



REPUBLIC OF KENYA
IN THE MAGISTRATE'S COURT AT NAIROBI
MILIMANI COMMERCIAL COURTS
ELECTION PETITION NO. 18 OF 2017
IN THE MATTER OF THE ELECTIONS ACT, 2011
AND
IN THE MATTER OF THE ELECTIONS
(PARLIAMENTARY AND COUNTY ELECTIONS)
PETITION RULES, 2017

JOSEPH OBIRI KENYAGA.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

PHYLIS AYIEMBA.....2ND RESPONDENT

ESTHER WAITERA CHEGE.....3RD RESPONDENT

RULING

Introduction

There are two applications coming for determination in this ruling. The first application is filed by the 3rd Respondent and is dated 10th October, 2017 while the second application is filed by the Petitioner and is dated 11th October, 2017.

The Petitioner is acting in person, his advocate having ceased to act for him due to lack of instructions from the Petitioner.

I will deal with the two applications one after the other as per the time of filing.

Background: The Petition

Joseph Obiri Kenyaga, the Petitioner herein has filed this petition to challenge the election of Esther

Waitera Chege the 1st Respondent as the duly elected Member of County Assembly for Nairobi South Ward, in Starehe Constituency, Nairobi County in the Republic of Kenya in the general election held on 8th August, 2017. Joseph vied for the seat on an ODM party ticket while Esther vied on Jubilee party ticket. The election was conducted by the Independent Electoral and Boundaries Commission (IEBC), the 1st Respondent and whose official as Returning Officer for Starehe Constituency was Phylis Ayiamba, the 2nd Respondent.

The Petitioner avers in his petition that he garnered 8,223 votes while the 3rd Respondent garnered 9,161 votes. According to the Petitioner there were massive irregularities during the tallying of the votes. The votes captured in form 36A Serial No. CA000289 for Mariakani primary school polling station 7 the 1st and 2nd Respondents' agents rightly captured the correct votes cast and the form was duly signed by the agents. But the information transferred to form 36B serial No. CA 0472891440-5 is totally different from that in form 36A. The Petitioner avers that he garnered 94 votes as per form 36A but the 2nd Respondent gave him 72 votes extra which he had not garnered. This arithmetic does not seem to add up though because 72 added to 94 is 166 and not 108 as indicated in the supporting affidavit. He also avers that the other candidates were given more votes than those that were cast at the polling station. The Petitioner avers that this alleged irregularity affected the total tally of the votes recorded.

According to the Petitioner therefore the tallying was not properly done and it was not accurate, transparent and verifiable.

The Petitioner therefore prays that the petition herein be allowed and the election of the 3rd Respondent be nullified and/or revoked and the 1st Respondent be directed to conduct and hold fresh elections forthwith as per the law provided. He also prays for the costs of the petition.

The 1st and 2nd Respondents filed a common response to the petition dated 18th September, 2017 and aver that the election was conducted in a transparent manner following the principles set out in the Constitution of Kenya, 2010, the Elections Act as well as the regulations made thereunder and there were no irregularities as alleged by the Petitioner. They denied all the allegations of impropriety leveled against them by the Petitioner. Their response is supported by the replying affidavit of Philice Ayiamba, the 2nd Respondent sworn on 18th September, 2017 and that of Faith Wangui Kimaru, the presiding officer at Mariakani primary school for polling station 7.

The 3rd Respondent filed her response to the petition dated 25th September, 2017 and supported by her replying affidavit sworn on 25th September, 2017 and that of her agent at the polling station Michael Gichuki Nyawira. The 3rd Respondent averred in the reply and deposed in the replying affidavits that there were no irregularities in tallying of the votes as alleged by the Petitioner. She prays that the petition be dismissed with costs to her.

