



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT NYERI

ELECTION PETITION NO.2 OF 2017

MARGARET NYATHOGORA.....1ST PETITIONER

LUCY MUGURE WANYITU.....2ND PETITIONER

ELIZABETH NYAGUTHI MWANGI.....3RD PETITIONER

SALOME WAIRIMU KAGO.....4TH PETITIONER

IMMACULATE WAMBUI KABUTHA.....5TH PETITIONER

ALICE MIRIGO MUCHIRI.....6TH PETITIONER

-VERSUS-

THE I.E.B.C.....1ST RESPONDENT

JUBILEE PARTY.....2ND RESPONDENT

BETH NYAWIRA KIMAILI.....3RD RESPONDENT

MUTHONI PATRICK MUTAHI.....4TH RESPONDENT

MILLICENT CHEROTICH.....5TH RESPONDENT

WAMBUGU THIONGO WILLIAM.....6TH RESPONDENT

MUTHONI ANNE CAROLINE.....7TH RESPONDENT

MARY NDIRITU NYAMBURA.....8TH RESPONDENT

LUCY WAMBUI KARIUKI.....9TH RESPONDENT

GATHUA WANJIKU LILIAN.....10TH RESPONDENT

ELIZABETH WANJIKU MUGO.....11TH RESPONDENT

WANJIKU JULIAH MUKAMI.....12TH RESPONDENT

THUMBI WAIHUINI BEATRICE.....13TH RESPONDENT

KAMAU WAIRIMU ROSE.....14TH RESPONDENT

NDIRITU NDOMO MARY.....15TH RESPONDENT

RULING

The Respondents in this petition has filed two similar or related Applications seeking to have the petition dismissed. The two Applications touch on the issue of security for costs.

The 1st Application is by the 1st Respondent and is dated 9.10.2017. The prayers therein are:-

- a) That the petition be dismissed for want of deposit of security for the payment of costs.
- b) Costs of the Application.

The application is based on the following grounds:

1. The Election Petition was filed on 25th September,2017.
2. The Petitioners mandated under Section 78 of the Elections Act,2011 were to deposit Kshs.100,000/= each in court as security for payment of costs within 10 days from the date of filing the petition.
3. It is now over 14 days since the Petitioners filed their petition yet they have each not filed the mandatory sum of Kshs.100,000/= each being security for payment of costs.
4. The Petition is thus a gross abuse of Court process.
5. The Petition is made in bad faith and the Petitioners are not keen on compliance with the law.
6. It is in the interest of justice that this application ought to be allowed as prayed.
7. It is fair, just and expedient that the Petition is dismissed.

It was supported by the Affidavit sworn by George Mbaye on 9.10.2017.

The 1st Respondent's main argument is that Section 78 of The Elections Act 2011, mandates each petitioner, to deposit Ksh.100,000/= as a security for payment of costs. That since there are 6 petitioners, the amount that ought to have been deposited is Kshs.600,000/= and not the Kshs.100,000/= which was deposited in court as security.

The second Application is dated 16.10.2017 and was brought by the 3rd to 15th Respondents. It seeks the following prayers:-

1. **THAT** the election petition herein be dismissed for failure by the petitioners to deposit a sum of Kshs.1,300,000/= in respect of security for costs.
2. **THAT** the costs of the Application and the petition be paid by the petitioners.

The application is based on the following grounds:-

1. Pursuant to Section 78 (2) (c) of the Elections Act, a person who files a Petition to challenge an election shall deposit One Hundred Thousand (Kshs.100,000/=) in the case of a Petition against a

Member of a County Assembly.

2. The Petitioners have filed an election petition regarding the validity of 13 elections of Members of a County Assembly (3rd to 15th Respondents). Consequently, the security for costs should be Kshs.1,300,000/= payable within 10 days after presentation of the Petition.

3. Having failed to deposit the said amount by 6th of October, 2017, the Election Petition should be dismissed with costs to the 3rd to 15th Respondents. Every petitioner must fully comply with the statutory provision.

4. The 3rd to 15th Respondents have individually incurred huge costs to defend the proceedings by filing the Response to the petition and Supporting affidavit as well as affidavits.

5. That failure to deposit security within 10 days is not a mere technicality but it goes to the root of the matter – jurisdiction of this court to conduct any further proceedings herein.

Their Application is supported by the Affidavit sworn on 16.10.2017 by Muthoni Anne Caroline. Their basic argument is that there are 13 petitions and therefore the petitioners ought to have paid a deposit in respect to each of them. That means that Kshs.1,300,000/- ought to have been deposited instead of the Kshs.100,000/- that they deposited.

