



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT ELDORET

ELECTION PETITION NO.1 OF 2017

REGINA CHEPKEMBOI CHUMBA.....PETITIONER

VERSUS

JUBILEE PARTY.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....2ND RESPONDENT

AND

NANCY SANG.....1ST INTERESTED PARTY

JEPTOO HELLEN.....2ND INTERESTED PARTY

TIROP BELINDA.....3RD INTERESTED PARTY

KEMBOI KESUMO MARIA.....4TH INTERESTED PARTY

SAMBAI JEPKEMBOI LEAH.....5TH INTERESTED PARTY

RONO JEBET ALICE.....6TH INTERESTED PARTY

MAIYO JEPKOECH ZIPPORAH.....7TH INTERESTED PARTY

JERUTO BARBEGI.....8TH INTERESTED PARTY

KENDAGOR JEPKOECH EILEEN.....9TH INTERESTED PARTY

BITOK JOAN CHESEREM.....10TH INTERESTED PARTY

HON. DR. BARMAO CATHERINE KIPTANUI.....11TH INTERESTED PARTY

MALOT LEAH JEMELI.....12TH INTERESTED PARTY

JENNY JEBET TOO.....13TH INTERESTED PARTY

SAMORA MACHEL.....14TH INTERESTED PARTY

BOROSWA MARY GORETI.....15TH INTERESTED PARTY

EDWIN KIPKOECH MISOI.....16TH INTERESTED PARTY

KOSGEI SALINA.....17TH INTERESTED PARTY

RULING

INTRODUCTION

Before me are 3 applications, one filed by the Petitioner dated 29.9.17, another by the 2nd Respondent dated 27.11.17 and the last by the Interested Parties also dated 27.11.17.

As will be shown shortly, all the applications are intertwined hence the need to deliver one ruling.

PETITIONER'S APPLICATION

The Petitioner filed an application under Certificate of Urgency seeking to have the court waive the requirement of depositing security of 100,000/-.

The grounds in support in summary are that: -

- 1. The Petitioner is a person living with disability and is representing 400 other persons.*
- 2. She is not capable of raising the security.*
- 3. The requirement of deposit is a technicality and contravenes the Articles 174(e) and 56(a) of the Constitution which protects the interests and rights of marginalized and minority persons.*

RESPONSE BY INTERESTED PARTIES TO THE PETITIONERS APPLICATION.

The firm of Z.K. Yego and Co. Advocates filed grounds of opposition stating that:

- 1. A Petitioner in a case against a Member of the County Assembly shall deposit in court security of 100,000/- Under Section 78(2) of the Elections Act 2011.*
- 2. Under the Law, the Petition is incompetent.*
- 3. The court should deter frivolous litigants.*

RESPONSE BY 2ND RESPONDENT TO THE PETITIONERS APPLICATION

The firm of Kaptich & Co. Advocates, filed grounds of opposition stating that:

- 1. The requirement to deposit the security is mandatory.*
- 2. Having failed to deposit, no further steps can be taken by the Petitioner.*

2ND RESPONDENTS APPLICATION

An application was filed seeking to strike out the Petition. The grounds on the face of the Application and Supporting Affidavit by Joseph Songok, it is stated that:

- 1. The Petition was filed on 5.9.17 and served on them on 5.10.17 after the requisite 15 days.*
- 2. The Petitioner failed to deposit the security of 100,000/-.*

3. *The Petition is incompetent and should be dismissed.*

INTERESTED PARTIES APPLICATION

The interested parties filed an application seeking to have the Petition dismissed. On the face of the Application and the Supporting Affidavit by Zipporah Jepkoech Maiyo, the grounds in support are that:

1. *The Petitioner having filed the case did not deposit security of 100,000/-.*
2. *The petitioner offends the requirements of Section 78 of the Election Act which is mandatory.*
3. *The Petition should be dismissed as being legally untenable.*

PETITIONERS RESPONSE TO APPLICATIONS BY RESPONDENT AND INTERESTED PARTIES

The Petitioner filed a short response stating that:

1. *Pursuant to Articles 48 and 159 (2) of the Constitution the petition is competent due to the overriding objective of access to justice.*
2. *Under Section 5 and 21 (i) of the Elections Act (Election Petition Rules), the Petition is properly before court.*

ISSUES FOR DETERMINATION

From the 3 applications what the court is called to determine is whether:

1. *The Petitioner failed to deposit security of 100,000/-.*
2. *The Petitioner is entitled to have the requirement of security waived.*
3. *The Petitioner failed to serve the Petition on the Respondents within the stipulated 15 days' period.*
4. *The 2nd Respondent and Interested Parties are entitled to have the Petition dismissed for failure to comply with the Law.*

PETITIONERS SUBMISSIONS ON ALL APPLICATIONS:

Written submissions were filed by Gilbert Kiprotich & Co. Advocates stating that Under Article 48 and 159(a) of the Constitution, there is an overriding objective to access to justice and the courts should not be bound by technicalities. Whereas it is admitted that the security was not paid, the Petitioner argues, she has filed an application for waiver of the same as her Petition is not frivolous.