The Applications

The 3rd Respondent in this Petition Esther Waitera Chege has filed a notice of motion dated 10th October, 2017 seeking for orders that the entire election petition herein be dismissed for want of deposit of security for costs that may become payable by the Petitioner within the stipulated statutory time and/or at all and that in the alternative and without prejudice to the foregoing the entire election petition be dismissed for being filed and/or served out of the stipulated statutory time. She also prays for the costs of the application and the entire petition to be awarded to her.

The application is brought under Article 87(2) of the Constitution of Kenya, sections 76(1) and 78(1), (2) (c),(3) and (4) of the Elections Act, 2011, Laws of Kenya and any other enabling provisions of the law.

The application is based on four grounds which are first, that the results of the election were declared on 10th August, 2017 whereas the petition was filed on 8th September, 2017 and served upon the 3rd

Respondent over a month later which was way after the fifteen days provided for under the law. Second, the Petitioner has not yet made a deposit for security for costs as required under section 78(1) of the Elections Act. Third, the 3rd Respondent has filed the present application to dismiss the petition as provided for under section 78(3) of the Elections Act, 2011 and finally that this court is by law precluded from taking further proceedings in the matter save for the present application.

The application is supported by the affidavit of the 3rd Respondent sworn on 10th October, 2017 where she has expounded on the grounds in support of the application.

In the supporting affidavit the 3rd Respondent deposes that she adopts her averments contained in her reply to the petition and the depositions in her replying affidavit filed together with the response. This means the court will consider the reply to the petition and the accompanying affidavits in this application.

The 3rd Respondent deposes that the election results for the Nairobi South Ward County Assembly seat were declared on 10th August, 2017 whereas the petition was filed on 8th September, 2017 after a total of 30 days, thus being beyond the 28 days provided for by the law and therefore out of time.

The 3rd Respondent also deposes that the Petitioner did not serve her with the petition within fifteen days of filing as required under the law and he has not offered any explanation for the delay. The 3rd Respondent does not however indicate either in this affidavit, the answer to the petition or the accompanying affidavit when she was served.

She also deposes that as at the time of filing her application, the Petitioner had not made a deposit for security for costs, well beyond the time provided for under the law, that is, within ten days after filing the petition.

The 1st and 2nd Respondents support the 3rd Respondent's application although they did not file a reply thereto. Their support is by way of submissions made by their learned counsel Mr. Anyoka.

The Petitioner filed a replying affidavit sworn on 11th October, 2017 in response to the 3rd Respondent's application. He deposes that he has filed a notice of motion seeking to extend time for him to deposit the sum of KShs 100,000/= and he seeks leave for the said extension of time. His prayer is that his application should be heard first before the 3rd Respondent's application.

In response to the 3rd Respondent's ground that the petition was filed out of time, he deposes that his petition was filed within time as per the laws applicable.

The Petitioner filed and served his replying affidavit to the 3rd Respondent's application as well as his application and supporting affidavit upon the Respondents' counsels when Mr. Wachira learned counsel for the 3rd Respondent was on his feet making submissions on the application by the 3rd Respondent. The Petitioner explained the reasons why he had arrived in court late with his documents and upon hearing learned counsels for the Respondents who had no objection to the late service, this court granted him leave to serve them.

The Petitioner then made an oral application that his application be deemed as a response to the 3rd Respondent's application. This court directed that the two applications be heard concurrently.

Learned counsels for the Respondents and the Petitioner made oral submissions on both applications.

The submissions

Failure to make deposit for security for costs

Learned counsel for the 3rd Respondent Mr. Wachira submits that the use of the word "shall" in S. 78(1)

means that it is not only mandatory that deposit for costs be made but that this must be within the ten days provided for. Learned counsel has submitted that the Petitioner had not applied for extension of time to deposit security for costs and had not shown any intention to do so when the Petitioner walked into court with his application for extension of time.

