, the 1st and 2nd Respondents application dated 20th September, 2022 is allowed. The Respondents will have costs of the Objections, application and the Petition. As required by the law a Certificate pursuant to Section 86(1) of the *Elections Act*, 2011 be and is hereby issued.

SIGNED, READ, DATED AND DELIVERED IN OPEN COURT THIS 22ND DAY OF DECEMBER, 2022 AT 10.30AM VIA MICROSOFT TEAMS IN THE PRESENCE OF:

HON. D. W. NYAMBU

CHIEF MAGISTRATE

12.2022

Mrs. Kamau for the 1st and 2nd Respondent

Mr. Ken Muriuki for the 3rd Respondent

N/A for Mr. Kariuki Njiru for the Petitioner

Petitioner present in person

Court Assistant Miss Wambui