



**REPUBLIC OF KENYA**

**IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT KIMILILI**

**ELECTION PETITION NO. 2 OF 2017**

**JUSTINE CHEMTAI .....PETITIONER**

**VERSUS**

**WINNIE ATIENO NYAMBOK**

**(FEDERAL PARTY OF KENYA**

**PARTY LEADER ..... 2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL**

**BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

JUSTINE CHEMTAI hereinafter called the Petitioner filed a Petition on the 6.9.2017 against WINNIE ATIENO NYAMBOK , FEDERAL PARTY OF KENYA PARTY LEADER and INDEPENDENT ELECTORAL BOUNDARIES COMMISSION ( sic) hereinafter called the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively.

The petitioner is challenging the gazettelement of the 1<sup>st</sup> Respondent as a member of Bungoma county in the Gender top up lists. The Petitioner's contention is that the 1<sup>st</sup> Respondent was not a resident of Bungoma County and neither is she married within Bungoma County.

The petitioner contented that the acts of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent prejudiced her. She sought orders to have the Respondent expunge and degazette the name of the 1<sup>st</sup> Respondent as a member of the Bungoma County Assembly and that the same be replaced with the names of lawful nominee from Kimilili sub county, Bungoma county.

The 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed responses to the petition. The advocate for the 1<sup>st</sup> Respondent successfully sought to enjoin the Federal party of Kenya as an interested party to the petition. There was no response from the 2<sup>nd</sup> Respondent .

The 3<sup>rd</sup> Respondent raised a preliminary objection dated 20.9.2017 challenging jurisdiction of the court to determine the matter.

The parties appeared before court on the 10.11.2017 for pretrial conference. At the pretrial conference, the issue of security of costs was raised by the advocate for the 1<sup>st</sup> Respondent. It is not in dispute that

the petitioner has not deposited security for costs as is mandatorily required in ordinary Election petitions. It is further common ground that no application seeking extension of time to deposit security for costs had been made. At the pretrial conference, the parties agreed to file skeleton submissions with regard to the preliminary objection on jurisdiction and on the issue as to whether failure to deposit security for costs by the petitioner would invalidate the petition. The 1<sup>st</sup> and 3<sup>rd</sup> respondent indeed filed their skeleton submissions as agreed. The petitioner never filed any submissions as agreed. I also note that amongst the documents filed by the 3<sup>rd</sup> Respondent is a decision by the political parties Tribunal in complainant No. 469 of 2017 between the petitioner and the interested party in which the tribunal amongst others made the following orders.

- a. “A declaration be and is hereby issued that the Respondent (read interested party ) lists of gender top up nomination to Bungoma county Assembly does not reflect the ethnic diversity of the people of Bungoma county.
- b. The Respondent ( read interested party ) is directed to reconstitute its lists of gender top up for nomination to Bungoma county Assembly to include the claimant ( read petitioner’s ) name as a person to represent gender balance within 48 hours from the delivery of the judgment.
- c. ....
- d. A copy of the judgment be transmitted to the Independent Electoral and Boundaries Commission for necessary action.”
- e .....

On the 16.10.2017 when the parties appeared before court ostensibly to argue the 2 preliminary issues regarding jurisdiction and deposit of security for costs, the advocate for the petitioner having earlier filed a notice of withdrawal of the petition sought through an oral application withdraw the petition. He asked that the petition be withdrawn with no order as to costs.

Both Advocates for the 1<sup>st</sup> Respondent, and interested parties on one hand and the advocate for the 3<sup>rd</sup> respondent on the other hand had no objection to the oral application to withdraw the petition with no order as to costs.

Rule 23 (1) of The Election (parliamentary and county ) petition Rules , 2017 hereinafter called the ‘Rules’ provide that a petition shall not be withdrawn without leave of the court .

Rule 23 (3) of the Rules provide the procedure including the format of the application to withdraw. It is intended that the petitioner states the grounds upon which the application is brought.

The intention of the Rule 23 of the Rules is hinged on the understanding that Election Petitions are inherently suits in the public interest and so cannot simply be withdrawn at the instance of the petitioner and even on the consent of the parties.

Having considered the oral application I find that it has failed to meet the mandatory requirements under Rule 23 (3) . For the foregoing reasons, I decline to grant the oral application to withdraw. The petitioner is accordingly directed to file and serve a formal application to withdraw the petition (if she still wishes to do so ) within 5 days from today. There shall be no order as to costs.

**DATED AT KIMILILI THIS 19<sup>TH</sup> DAY OF OCTOBER 2017**

**D. O. ONYANGO,**

**SENIOR PRINCIPAL MAGISTRATE,**

**KIMILILI.**