Margaret Nyathongora swore two Replying affidavits on behalf of the petitioners. The first affidavit was sworn on 16.10.2017 in response to the 1st Respondents Application whilst the second Affidavit was sworn on 19th October, 2017. She attached the cash deposit slip marked 'MM1' and the deposit receipt No.B453642 to 'MM2' to the two affidavits.

She deponed that the petitioners have fully discharged their obligations with respect to payment of security for costs for a petition against a member of a County Assembly. That the petition herein represents one (1) petition presented by many aggrieved persons arising from the nomination process and it is therefore misleading to suggest that there are many petitions.

The 3rd to 15th Respondents supported the 1st Respondent's Application. Each of the 3 sides then filed written submissions in respect of their positions.

As earlier pointed out the key issue for determination is what amount of money, being of security for costs, should the petitioners have deposited? Is it the Kshs.100,000/- that they deposited, or it is Kshs.600,000/= representing Kshs.100,000 X 6 by each of the petitioners as argued by the 1st Respondent or Kshs.1,300,000/- representing 100,000/- X 13 Respondents or Kshs.1,900,000/- representing Kshs.600,000/- for all the petitioners plus Kshs.1,300,000/- for all the Respondents.

The Law

All the 3 sides relied on the same provisions of the Laws but gave them different interpretation.

Rule 13 (1) of the Elections (Parliamentary and County) Election Regulations 2017 states that:-

Within 10 days of filing a petition, under these rules a petitioner shall deposit security for the payment of costs that may become payable by the petitioner as provided under Section 78 (2) and 78(2) (c) of the Act.

Section 78 (2) (c) of the Election Act 2011 provides as follows-

A person who presents a petition to challenge an election shall deposit One Hundred Thousand Shillings, in the case of a Petition against a member of a County Assembly.

Now all the parties agree that the security of costs, MUST be deposited. The divergent point is how much security should be paid when one petition has a number of parties.

The 1st Respondent/Applicant in 1st Application argues that Regulation 13 (1) cited above, uses the wording a ‘petitioner’ and this should mean that each and every petitioner to a suit ought to abide by the provision and thus should each pay the anticipated security for costs.

That the Regulations define a petitioner to mean’ A person who files a petition to the election court under the constitution or under the Act in accordance with the Rules. That this definition is pronounced strictly in singular terms and when reflected upon as against this suit means that each petitioner is considered individually. Therefore, the Kshs.100,000/= deposit paid herein, can only be applicable to one petitioner.

They relied on 3 cases;

- a) **Rotich Samwel Kimutai -Vs-Ezekiel Lenyongopeta & 2 others (2005)eKLR**
- b) **Evans Nyambaso Zedekiah & Another -Vs- Independent Electoral and Boundaries Commission & 2 others (2013)eKLR**
- c) **Kumbatha Naomi Cidi -Vs-County Returning Officer, Kilifi & 3 others (2013)eKLR**

These 3 authorities echo that failure to deposit the money and within time is not a mere irregularity which can be waived by the parties and failure to comply with Section 78 of the Act and Rule 11 is fatal to a Petition which must then be struck out.

They urged the court to dismiss the petition.

The 3rd to 15th Respondents (Applicants in the 2nd Application) point out that this petition may be 1 but it represents 13 elections conducted by the 1st Respondent in accordance with Article 90 (2) of the Constitution which states that IEBC shall be responsible for the conduct and supervision of elections for seats under Article 177 (1) (b) and (c) of the Constitution.

That this court is not dealing with the nomination process within the Jubilee Party but rather the election and declaration of results by IEBC in respect to 13 elections of 28.8.2017. That where a petition is questioning 13 elections of MCAs, in a consolidated Election Petition, the security for costs must be enhanced accordingly. They cited 2 cases:-

- a) **Mwanhamisi Omor Komora -Vs- I.E.B.C Mombasa Election Petition No.1 of 2013 (2013) eKLR**
- b) **Fatuma Zainabu Mohamed -Vs- Ghati Dennitah & 10 others (2013)eKLR**

These two authorities deal with the mandatory requirement to deposit the costs and extension of the time within which such a deposit can be made.

The petitioner, (Respondent to the 2 Applications maintained that we only have 1 petition and therefore the Ksh.100,000/= is sufficient. Further that the court is enjoined by Article 159(2) (b) of the Constitution to determine issues of substance and merit and not technicalities. They relied on the case of **Philemon Chepkwony Lutodo -Vs- IEBC and 2 others Kitale Election Petition No.11 of 2013 eKLR 2013**. Where the court in considering the definition of a “Petitioner” and “person” as contained in the Act, was categorical that the same should be interpreted in the plural rather than singular terms. The court in this case dismissed the prayer to direct each of the Petitioners to deposit Kshs.500,000/= costs.