With reference to the Case of **LYDIA MAITHA VS NAISULA LESULIDA (2013) Eklr**, it was submitted that the requirement to deposit security was hindering her access to Justice yet she is a person living with disability. Reference was also made to Section 5 and 21 (i) of the Election Petition Rules, where Counsel argued gives the court discretion where there is failure to comply with rules.

Under Article 159 (2) of the Constitutions, it was suggested that the court should follow the overriding objective of enabling the court to deal with cases justly. Reference was made to the case of **NICHOLAS KORIR SALAT VS IEBC (2013) Elkr**

2ND RESPONDENT SUBMISSIONS

The first issue raised is that the Petitioner cannot purport to file suit on behalf of persons living with

disability as they are not named. Reference was made to the case of **KIRINYAGA UNITED BAR OWNERS VS COUNTY SECRETARY KIRINYAGA COUNTY GOVERNMENT (2014) ELKR.**

As to the issue of security, it was submitted that:

Under Section 78(2) © of the Election Act, a Petitioner in a case against a Member of County Assembly shall deposit 100,000/-. Counsel cited the case of **PATRICK KIMANZI VS MARCUS MUTUA (2013) Eklr.** in which it was held that deposit of security is mandated by statute in imperative terms and is not an irregularity or technicality.

On the third issue of Service of the Petition, it was submitted that the Petitioner breached Section 76(1)(a) of the Election Petition Rules by serving the Respondents after 30 days instead of the stipulated 15 days. Counsel cited the case of **JACINTA MWATELA VS IEBC & 3 OTHERS (2013) EKLK.**

INTERESTED PARTIES SUBMISSION

In line with their application, their Counsel only addressed the issue of deposit of security only. According to Counsel, Under Section 78(2) of the Election Act, and Rule 11 (i) of the Petition Rules, the Petitioner is required to deposit a security of 100,000/- within 10 days. It was argued that this is a mandatory requirement meant to offer compensation to a successful party and curb mischief and abuse of the Electoral Process by frivolous litigants. To support the argument several cases were cited:

IBRAHIM AHMED VS IEBC (2017) EKLK, NORRIS MUINDI VS NAOMI SHABAN & OTHERS (2017) EKLK and lastly the case of **RAILA ODINGA VS IEBC AND OTHERS (SUPREME COURT PETITION NO.5 OF 2013)**

ANALYSIS AND DETERMINATION

The court record shows that this Petition was filed on 5.9.17 alongside an Application Under Certificate of Urgency seeking to restrain the Interested Parties from being sworn in. When the Petitioner Advocate appeared in court, I did point out that since courts had not been gazetted by the Chief Justice to handle Petitions no Substantive Orders could be granted. The Petitioner was directed to serve the parties then and the matter be mentioned within 2 weeks on 19.9.17.

On the said date Counsel for the Petitioner informed the court that they had not served, as they were awaiting for the courts to be gazette.

On 3.10.17, there was still no service and Counsel then informed the court that they had filed an application seeking to waive the requirement of deposit of security.

On 10.10.17 Mr. Keter informed the court service had been done. Mr. Chanzu Advocate appeared for the interested parties and Mr. Baraza for the 2nd Respondent.

FINDINGS ON SERVICE

Under Section 76(1)(a) of the Election Act, it is provided that a Petition

“To question the validity of an election shall be filed within 28 days after date of declaration of the results of the Election and served within 15 days of presentation. (Emphasis mine)

The Petition having been filed on 5.9.17, the same should have been served on the respondents within 15 days meaning on/or before 20.9.17. The Affidavit of Service presented by Patrick Ongeri dated 6.10.17 shows that on 4.10.17 he served the Interested Parties in Eldoret.

On 5.10.17 the Process Server travelled to Nairobi and served the 1st and 2nd Respondents.

It is apparent that the Respondents and the Interested Parties were served way after the 15 days as stipulated by Law Under Section 76(i)(e) of the Election Act. The Petitioner did not file a replying affidavit to explain the delay in serving the Petition. Only grounds of opposition were filed which is not sufficient to address issues of fact. It is in the submissions that Counsel stated that the court has a discretion to extend time where there is failure to comply with the Rules Sections 5 of the Election (Parliamentary and County Election), Petition Rules States that

“The effect of any failure to comply with the rules shall be a determination at the courts discretion subject to the provisions of Article 159(2) of the Constitution.

