



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL'S MAGISTRATE'S COURT

AT MUMIAS

ELECTION PETITION NO 2 OF 2017

IN THE MATTER OF THE ELECTION FOR MEMBER OF THE COUNTY

ASSEMBLY MAYONI WARD, MATUNGU CONSITTUENCY

BETWEEN

KONGOTI RONALD ANZELEMO.....PETITIONER

- AND-

JULIUS ODUOR.....1ST RESPONDENT

INDEPENDENT ELECTRAL AND BOUNDARIES COMMISSION.....2ND RESPONDENT

JOHN K. KIRUI (RETURNING OFFICER MATUNGU CONSTITUENCY...3RD RESPONDENT

RULING

1. The 1st respondent/applicant filed a Notice of Motion dated 25/9/2017 and a preliminary objection dated 10/10/2017. The application is brought under section 78(1), (2)c and (3) of the Elections Act (no.24 of 2011) (revised 2016) and all enabling provisions of the relevant laws; the applicant seeks the following prayers:

a) That this honorable court be pleased to dismiss the petitioner's petition herein for failure to comply with the mandatory provisions of section 78(1) as read together with section 78(2) of the Elections Act(no. 24 of 2011)

b) That the costs of this petition and application be provided for.

2. The preliminary objection is premised on the following:

a) That the petition is totally defective having failed to be in compliance with rule 11 and 12 of the Election Petition (County and Parliamentary) Rules 2017 as with the mandatory provisions of section 78 of the Elections Act.

b) The Petition ought to be struck out for violating the law

3. The respondent/petitioner filed a replying affidavit sworn by him on 16/10/2017. The 2nd and 3rd

respondent's did not oppose the application.

4. In the grounds in support of the application the applicant has indicated that the petition was filed on 6/9/2017. When the petition was filed the petitioner was required to deposit security for costs being Kshs. 100,000, which was to be paid within ten days after the filing of the petition. The petitioner, at the time of filing the application under consideration had yet to deposit the security for costs. The supporting affidavit sworn by the applicant was along the same lines. I was urged to allow the prayers sought.

5. The respondent deposed in his replying affidavit that he was not aware that he was supposed to deposit the security for costs. He stated that the petition was instigated at his instance with the help of his party being Amani National Congress (herein after known as A.N.C). He added that his area Member of Parliament coordinated with his advocate of record on his behalf. He stated that he did not know his advocates, Ashioya Mogire & Nkatha, prior to filing the petition. He averred further that after he signed the petition he did leave everything to his advocate and he was not informed if any amount was needed to be deposited. He was made aware of the same when he was served with the application under consideration. When he knew of that requirement he made frantic efforts have the same paid. He was told by his party that there had been bureaucracy in the party offices and they were still willing to pay for the same. That never came to pass. He stated that he was not financially able to pay for the same, but he has since managed to raise the monies. He averred that he was willing to deposit the security but he did not have leave of court. He prayed that I dismiss the application and allow him to deposit the security. He added that he has since appointed the firm of Namatsi & Co advocates to act for him in this petition and the firm of Ashioya Mogire & Nkatha is not longer on record for him. In conclusion he stated that he has a very strong case as against the applicant.

6. Mr. Ombito and Mr. Omollo acting for the applicant submitted as follows. The wording of section 78 of the Elections Act no. 24 of 2011 is that the deposit be made within 10 days. In addition, this court cannot hear any proceedings until that is done. They relied on **Rotich Samuel Kimutai vs. Ezekiel Lenyongopeta and 2 others (2005) eklr** and **Esposito Franco vs. Amason Kingi Jeffa and two others (2010) eklr**. The first import of those two decisions, it was submitted, is, for want of deposit of the security for costs makes the petition incomplete. The court in the foregoing authorities indicated that even if there is power to extend time to deposit the costs, the discretion of the court cannot be invoked to extend powers given to the Act. In a nutshell, the provisions of rule 19 cannot override provisions of the act.