The issue of the deposit for security for costs has been subject to a lot of litigation in our courts. Infact, way back in 2011, one petitioner moved to court to have the provisions of Section 78 of the Elections Act declared unconstitutional. This was in **Johnson Muthama-Vs-Minister of Justice and Constitution**

Affairs & others Nairobi Petition No.198 of 2011 where the court gave the rationale behind the requisite for the deposit of costs in civil practice and eventually dismissed the petition. It was held that among other things, that given the nature of elections, it serves a useful and rational purpose to ensuring that only those who have a serious interest in challenging the outcome of an election do so.

This authority was cited amongst others by the Court of Appeal when one Respondent moved to the Appellate Court praying that the petitioner be ordered to deposit costs in both the High Court and before the Court of Appeal. This was in the matter of an Application for security for costs **between Gatirai Peter Munya -Vs- David Muiraria & others Nyeri Civil Appeal Application No.38 of 2013 (2014) eKLR.**

The bench comprising Judge Otieno Odek, Judge Mohammed and Alnashir Visiram cited other cases such as **Harit Sheth Advocate -Vs- Shamas Charqua Civil Appeal No.68 of 2008** where it was held that the principal aims or the overriding objections include the need to act justly in every situation, the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts in ensuring that the principle of equality is maintained and that as far as it is practicable to place the parties on equal footing.

They also cited the High Court Judge in **Patrick Ngeta Minzi -Vs- Marcus Mutua Muluu & 2 others High Court Petition No.8 of 2013** security of costs ensures that the respondent is not left without recompense for any costs or charges payable to him. The duty of the court is therefore to create a level ground for all the parties involved in this case, the proportionality of the right of the petitioner to access to justice vis a vis the respondents right to have security for any costs that may be owed to them and not to have vexatious proceedings brought against him.

After the analysis of all these cases the court of Appeal, allowed the application for the deposit of security for costs, but did not order the petitioner to deposit the Kshs.2,000,000/= the Respondents were demanding. He was directed to deposit Kshs.500,000/- in both the High Court Petition and a similar amount in the Court of Appeal proceedings.

The bulk of the authorities cited by the Applicants herein reference to position that payment of costs is a mandatory provision. That is not in dispute. The courts have however not been too rigid on the time factor and this time has been enlarged whenever such a request was made.

When it comes to a petition which has multiple parties, the closest authority is the one that the petitioners/ Respondents cited. That is **Kitale Election Petition No.11 of 2013- Philemon Chepkwony Motodo - Vs- IEBC and others (ibid).** In his long and well reasoned ruling the Honourable Judge R.Karanja considered whether an election petition filed by more than one person imposes upon each of the petitioners the obligation to separately deposit security in terms of Section 78 (2) (b) of the Elections Act read together with Rule 11 (1) of the Election Petition Rules.

He held that *“The opinion of this court is that Parliament in enacting Section 78 (1) (b) and 78 (2) of the Elections Act, did not intend to block any person from accessing justice by the requirement that a petition deposits a sum of Kshs.500,000/= in an election petition. If that were the case, then the values and principles embodied in the constitution would be meaningless, but we all know that the constitution is the Supreme Law and well above any ordinary Act of Parliament”*. He continued to state that

“Therefore this court is inclined to interpret the words a petitioner as appears in Section 78(1) of the Elections Act and the words ‘a person’ as appears in Section 78(2) of The Elections Act in plural ratio than singular terms. It would be too restrictive to apply the said provision in singular terms as doing so will have the repercussion of blocking people who have a common cause to jointly approach with a view to minimizing costs. He concluded that the deposit required under Section 78(2) (b) of the act relates more to the petition rather than the person or persons filing the same in court”.

The court is persuaded that the reasoning in this judgment are very sound and founded on a proper interpretation of the law. The Judge even gave the basis for the said deposit which he said was to be a

‘device to discourage unnecessary litigation the basis of ‘looser pay principles’.

This authority answers word for word to first Application where there are many petitioners. It did not touch on the number of Respondents. But without going into the arguments, the court observes that even in that petition, there were many respondents and the deposit ordered was one. The same argument that the number of Respondents is not what should be considered but the petition itself.

The security for costs should not be used as a bar to people with a common cause, bringing one case against other people whom they may deem have a common problem.

The court therefore finds that the two Applications lack merit. The deposit for costs relate to a petition and the deposit of Kshs.100,000/= made by the petitioners was adequate. The 1st Respondents Application dated 9.10.2017 and the 3rd to 15th Respondents Application dated 16.10.2017 are dismissed. Costs to abide in the petition.

Dated, signed and delivered in open court at Nyeri this 31st day of October, 2017.

W.KAGENDO

CHIEF MAGISTRATE

Delivered in the presence of;

for the petitioner –

1st Respondent-

3rd -15th Respondents-