In support of his submissions on this issue Mr. Wachira, learned counsel referred to the case **Moses Saisi v Independent Electoral & Boundaries Commission & 2 Others [2013] eKLR** and **Kumbatha Naomi Cidi v. County Returning Officer, Kilifi & 3 Others [2013]eKLR**. In the **Moses Saisi** case the issue was largely on the withdrawal of the case by the Petitioner. In the **Kumbatha Naomi Cidi** case the High Court at Malindi, F. Muchemi J., struck out the election petition partly for reasons that the Petitioner had not made a deposit for security for costs as required under section 78(2) of the Elections Act, 2011 and partly that the petition had not been served. The High Court further found that failure to deposit the security is not a mere irregularity that can be wished away. Mr. Wachira submits correctly that this decision is binding on this court. However, the court had stated earlier before making this finding that the petitioner took no steps to demonstrate any intention to comply with the legal requirement.

Mr. Anyoka for the 1st and 2nd Respondents largely supported the submissions by Mr. Wachira. Learned counsel submitted that the provision for deposit for security for costs is a substantive requirement underpinning the jurisdiction of the court to deal with the dispute. It is meant to cure a fundamental mischief which is to discourage frivolous or vexatious litigants from challenging the results of an election and to cushion the respondent from any costs that might ensue from such petition or proceedings. The failure to make a deposit for security for costs is fatal to the petition, learned counsel submits. Learned counsel submitted further that this court has no jurisdiction to extend the timelines provided for making the deposit for security for costs even for an hour or a day.

Mr. Anyoka learned counsel relied on the case of **Evans Nyambaso Zedekiah & another v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR** where Sitati J struck out the election petition for failure by the petitioner to make a deposit for security for costs in time as required by the Elections Act. The court cited the decision of the Court of Appeal in the case of **Rotich Samuel Kimutai –vs- Ezekiel Lenyongopeta & Others Court of Appeal Nairobi Civil Appeal NO.273 of 2003 [2005] e KLR**, thus:

the Court of Appeal was faced with a similar situation of non-compliance with section 21 of the repealed Cap 7 of Laws of Kenya. On appeal against an order of the Superior Court dismissing the petition on account of failure to deposit security within the statutory time frame, the Court said the following:

“Once again we think the intention of Parliament was clear in enacting the time limit in such peremptory languages “Not more than three days ... shall give” does not admit ambiguity or further search for the intention of Parliament. Whether or not Parliament should have enacted a further provision for seeking extension of time is appropriate, would of course be academic for purposes of this appeal and in any event there was no attempt to apply for extension of time at all. Section 21 (3) provides for the consequences of non-compliance which is what in the end transpired in this case. Failure to deposit the money within the time was not a mere irregularity which could be waived by the party.”

The Petitioner on his part was contend to submit that he had filed an application for extension of time within which to make the deposit for security for costs. His plea is that the court should not lock out of the seat of justice poor persons like him for being unable to comply with the law requiring deposit for costs. He submits that the requirement to make deposit for security for costs is not constitutional but statutory.

The petitioner referred to a recent election petition pending before the High Court at Nairobi in **Election Petition No. 10 of 2017 Ndwiga Steve Mbogo v.IEBC,Philice Khaemba, Returning Officer Starehe Constituency and Njagagwa Charles Kanyi** contending that the court had made an extension of time for a person he considered to have the means to have made the security for costs in time unlike himself.

He urged me to be guided by that decision. Unfortunately he did not give me a copy of the court's determination and so I do not have the benefit of considering it if at all such a decision was made.

Petition filed after 28 days of declaration of results

The 3rd Respondent has urged the court to strike out this petition on the ground that it was filed outside the constitutional time limit of twenty eight days as provided for under Article 87(2) of the constitution. She says that the election results were declared on 10th August, 2017 and the Petitioner filed the petition on 8th September, 2017 after what in her computation is thirty days.

Learned counsel for the 3rd Respondent Mr. Wachira has referred to Article 87(2) of the Constitution and section 76(1)(a) of the Elections Act for the provision that an election petition to challenge the election of a Member of County Assembly shall be filed within twenty eight days after the declaration of results by the IEBC.

