



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATES COURT AT BUSIA

ELECTION PETITION NO. 5 OF 2017

ARAMISI MAKOKHA NAKHONE-----PETITIONER VERSUS

MUKHWANA LABAN WANZALA-----1ST RESPONDENT

INDEPENDENT ELECTORAL BOUNDARIES

COMMISSION-----2ND RESPONDENT

KIPKOGEI BOWEN NOAH-----3RD RESPONDENT

RULING

After the general election held on 8th August 2017, the 1st respondent was re-elected as the Member of the Bukhayo East County Assembly Ward. The Petitioner was one of the candidates in that election. He filed this petition on 6th September 2017, challenging the election of the 1st respondent as the Member of County Assembly for Bukhayo East County Assembly Ward.

At 10.00 hours at Pre-Trial Conference on Monday 9th October 2017, this court observed that **“There is no deposit for security for costs. This matter is stood over generally”**. The matter rested at that. On 17th October 2017, a Notice to Show Cause was issued for the parties by the court to appear on 19.10.17 and show cause why the petition should not be dismissed for want of security for costs and the parties were duly served.

Soon after the Pre-Trial Conference at about 17.10.17 at 3.30 P.M, there was a Notice of motion dated 17th October 2017 filed herein by E.O. Kweyu & Co. Advocates for the 1st Respondent/Applicant herein for orders:

- 1. That the honourable be pleased to dismiss the petitioner’s petition as against the 1st respondent for non-compliance*
- 2. That, the 1st respondent be paid costs of the petition*
- 3. That costs of this application be provided for.*

The application was premised upon the sworn affidavit of LABAN WANZALA MUKHWANA, the 1st Respondent and on the following general grounds:

- a) That the petitioner presented the petition on the 6th September 2017

- b) That upon presentation of the petition it was mandatory for the petitioner to deposit the security for costs within 10 days from the date of presentation which the petitioner failed to comply.
- c) That the condition for deposit of security for costs is a substantive issue and not merely procedural which goes to root of the petition.
- d) That the 1st respondent did file the requisite response to the petition as required in law and therefore ready to proceed with the petition.
- e) That it is therefore imperative that the orders sought by the 1st Respondent be granted **ex debito justitiae**.
- f) That it is also in the interest of justice that the 1st respondent be paid costs of the petition and of this application.

Soon thereafter 19.10.17, there was a Notice of motion dated 19th October 2017 filed herein by the firm of Ngaywa Ngige & Kibet Advocates for the 2nd and 3rd Respondents/Applicants herein for orders:

1. *That this petition be dismissed with costs for want of deposit of security for costs*
2. *That the costs of this application and the entire petition be awarded to the Applicant*

The said application was based on the following factual foundations;

- a) That the petitioner filed the petition herein on 6th September 2017 and caused the same to be served upon the 2nd and 3rd Respondents on the 8th September 2017.
- b) That the petitioner has failed to comply with mandatory legal requirement of depositing security for costs within 10 days of presenting the petition in court.
- c) That the petition is thus fatally defective and an abuse of court process
- d) That the petitioner has not demonstrated why he failed to comply with the mandatory provisions of the law.

It was supported by the affidavit of Moses Olando Ngaywa duly sworn and reiterating the same grounds.

On 19.10.17 when the matter came up for the hearing of the above two applications for dismissal and the NTSC issued by the court, Miss Maloba appeared for the Petitioner and Mr. Ngaywa appeared for the 2nd and 3rd Respondent and also held brief for Mr. Kweyu for the 1st Respondent.

SUBMISSIONS

On both issues of Notice to Show Cause and the applications to dismiss the petition, Ms. Maloba, learned counsel for the Petitioner made an oral response and informed the court that she had instruction to have this petition withdrawn. She also informed the court that she did not object to costs being awarded to the three respondents. She therefore consented to both applications being granted.

On the other hand, and in connection with the application to have the entire petition dismissed for want of deposit of security for costs dated 13.9.10.17 as well as Mr. Kweyu's application filed on 17.10.17 it emerged that the two applications had not been responded to despite having been served upon counsel for the Petitioner.

