

REPUBLIC OF KENYA

IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT BUTALI

ELECTION PETITION NO. 1 OF 2017

(FORMERLY KAKAMEGA CME PETITION NO. 11 OF 2017)

WALTER SHIUNDU MURUNGA.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

ENOCK OTARA (RETURNING OFFICER).....2ND RESPONDENT

SITANDA KENNEDY KILWAKI.....3RD RESPONDENT

RULING

The petitioner filed a notice of motion under provisions 159 of Constitution, Rules 13 & 19 of the elections (parliamentary82 County Elections (Petition Rules -2017 and under a certificate of urgency.

The petitioner prays for an extension of time within which he is supposed to deposit security for costs as required under Section 78(2) (c) of the Elections Act 2017.

I have looked at this application together with the supporting affidavit of the Petitioner Mr.Walter Shiundu Murunga and I hereby rule as follows;-

Sections 78 of the Elections Act, 2011 Requires the Petitioner to deposit Security of costs within 10 days of filing the petition. In this particular petition the petitioner sought to file Kshs.100,000/- as security for costs before his petition can be heard and determined. The purpose of this requirement was to discourage frivolous and or vexatious litigants from challenging the results of an election. The other purpose is to cushion or recompense respondents who incur expenses in defending hopeless and unsuccessful election petitions. See the case of (*Esposito Franco Vs. Amason Jeffah Kingi and 2 others.) Civil Appeal No. 248 of 2008 (In Nairobi).*

The payment of the required amount is not merely a procedural requirement but an essential element that cannot merely be excused as a matter of judicial discretion. This fact was demonstrated in the case of (*Said Buya Hiribae Vs. Hassan Dukicha Abdi & others) Mombasa Election Petition No. 7 of 2013.*

In the Petition before me, the Petitioner lodged his petition on 6th September 2017 which was within the required statutory 28 days from the date of declaration of the results which was on 9th of August 2017. He had 10 days statutory time given to deposit his security of costs. He did not and his 10 days lapsed on 16th September, 2017. This matter was mentioned before me on 20th September, 2017 that was 4 days after his statutory period to deposit had lapsed; technically he already had 4 days extension without leave of court.

The Petitioner through his Advocates Mr. Oburu and Sereti made an oral application seeking to extend time to deposit his security of costs, an application which Mr. Wangila for the 3rd Respondent and Miss Wakoli for the 1st and 2nd Respondent objected to. The court therefore directed the Petitioner to file a formal application seeking extension of time within which to deposit the security for costs and gave a

mention of the case on 6th of October 2017. This by itself was technically an extension of time and an opportunity for the Petitioner to deposit his security which would have dispensed of his certificate of urgency seeking extension of time, in short the court gave him an extension of time illegally but he did take advantage of the same to date he has 20 days from the date his statutory time of 10 days lapsed.

However, Paragraph 8 of the Petitioner's supporting affidavit together with annexure thereof confirms to the court that he has funds to deposit the security. I hereby ruled under consideration of Section 78(3) that the Petitioner to deposit his security before 2:00pm today when the matter will be mentioned and parties will take a date for pre-trial where all other subsequent applications will be heard and determined.

EVANS W. MULEKA

S.R.M BUTALI

OCTOBER 6, 2017.