While quoting the above, the Petitioner did not quote any cases to support their argument. In the “Bench Book on Electoral Disputes Resolution” Compiled by the Judiciary in 2017, a Section in Chapter 4 is dedicated to the issues of filing and service of Election Petitions with regard to Parliamentary and County Election Petitions reference was made to the following cases.

- **ROZA AKINYI NUYU VS IEBC & 2 OTHERS CA 40 of 2013 KISUMU**
- **CHARLES KIMUREN VS GRACE CHELAGAT (ELECTION PETITION NO.1 OF 2013 ELDORET.**

The dictum of the Court of Appeal was that service of the Petition upon the Respondents was a fundamental step in the Electoral Process and Resolution of Disputes arising therefrom. Failure to service an Election Petition in the prescribed manner and within the prescribed time or at all is a fatal mistake. There is no reason given why the Petitioner did not serve the Respondents and the Interested Parties within 15 days even after the court directed them to do so on 5.9.17.

The Election Courts are called upon to strictly enforce requirements relating to prescribed timelines in Electoral Dispute Resolution. In the case of **PETER GATIRA MUNYA VS DICKSON GITHINJI (Petition No.2'b'of 2014)**, the Supreme Court explained the Historical Context and rationale for the strict enforcement of Electoral Dispute Resolution timelines and had these to say:

‘The Constitution in Article 87(i) must be viewed against the County’s Electoral history. Fresh in the memories of the Electorate are those times of the past when Election Petitions took as long as 5 years to resolve making a complete mockery of the peoples’ franchise.’

In the Bench Book on Electoral Dispute Resolution referred to earlier, based on the Raila Petition of 2013, the cases of **PAUL ABWORA VS IEBC CA 52/ 2013 and MARY WAMBUI VS PETER GICHUKI PETITION 7/2016)**. It was summarized that the courts are hesitant to uphold legislation or conduct that tends to undermine the Constitutional Objectives of timely Resolution of Electoral Disputes. The need to avoid the inordinate delays that previously characterized Electoral Disputes. The need to avoid the inordinate delays that previously characterized Electoral Dispute Resolution may occasionally justify strict enforcement of timelines even in circumstances where strictness is arguably inconsistent with need to Resolve Electoral Disputes on their substantive merits. Prescribed Electoral Disputes timelines therefore are not mere legal or procedural technicalities within the meaning of Article 159(2) of the Constitution, **(LEMANKEN ARAMAT VS HARUN LEMPAKA & 2 OTHERS SUBORNATE COURT PETITION 5/2014.**

From the foregoing, it is clear that the Petitioner was required to serve the respondents within 15 days but did not do so. Service was done almost one month later Contrary to the Law.

FINDINGS ON DEPOSIT OF SECURITY.

At the outset it is not in dispute that the Petitioner did not deposit Security of 100,000/- as required by law. Under Section 78(i) of the Elections Act, it is provided *that one who challenges the Election of a Member of County Assemblies shall deposit 100,000/-*. Under Rule 11(i), *the Petitioner has upto 10 days to deposit the amount*. while admitting that the security was not deposited, the Petitioner filed an application seeking to have the court waive the requirement. The reasons given are that the Petitioner is a

person living with disability and is unable to raise the amount. The Petitioner argued that Under Article 159 (2) of the Constitution and Articles 48, she has a right to access justice and the court should not be bound by technicalities. The Petitioner did not cite cases specific to the issue of waiver of depositing of security. According to the Respondents and Interested Parties, the requirement for deposit of security is mandatory.

The court has considered, the authorities cited by the Respondents. In the Voi Case, Justice Kamau ruled that:

“Failure to deposit security for costs is not a procedural technicality that can be cured by Article 159(2) (d) of the Constitutions. Notably that Article is not a panacea of all omissions as some actions are hinged on mandatory and not discretionary Provision of Law.

In the Ibrahim Ahmed case this is what Justice Kimaru had to say

“the requirement for the deposit of security of costs is a substantive legal requirement and is not a procedural technicality that the court can excise or extend time to enable compliance to be made.”

In a recent case of **MORRIS MUTISA VS NAOMI SHABAN (2017)** Elkr, Justice Kamau, sitting in Voi High Court held that the requirement to deposit security is couched in mandatory terms and the objective of deposit of security is to offer recompense to a successful respondent. Equally important such deposit services to discourage any

Tom, Dick and Harry who might be busy bodies from filing frivolous petitions. In her assessment, failure to deposit security was a substantive issue that went to the root of the Petition as Section 78(i) of the Elections Act was mandatory. The law does not make provision of waiver of depositing of such security and if parliament thought otherwise while enacting the law, nothing would have been easier than they making provision for the court to waive the requirement. Recently during the petition challenging the Presidential Elections, there are petitioners who sought to file petitions without depositing the requisite security and the Supreme Court declined the requisite.