Mr. Ngaywa for all the three respondents submitted that the records were clear that no deposit of the

requisite security for cost had been made. There was no application to have time for depositing that security extended. He therefore submitted that the entire petition should be dismissed with costs to the respondents.

ANALYSIS BY THE COURT

Section 78 of the *Elections Act, 2011* provides as follows;

78. (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.

Further, Rule 13 (1) of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017** stipulates that:

13. 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) 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.

It is clear therefore that there is a requirement under section 78 (2) (c) and Rule 13 (1) of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017** that the petitioner herein **ARAMISI MAKOKHA NAKHONE** should have deposited the sum of **Kshs.100,000/=** by **21st September 2017** (*idest* within ten days after filing the petition starting from 6th September 2017 and excluding weekends and public holidays). The petitioner did not do so.

WITHDRAWAL OF AN ELECTION PETITION

Starting with the petitioner's attempt to withdraw the Petition verbally, I have carefully considered what

counsel for the Petitioner had to say and what the law says about that.

I am bound to examine whether the petitioner has complied with the procedures laid down by the law for withdrawal of an election petition.

These procedures are to be found in Rules 21 to 24 of the **Elections (Parliamentary and County Elections) Petitions Rules of 2017** which state as follows:

21. (1) An election petition shall not be withdrawn without leave of the court.

(2) The court shall grant leave on such terms as to the payment of costs or as the court may consider fit and just.

(3) An application for leave to withdraw an election petition shall—

(a) be in the Form 5 set out in the Schedule;

(b) be signed by the Petitioner or by a person authorized by the petitioner

(c) state the grounds for withdrawing the petition; and

(d) be filed at the office of the Registrar.

(4) The parties to the election petition shall, each file an affidavit, before leave of a petition is determined, addressing the ground on which the petition is intended to be withdrawn.

22 (1) The Petitioner shall serve each the Respondent with a copy of the application to withdraw a petition.

(2) The Petitioner shall, publish in a newspaper of national circulation, a notice of intention to withdraw an election petition in Form 6 set out in the Schedule.

I have carefully perused the proceedings herein, and I have noted many areas of non-compliance with the laid down procedure.

1. An application for leave to withdraw the petition must be made and it has to be formal. None was filed or served herein. The application has to be in a prescribed form (Form 5)

2. A notice of intention to withdraw must be signed by the Petitioner or a person authorized by the Petitioner(e.g. his advocate or other agent(s)). None has been signed by the Petitioner herein or anybody else.

3. Thepetitioner has to state grounds for withdrawal. None was filed.

4. It has to be lodged at the registry. None was lodged.

In ***Moses Saisi V Independent Electoral & Boundaries Commission & 2 Others [2013] Eklr*** the learned **Honourable George Dulu J** citing the cases of **Martin Sarakwe Wechuli -vs- IEBC, Returning Officer Bumula Constituency** and the case of **Boniface Okhiya Otsiula- Bungoma HC Election Petition 7 of 2013** -where the High Court gave the rundown of the requirements for withdrawal of an election petition) had the following to say;

“It follows therefore that in our present case, there is no valid request for withdrawal of the petition to be acted upon by the court. The verbal request for withdrawal of the petition is not a valid request for withdrawal..... In my view, the law governing the situation in the present petition is Section 78 (3) and (4) of the Elections Act, which states that;“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”.

Going by the above case law, I find that the petitioner is not allowed by law to withdraw his petition without the leave of the court and without complying with the procedure set out by the law at all or in the manner his counsel purported to do.

APPLICATIONS FOR DISMISSAL OF THE PETITION FOR WANT OF SECURITY FOR COSTS

The provision relating to deposit of security for costs was addressed in ***Esposito Franco v Kingi and Another (Supra)*** where the court stated that;

“Section 21 of the Act is worded in a peremptory language. It does not admit of ambiguity or further search of the intention of Parliament. Failure to deposit the security within 3 (NOW TEN DAYS) days is not a mere irregularity. It goes to the root of the matter – jurisdiction. I find and hold that this court lacks jurisdiction.... to extend time within which to deposit security for costs.”