Mr. Wachira learned counsel for the 3rd Respondent therefore submits that for that reason the petition herein is dead and no amount of pumping will resuscitate it.

Mr. Anyoka learned counsel for the 1st and 2nd Respondents submitted that they associated themselves fully with the facts as presented by the 3rd Respondent.

Mr. Anyoka learned counsel submits that Article 87(2) of the Constitution and section 76(1) of the Elections Act, 2011 respectively prescribe constitutional and statutory time limits of twenty eight days within which an election petition must be filed. He submitted that time starts running immediately the returning officer issues a certificate of the election to the successful candidate or announces the results.

Mr. Anyoka learned counsel for the 1st and 2nd Respondents submitted that the jurisdiction to hear and determine electoral disputes is inherently tied to the issue of time and any breach of this strict scheme of time removes the dispute from the jurisdiction of the court. In supporting this ground learned counsel relied on the case of **Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014]eKLR** and **Mary Wambui Munene v Peter Gichuki King'ara & 2 others [2014] eKLR**, where the Supreme Court found that the issue of whether the election petition was filed outside the time provided under Article 87(2) of the Constitution was an issue of jurisdiction and had to be considered and determined on priority.

Learned counsel further referred this court to the holding of the Court of Appeal by Nyarangi JA in the celebrated case of **The Owners of Motor Vessel "Lillian S" V Caltex Oil Kenya Ltd (1989) KLR 1** at Page 14 that **"Jurisdiction is everything and without it, a court has no power to make one step, where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence and a Court of Law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction"**.

Learned counsel therefore urged this court to first determine the issue of its jurisdiction to proceed further with this petition given the assertion that the petition had been filed outside the time limit of twenty eight days after the declaration of results.

Mr. Anyoka learned counsel further submitted that failure to file an election petition within the prescribed constitutional timeline is not a procedural issue that is capable of being salvaged by Article 159(2)(d) of the Constitution or Rule 19(1) of Elections (Parliamentary and County Elections) Petitions Rules, 2017.

Failure to serve the petition

The third ground for the 3rd Respondent's application is that she was not served in time with the petition. Rule 10 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides that service of an election petition shall be within fifteen days after filing either by direct service or by an

advertisement that is published in a newspaper of national circulation.

The 3rd Respondent does not however indicate either in her replying affidavit, the reply to the petition or the accompanying affidavit when she was served, if the service was late or if she was not served at all how she came to know of the petition against her. Her address for service is dated 18th September, 2017 and filed in court on 19th September, 2017, a month after the petition was filed. The law requires that a petition should be served within fifteen days of filing.

Learned counsel for the 3rd Respondent has cited in his submissions the case of **Kumbatha Naomi Cidi** above where the High Court held that failure to serve the petition was fatal.

The 1st and 2nd Respondents did not make submissions on this ground and the Petitioner did not make a reply or submissions on it either.

Analysis and Determination

It is a matter of general knowledge and without dispute that to-date the Petitioner has not made a deposit for security for costs in the sum of KShs 100,000/= as required by law. His final plea during submissions was that the court grants him ten days to make the deposit for security for costs.

The issue for determination here is what the effect of the failure to make a deposit for costs as required under these provisions of the law is.

Section 78 of the Elections Act, 2011 makes provision for payment of security for costs in the following terms.

S.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—

...

(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.

Learned counsels for the Respondents have cited several cases where the High Court struck out or dismissed election petitions for failure by the petitioner to make a deposit for security for costs altogether or within the time prescribed by law.

In the **Moses Saisi** petition and the **Kumbatha Naomi Cidi** petition one common issue that stands out is that in spite of the failure by the petitioner to make the deposit for security for costs the petitioner made no attempt to make an application for extension of time to make the deposit. It is not known what the court would have held if the petitioners in those cases had shown intention to make a deposit for costs like in the present petition where in response to the application the petitioner requests for time to make the deposit for costs.