7. It was submitted further that there has been undue delay by the respondent. The reasons given by the respondent for the same are not convincing. Mr. Ombito indicated that the basis of the payment of the costs is to put a cap on frivolous and vexatious litigants. The rational was to avoid the situation we are in. He added that application preceded the application to extend time. The application to extend time, he explained is a knee jerk reaction, to the application and the preliminary objection. It is filed in bad faith. He submitted that Article 159 of the constitution as per authorities he relied on is not applicable as the court indicated that section 78 of the Elections Act no 24 of 2011 is not a technicality, but the substance of law. The time frame for hearing of the petition does not allow the delay showed by petitioner.

8. Mr. Omollo added that the advocate for the petitioner had not explained in an affidavit that he failed to advise him on the deposit. He explained that paragraph 15 of the replying affidavit shows that he, Mr. Namatsi is now on record for the petitioner. If that is the case he should have filed a notice of change of advocates and not a notice of appointment. In terms of paragraph 15 of the replying affidavit, Mr. Namatsi is not properly on record. He submitted in conclusion that the provisions of the Constitution cannot be invoked to assist an indolent litigant.

9. Mr. Namatsi, submitted that Section 78 of the Elections Act should not be interpreted to contradict the rules there under. Section 78 envisages a situation that when a deposit has not been made, an applicant can to come to court before a dismissal can be made. Had it been to the contrary, the act would have been specified the same. It allows the petitioner to explain why he did not comply vide an application. He relied on **Election petition number 6 of 2013 Fatuma Zainab Mohamed vs Ghati Dennitah and 10 others. He also relied on the Article 38 and 48 of the Constitution**. He added that they have filed an

application to extend the time to have the deposit paid in court. He submitted that it should be clearly noted that the petitioner is ready to deposit the amount in court and the reasons for the delay are given in the replying affidavit. He added that his client has appointed him to take over this petition as per paragraph 15 of the replying affidavit. That should give an assurance to the court that he is ready to proceed with the matter as he has today.

10. Before I determine the issues before me, I will address the submission raised by Mr. Omollo that Mr. Namatsi is not properly on record. In paragraph 15 of the replying affidavit, drawn by Mr. Namatsi, the petitioner indicates that he has now instructed him to act for him in place of Ashioya , Mogire and Nkatha Advocates. Mr. Namatsi in his submission conceded as much. Mr. Namatsi filed a Notice of Appointment in which he indicates he acts alongside the firm of Ashioya , Mogire and Nkatha. Taking the averments of his client, that is not the position. In the circumstances he should have filed a Notice of Change as per the provisions of Order 9 rule 5 as read with Order 9 rule 6. I have nothing on record to show that the firm of Ashioya , Mogire and Nkatha Advocates were served with the Notice of Appointment and the replying affidavit. Order 9 rule 7 requires that Notice of Appointment be served as well. In absence of that evidence I will consider the firm of Ashioya , Mogire and Nkatha advocates to be properly on record for the petitioner. I will also in the interest of justice, considering the nature of the application consider that Mr. Namatsi is acting alongside the firm of Ashioya , Mogire and Nkatha Advocates. In this regard, I am guided by the overriding objective of the Civil Procedure Act under section 1A and 1B, in which Mr. Namatsi and his client are enjoined.

11. Section 78 of the Elections Act no. 24 of 2011 provides as follows:

Security for costs

(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.

12. It is not in dispute that the petitioner/respondent has not deposited security for costs. Section 78 of the Elections Act no 24 of 2011, provides that the petitioner shall deposit the security for costs not more than ten days after the petition is filed. The court cannot hear any proceedings until that issue is resolved. Section 78(3) allows the 1st respondent as he has herein, to file the objection for my determination on the contrary. As it is a mandatory provision of law, and the petition cannot be heard until that issue is resolved; it is for the petitioner to explain satisfactorily, once the objection has been filed, why his petition should not be dismissed under section 78 of the Elections Act.

13. In his replying affidavit, he has stated that he was not aware of the fact that security was to be deposited and his then Advocate on record, did not tell him about the need and urgency to deposit the same. He added that his party, A.N.C, had intimated that they will go ahead and deposit but they did not come through. He added that now he has the money and he is ready to deposit the same.