I note the under Rule 19(10) of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017** provides that:-

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.

There is a school of thought which holds the view 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. The school of thought therefore holds the view that the election where no deposit for costs is made, this divests the court of jurisdiction even to extend time for any activity to be made.

This school of thought is as epitomised in the case of ***Eposito Franco v. Amason Kingi and 2 Others, Court of Appeal Civil Appeal No. 248 of 2008*** stating that the holding of the court that there was no power to extend the time for deposit of security for costs. In a nutshell, this school of thought holds the view that the court is stripped of jurisdiction as soon as the rules of depositing the security for costs are breached.

The reasoning in that case and where judges felt they were bound by it was expressed as follows;

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

The legislature therefore intended to cure the mischief of vexatious litigants as well as protecting the respondent's rights of costs in the event that the petition is not successful.

In ***K. Naomi Cidi –vs- IEBC & 3 Others, Malindi HC Election Petition No. 13 of 2013***, the law under **Section 73 (3) of the Elections Act** is clear that once the deposit for costs has not been made, no further proceedings shall be heard on the petition and the respondents may apply for dismissal of the petition and for payment of costs.

In the case of ***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. (see Harit Sheth Advocate –vs- Shamas Charania – Nairobi Court of Appeal, Civil Appeal No.68 of 2008 [2010] eKLR.”

In **Evans Nyambaso Zedekiah & another v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR**, Honourable Lady Justice RUTH NEKOYE 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. 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” –vs- Caltex Oil (Kenya) Ltd [1989] KLR 1”.

In my opinion, the petitioner herein ARAMISI MAKOKHA had an option of applying for an extension of time to pay the Security for costs out of time. He never did so. In this court’s opinion, the petitioner is no more than a busy body.

I find that failure to deposit the security within **TEN DAYS** is not a mere irregularity since I find that the petitioner has not complied with the electoral laws. I agree with the respondents that the Petitioner’s petition should be dismissed for want of security for costs in accordance with **Section 78 (3) of the Elections Act, 2011**.

In this case, there are pending applications filed by the respondents for dismissal of the election petition for default to comply with the law, and since the petitioner herein **ARAMISI MAKOKHA NAKHONE** agreed that the election petition herein be terminated, and since no responses were made to the said applications, I apply the provisions of Section 78 of the Election Act and dismiss the petition for want of security for costs and therefore, non-compliance with the law.

COSTS

Ordinarily, costs following the events. However, elections petitions are *sui generis* with their own laws and regulations as to their manner of procedure and substance.

Section 78 (3) Elections Act, 2011 stipulates that 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.

Section 78 (4) of the Elections Act, 2011 stipulates that 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

Section 84 of the Elections Act, 2011 stipulates that an election court shall award the costs of and incidental to a petition and such costs shall follow the cause.

Rule 30 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 stipulates that on Costs:

(1) *The election court may, at the conclusion of a petition, make an order specifying—*

(a) *the total amount of costs payable;*

(b) the maximum amount of costs payable;

(c) the person who shall pay the costs under paragraph (a) or (b); and

(d) the person to whom the costs payable under paragraphs (a) and (b) shall be paid.

In this case, I note that since all the respondents had already filed applications for dismissal of the petition for want of compliance with the law, and requested for costs before Miss Maloba, learned counsel for the petitioner informed the court that she had instructions to terminate the petition, in my view, they are entitled to costs.

FINAL ORDERS

The above analysis leads me to conclude that an election petition cannot just be withdrawn without the leave of the court, more so, it cannot be withdrawn verbally and in the circumstances of this case, I make the following orders;

- 1. That this election petition herein is hereby dismissed for want of security for costs.**
- 2. The petitioner will pay the costs of the 1st, 2nd and 3rd respondents which will be determined in accordance with the law governing election petitions.**

This ruling is printed in duplicate and a soft copy stored in an electronically protected data bank. A copy of this ruling can be obtained at the court's registry upon payment of court fee amounting to Kshs. 60 / per page.

Dated, signed and delivered at Busia this 19th day of October 2017.

G. N. WAKAHIU,

CM. BUSIA.