There are yet other cases where the High Court has allowed an extension of time for the petitioner to make the deposit for security for costs. See the cases of **Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 Others [2013] eKLR**, **Charles Ong'ondo Were v Joseph Oyugi Magwanga & 3 others**

[2013] eKLR and Kisii Election Petition No.6 of 2013, Fatuma Zainabu Mohamed v Ghati Dennitali & 10 Others (unreported). In these cases the High Court considered the issues raised in the present application on whether an election court has jurisdiction to make an extension of time for the Petitioner to make the deposit for security for costs, whether the requirement to deposit costs is a procedural technicality or a substantive issue that goes to the root of the petition, whether any prejudice will be occasioned to the Respondent if the extension of time is granted. In each of the cases, the petitioner had made an application for extension of time to make the deposit for security for costs. The court returned a positive verdict in each case that it would be fair to grant the extension rather than to deny it. I am satisfied that these decisions well answer the issues raised by the present application

For instance in the **Patrick Ngeta Kimanzi** petition the High Court, Majanja J, considered the issue of whether or not the court has jurisdiction to extend time for furnishing security under section 78 of the Elections Act, 2011 and upon reviewing several decisions including the Court of Appeal decision in the case of **Rotich Samwel Kimutai** cited above he arrived at the decision that the court had jurisdiction to extend the time.

I am inclined to be guided by these later decisions. Considering the valiant efforts shown by the Petitioner herein to defend this application, first taking it upon himself when his counsel withdrew from acting, then complying with the strict requirements for him to file his reply and serve within a limited time and at the same time making his application for extension of time and his application to prosecute it, I am satisfied and find that the ends of justice will be better served by finding that the failure to make the deposit for costs in time will not occasion prejudice to the Respondents. The Petitioner in his replying affidavit indicates that he is prepared to make that deposit even though his request during submissions that this be within ten days is not tenable. In any event, the deposit for security for costs will to some measure cushion the Respondents against the non-payment of costs by the Petitioner should his petition not succeed.

This ground of the 3rd Respondent's application for the dismissal of the petition for non-payment of security costs will therefore fail.

The next ground is that the petition was filed out of the time limit of 28 days after filing as provided for under the constitution and the Elections Act, 2011.

The evidence tendered by the 3rd Respondent in support of this ground is found in her affidavit supporting the reply to the petition being Form 36B Serial No. CA0472891442-7 for Nairobi South Ward. This form has the name of the Returning Officer Philice Ayiemba, her ID No/Passport 27047832 and is signed and bears the stamp of the Returning Officer IEBC and is dated 11th August, 2017. In the table titled Chief Agents or Candidates (if present) in the row number 1 the following details are entered in pen, the name Esther W. Chege, ID/Passport 22394681/ Party Name/Independent Candidate Jubilee Party; Tel. Contact 0722619648 and then signed.

Similarly the replying affidavit of the Returning Officer Philice Ayiemba, the 2nd Respondent herein sworn on 18th September, 2017 accompanying the response to the petition has a Form 36B with the name of the Returning Officer as Philice Ayiemba with ID. No./Passport 27047832 and is signed and bears the stamp of the Returning Officer. This one has Serial Number CA0472891140-5. In the table titled Chief Agents or Candidates (if present) in the row number 1 the following details are entered in pen the details entered are in the second and third rows with the first row being blank. In the second row the details are Name of Candidate or Agent Joseph Obiri, ID/Passport 11691504, Party Name/Independent Candidate ODM; Tel. Contact 071477881 and then signed. In the third row the details are Name of the Candidate or Agent Johnstone Biwott, ID/Passport 20229942, Party Name/Independent Candidate Independent; Tel. Contact 0722257305 and then signed. This form is also dated 11th August, 2017.