14. The petition in court file has section in which the costs were assessed. The filing fees are specified

and the security for costs is also specified inside the petition itself. The receipt for the filing fees on record was issued in the name of the petitioner. Normally the receipt is issued in the name offered by the person paying. The presumption that arises is that the petitioner paid for the filing fees himself. If that is the case, I find it very farfetched that the assessing officer would only tell him about the filing fees indicated, and fail mention the security of costs also indicated. If there was a contrary explanation, considering the petitioner pleaded ignorance, it was not explained at all by him in his response.

15. The applicant indicates that his advocate did not tell him about the deposit of the security for costs. My finding in the foregoing paragraph makes that reason moot. Be that as it may, if it turns out indeed he was unaware as he has deposed, it was prudent that his advocates on record Ashioya , Mogire and Nkatha files an affidavit acknowledging that fact as well as his party to explain the bureaucracy he encountered and mentioned. In lieu of that, he should have availed evidence in form of annexures to explain as much. The explanation given considering consequences for non compliance would truly not do in the circumstances. I will add that he has not shown via evidence that he was on his accord, initially not able to pay and he is now able to pay the deposit.

16. In *Fatuma Zainabu Mohamed vs. Ghati Dennitah and 10 others (2013) eklr* the court was called upon to determine if it could enlarge time for the deposit security for costs in an election petition and if it would do so. The application before me is different as per the prayers outlined. I have relied on the following authorities in my finding herein; *Said Buya Hiribae vs. Hassan Dukicha Abdi & 2 others Mombasa Election Petition no. 7 of 2013*, *Kumbatha Naomi Cidi vs. County Returning Officer, Kilifi & 3 others Election Petition (Malindi) no 13 of 2013* and *Simion Kiprop Sang vs. Zakayo K. Cheruiyot & 2 Others Nairobi Election Petition no 1 of 2013*.

17. Lastly I will deal with the issue of delay. The Petition was filed on 6/9/2017. Up till the application under consideration and the preliminary objection was filed, the petitioner did not move the court at all. When the matter was listed for pretrial on 12/10/2017 after notice was issued 10 days prior, the petitioner orally sought leave to enlarge time to deposit the security. I asked why the application had not been filed before; the counsel acting for him at the time was none the wiser. I gave him time to respond to the present application and the preliminary objection. He filed the response late on 16/10/2017. It was served on the counsel for the respondents early in the morning on 17/10/2017. The matter was coming for hearing of the application and preliminary objection under consideration. The amount of time the petitioner has had to move the court and salvage his petition is clearly enough; his indolence in this regard is also very obvious. I will for the reasons given strike out the Petition. The costs of the application are awarded to the 1st respondent.

18. **Section 84** of the **Act** provides that, “An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.” **Rule 36 (1)** of the **Rules** provide as follows:

36 (1) The Court shall, at the conclusion of an election petition, make an order specifying –

a) the total amount of costs payable; and

b) the person by and to whom the costs shall be paid.

19. As the 1st respondent has succeeded in their application, they shall have the costs of the application and the petition. I award the costs of the Petition to the 2nd and 3rd respondent as well.

20. As this case has been struck out at the preliminary stage before the pre-trial conference has been held. I award instruction fees for the petition and application (as applicable) to strike out for each party at **Kshs. 100,000.00**. The other incidental costs shall be assessed and the total costs certified.

21. The final orders are therefore are follows;

(a) The petition be and is hereby struck out.

(b) The respondents are awarded costs of the petition and the application assessed as follows:

(i) Kshs. 100,000/- as the total instruction fees for the petition and application for the 1st respondent.

(ii) Kshs. 100,000/- as the total instruction fees for the petition for the 2nd respondent and 3rd respondent.

(iii) All other incidental costs shall be assessed and the total costs certified.

(iv) A certificate of this determination in accordance with **section 86(1)** of the ***Elections Act, no. 24 of 2011*** shall issue to the Independent Boundaries and Electoral Commission and the Speaker of the County Assembly, Kakamega County.

Dated, Signed and delivered this 23rd of October 2017.

CHERUTO C. KIPKORIR

SENIOR RESIDENT MAGISTRATE

In open court, in the presence of:

Court Clerk: Cohen.

Mr. Namatsi for the Petitioner

Mr. Omollo and Mr. Ombito for the 1st Respondent

Mr. Omollo holding brief for the firm of Kadima & Co advocates for the 2nd and 3rd Respondent