For the court to waive the requirement for deposit, would be going against the law which does not give the court discretion to do so. The Petitioner may have laid a good argument on account of being disabled and that she should not have her rights curtailed. The Constitution implores that people living with disabilities and marginalized groups should be given special considerations. If per chance that courts were ever to waive the requirement to deposit security where would that leave the Petitioner? She would still be in dire straits since an objection has already been raised on the issue of service of the petition which is a substantive issue that goes to the root of the Petition. The respondents cited Section 78(3) of the Election Act which provides that *“where a Petitioner does not deposit security as required by the 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 payment of the respondent’s costs.*

When the petition was filed, the petitioner did not deposit security. She had 10 days to do so but did not comply. The law and the emerging jurisprudence from the Superior Courts is that this is a mandatory requirement which has to be adhered to since the law is couched in mandatory terms. The conclusion is that the petitioner did not comply and that there is no provision made in the law to waive the statutory requirement as has been requested by the petitioner.

The conclusion on this aspect is that by failing to deposit security, the Petitioner is in breach of the Elections Act and this goes to the root of the Petition.

THE PETITIONER

I have considered the petition and affidavit in support. It is not clear whether she is suing on her personal capacity or on behalf of the people living with disability as a representative suit. This issue was raised by

the respondents. There is also no indication whether she had offered herself to be considered to be nominated. The court has seen a copy of the Judgment she presented from the Political Parties Disputes Tribunal. She does not appear as a party.

With great humility I would like to make reference to the judgment made by my learned Sister Njeri Thuku Principal Magistrate Lamu Law Courts, in the case of **JANE NJERI KAMANDE VS ANTHONY NJOMO MAINA & OTHERS (ELECTION PETITION NO.1 OF 2017) LAMU MAGISTRATE'S COURT**

She opined that little in our system is often said in a positive way about a Petitioner who was not a candidate. The trend of a voter challenging a petition in Kenya emerged in 2013. Prior to this it was always a Candidate who lost that filed a petition.

Hon. Njeri Thuku made reference to the Case of **IN THE MATTER OF ACT PEOPLE ACT, 1983 & IN THE MATTER OF THE MAYORAL ELECTION FOR THE LONDON BOROUGH OF TOWER HAMLETS BETWEEN ANDREW ERLAM VS MOHAMED LUFTUR RAHMAN AND JOHN WILLIAMS**. Judge Mawery stated that

“To bring an election petition as a private citizen requires enormous courage. If things go wrong and the petition is dismissed, the petitions face a potentially devas tallying bill of costs which unless they are fortunate may Weill bankrupt then. There is no access to public funding: Parliament has left the policing of fair and democratic elections to the chance that concerned citizens will become involved at their own expense whether that is an appropriate and sufficient way to protect democracy is open to questions.”

CONCLUSION

I take this chance to commend the Advocates for the parties for the co-operation extended to the court and the courtesy they have extended to the court and each other. I also wish to appreciate the assistance given by the Judiciary Committee on Election for the updates and compiling of and dissemination of Legal Material and Case Law.

Having considered, the three applications and submissions presented by the Advocates, I am satisfied that the Petitioner did not deposit security for costs and this is Contrary to the Provisions of Section 78(2) © of the Elections Act. Secondly, the Petition served on the respondent and interested party after one month which is outside the 15 days' period Provided Under the Provisions of Section 76 (i)(a) of the Election Act.

There is no Provision made in respect to the Petitioner's application to have the requirements for security waived.

The net effect of the three applications is that the Petitioner's application is hereby dismissed with costs.

The applications by the 2nd Respondent and the interested parties have merit and will be allowed. The petition is hereby struck out with costs.

The Petitioner has tried to present her financial position of lacking funds. The Law provides for costs to be paid and this is what she has sought to challenge. It is now within the magnanimity of the respondents to decide if they will demand for costs. The same will be capped at 500,000/-, 2nd Respondent entitled to 250,000/- and the Interested Parties at 250,000/-. To be taxed by the Executive Officer.

It is so ordered.

Delivered in open court this 26th day of January, 2018.

Right of appeal 30 days.

Signed

Hon. C. Obulutsa CM

26th January, 2018

In the presence of

Mr. Keter for Petitioner

Mr. Songok for 2nd Respondent

Mr. Chanzu for Interested Parties