It is apparent that there are some differences in the two forms on the serial numbers and the details entered in hand in the table of Chief Agents or Candidates (if any). No doubt there could be a good explanation for these differences by the Returning Officer who is supposed to complete and issue Form

36B under Rule 83 of the Elections (General) Regulations, 2012 on tallying and announcement of election results which in the relevant sections provides as follows:

S. 83(1) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present-

(a)...

(f) sign and date the relevant forms and publicly declare the results for the position of
—

(i) member of County Assembly;

(ii)...

(g) issue certificates to persons elected in the county assembly and National Assembly elections in Forms 36C and 35C respectively set out in the Schedule;

In my understanding of these provisions the most appropriate way by which the Returning Officer or any other person can confirm the results that were declared is through the relevant form signed and dated by the Returning Officer for the results of the member of County Assembly or the certificate issued to the person elected to the County Assembly.

Neither of the Respondents has annexed a copy of the certificate issued to the 3rd Respondent upon being declared as the duly elected member of the Nairobi South Ward member of Nairobi County Assembly.

The law requires that Form 36B be dated and I trust that is the date anybody will consider to be the date when the results were declared. In the two forms produced herein the date on each of them is 11th August, 2017. There is no other evidence to show otherwise. I must therefore consider this date as the date when the results were declared.

In her replying affidavit accompanying the response to the petition the Returning Officer, the 2nd Respondent deposes that the results for the Member of County Assembly for Nairobi South Ward were announced on 10th August, 2017 and so the petition ought to have been filed on or before 7th September, 2017. This deposition seems to contradict the entry in the Form 36B annexed to said affidavit. It follows from her averment that going by the entry in the form that the results were declared on 11th August, 2017 then it follows that the petition ought to have been filed on or before 8th September, 2017. Therefore, this petition having been filed on 8th September, 2017 it means it was within the twenty eight days prescribed

Even then, under the Interpretation and General Provisions Act (Cap.2) Laws of Kenya, time starts running the following day after the day of the event. Section 57 of the Act provides as follows:

S. 57. In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

Applying this provision to the present case where the evidence is that the results of the election were declared on 11th August, 2011 it follows that time for filing the petition started running on 12th August, 2017. Counting from this date, the twenty eight days within which the petition was supposed to be filed ended on 8th September, 2017. This is the date that this petition is stamped as filed. I therefore find that the averment and submissions that the petition was filed outside the time required under the constitution and the law is not supported by any evidence. In fact the evidence available shows otherwise.

I therefore find that the petition was not filed outside the stipulated timelines. In the premises, that ground of the application must also fail.

The final ground of the 3rd Respondent's application is on service. The 3rd Respondent alleges that she was served with the petition way after the fifteen days stipulated under the law.

I have indicated above that this ground is not supported by any evidence. The 3rd Respondent does not indicate either in her supporting affidavit to this application, the answer to the petition or the accompanying affidavit when she was served. It is a cardinal principle of our law that whoever alleges must prove. The principle is firmly embedded in the Evidence Act, (Cap. 80) of the Laws of Kenya. Section 109 of the Evidence Act, provides that;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

In this application the burden of proof is upon the 3rd Respondent to show that she was served outside the period of fifteen days as stipulated under Rule 10(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. I find that the 3rd Respondent has not discharged this burden in respect of this ground and therefore the same must also fail.

In the final analysis I find that the application to dismiss the petition does not succeed. The same is dismissed.

Turning to the Petitioner's application his single prayer is that leave be granted for him to deposit the sum of KShs 100,000/= being deposit for security for costs. The grounds in support are that he could not raise the KShs 100,000/= immediately within the ten days of filing and that the court has jurisdiction to extend time for a party to do an act that it was supposed to do.

The application is supported by the Petitioner's affidavit sworn on 11th October, 2017 which reiterates the grounds in support of the application.

