



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MUMIAS

ELECTION PETITION NO. 1 OF 2017

JANE NAICAR ESHUCHI.....PETITIONER

VERSUS

MAURICE SAKWA.....1ST RESPONDENT

ERIC OMONDI.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....3RD RESPONDENT

RULING

Jane NAICAR ESHUCHI the petitioner herein filed the petition challenging the Election of Maurice Swaka, the 1st respondent herein. She also sued Erick Omondi the 2nd respondent who was the returning officer Kwhisero constituency and Independent Electoral and Boundaries Commission as 3rd respondent.

This case is coming up for pre-trial directions today. Counsel for all parties were present. Mr Ombito for 1st respondent addressed the court as follows, "Mr. Namatsi and I appear for 1st respondent. we had filed a notice of preliminary objection dated 18.9.17 and an application by Mr. Namatsi dated 22.9.17 which covers more or less the same grounds as the preliminary objection. We have had some discussion with my colleagues. We are willing and ready with the permission of the court. To record a consent on both preliminary objection of 18.9.17 and notice of motion of dated 21.9.17 in the following terms' by consent between petitioner and all the respondents "

"The petitioner filed herein having failed to comply with mandatory provisions of Rules 11 and 12 of (parliamentary and county)petition Rules 2017 and section 78 Elections Act that the petition be and is hereby marked as struck out with no orders as to costs to the 1st respondent"

Counsel for petitioner and 2nd and 3rd respondents confirmed the terms of the said consent. This court did not adopt the said consent but reserved the matter for ruling this afternoon.

I have seen the application dated 22.9.17 and the notice of preliminary objection dated 18.9.17 , the same seeks striking out/dismissal of the petition for failure to comply with mandatory provisions of Section 78 of the Act and Rules 11 and 12 of the (parliamentary and county)Election Rules 2017. Considering the proceedings of this morning, the application is not opposed.

Section 78 of the Election Act provides;

(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 a 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

Rules 11 and 12 (of the parliamentary and county) Election Petition Rules 2017 stresses that security of costs must be deposited 10 days after filling of petition as provided for under sections 78(2) (b) and 78(2) (c) of the . The petition was filed on 6.9.17 and it is now over one month since then and no security of costs has been deposited as required by section 78 of the Elections Act and Rules 11 and 12 (of the parliamentary and county) Election Rules 2017. In Election petition no 11 of 2013 (Malindi) Anastasia Wanjiru versus IEBC & Shakila Abdalla Mohamed. Where the Honourable lady Justice F. Muchemi held that *“the law is clear that no further proceedings shall be entertained by the court where the petitioner has defaulted in depositing security. I understand this provision to mean that the court shall not proceed to hear a petition where no security has been deposited. However, the law is clear that the court may proceed to hear the respondent's application for dismissal of the petition for non-compliance with Section 78 of the Act ”*.

I have carefully considered the application and notice of preliminary objection filed herein and the law and I find that the petitioner herein failed to deposit security of costs which is fatal to the petition. The purported consent herein is thus irrelevant in view of my said finding.

In the upshot, I thus proceed to strike out the petition herein with no orders as to costs.

14 DAYS RIGHT OF APPEAL.

T.A ODERA

SPM

11.10.17

DELIVERED AND SIGNED IN OPEN COURT AT MUMIAS IN THE PRESENCE OF OMBITO AND NAMATSI ADVOCATES FOR 1ST RESPONDENT & AMUNGA ADVOCATE FOR PETITIONER. NAMATSI ADVOCATE HOLDING BRIEF FOR KUKUBEA ADVOCATE FOR 2ND & 3RD RESPONDENTS.

T.A ODERA

SPM

11.10.17