The 1st and 2nd Respondents filed grounds of opposition dated 13th October, 2017. The respondents aver that the application is misconceived and untenable, that section 78(1) of the Elections Act is couched in mandatory terms, that Article 2(4) of the Constitution, section 78(1) and (3) of the Elections Act, 2011 require that there be no further proceedings and the court has no jurisdiction to entertain the application before court and finally that Article 159(2)(d) and/or Rule 19(1) cannot cure this mistake.

The 3rd Respondent filed an objection cum grounds of opposition dated 13th October, 2017. This was filed in the High Court Constitutional and Human Rights Division. The confusion must have arisen with the person who made the filing. But it is a genuine error. The reason is that whereas the petition was filed at the Milimani Magistrates' Commercial Courts, the location of the hearing of the petition is at the Milimani Law Courts in the Milimani Magistrates' Criminal Courts where the High Court Human Rights and Constitutional Division are also located and where election petitions in the High Court are filed. However, since both the Petitioner and learned counsel for the 1st and 2nd Respondents Mr. Anyoka acknowledge that they were duly served I find no problem holding that the response be deemed as duly filed and properly on record. I will however, have the documents remitted to Milimani Magistrate's Commercial Court for appropriate stamping.

In the objection/grounds filed by the 3rd Respondent she avers first that this court lacks jurisdiction at this stage to entertain any other proceedings save for the application for dismissing the petition for reasons that the Petitioner has not deposited security for costs as provided for under section 78(3) of the Elections Act. Second, the petition is fatally defective and incompetent as it does not satisfy the threshold of a validly presented election petition. Third, the application is misconceived, bad in law, incompetent and

amounts to an abuse of the court process as the same is only intended to pre-empt the ruling on the 3rd Respondent's application dated 10th October, 2017 and finally that the application does not raise and/or inform this court substantial facts on how the Petitioner will raise the deposit on security for costs to warrant to the issuance of the orders sought.

As indicated above, submissions on this application were made concurrently with those on the application by the 3rd Respondent.

I have considered the application, the grounds in support, the supporting affidavit, the responses thereto by the Respondents and the submissions by the Petitioner and the learned counsels for the Respondents.

It is apparent that the issues raised in this application have been exhaustively covered in the analysis of the 3rd Respondent's application both on the facts and the law.

I am satisfied that the application has merit and the same is allowed.

However, the request by the Petitioner that he be allowed ten days to make the deposit for costs is untenable. The reasons are that the failure to make the deposit for security for costs in itself will ground the hearing of the petition as no further proceedings can be taken on it. If this request is granted it means that the proceedings on the petition stop for the next ten days. This will be a violation of Rule 20 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 which provides that save in exceptional circumstances, once the hearing of a petition has commenced it shall proceed uninterrupted on a day to day basis until it is determined and where there is adjournment it shall be for a period not exceeding five days. Moreover, the Petitioner did not even make that request as a prayer in his application so that the Respondents would have had an opportunity to respond thereto.

I have just learnt that tomorrow is a gazetted public holiday and the following day is Election Day for the fresh presidential election. The next working day is Friday 27th October, 2017. It is directed that the Petitioner shall make the deposit for security for costs in full as provided for under the law on or before the close of business at 5.00 p.m. on Friday, 27th October, 2017. If this order is not complied with at that time then the petition will stand struck out for failure to make the deposit for security for costs and it will be mentioned on Monday, 30th October, 2017 at 9.30 a.m. to confirm that the order of dismissal took effect. Otherwise it will proceed for pre-trial conferencing as shall be directed by the court shortly after delivery of this ruling.

Costs of both applications shall be in the cause.

Orders accordingly.

Delivered in open court before:

.....for the Petitioner.

.....for the 1st and 2nd Respondents.

.....for the 3rd Respondent.

.....Court Assistant.

ANDAYI W. F. (MR)

CHIEF MAGISTRATE

24/10/2017

