



**REPUBLIC OF KENYA**  
**IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT**

**AT KIMILILI**

**ELECTION PETITION NO. 2 OF 2017**

**JUSTINE CHEMTAI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**WINNIE ATIENO NYAMBOK.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**FEDERAL PARTY OF KENYA PARTY LEADER...2<sup>ND</sup> DEFENDANT/RESPONDENT**

**INDEPENDENT ELECTORAL AND**

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

**AND**

**THE FEDERAL PARTY OF KENYA.....INTERESTED PARTY/APPLICANT**

**R U L I N G**

By a notice of motion dated 30.10.2017 brought under certificate of urgency, the Petitioner hereinafter called the Applicant seeks the following orders;

- i. That the court sets aside the notice to withdraw dated 13.10.2017 and consent recorded on 16.10.2017 (sic).
- ii. That the court grants the applicant leave to furnish security for this petition out of time.

The application is supported by an affidavit sworn by the applicant. The gist of the application is that the applicant who had earlier indicated through his advocate that she intended to withdraw the petition in a new twist of events is now desirous of prosecuting the petition. That the applicant has sought further advice from counsels not on record and she has been duly advised that the court has jurisdiction to determine the petition contrary to earlier advice she got to the contrary. The applicant contends that the petition is of utmost public interest as it involves representation of the people of Bungoma. That the applicant and the people of Bungoma will suffer irreparably should the court decline to grant the orders sought. The applicant has deponed that the 1<sup>st</sup> Respondent was irregularly gazetted to serve as a nominated MCA in Kakamega county as well.

The application was placed before me on the 31.10.2017 and I did certify the same as urgent. I ordered

the same be served for inter parties hearing on the 3.11.2017.

On the morning of 3.11.2017 the applicant and his counsels appeared. An affidavit of service by one Emmanuel W. Ouna indicated that the 1<sup>st</sup> Respondent, interested party and 3<sup>rd</sup> respondent's advocates were served on the 1.11.2017. By the time the application was called out on the 3.11.2017 none of the Respondents, the interested party nor their advocates were present.

The applicant's counsel prosecuted his application. Later Mr. Ayieko for the interested party and 1<sup>st</sup> Respondent appeared after the matter was already dealt with. I note from the record that he later had a replying affidavit filed by the 1<sup>st</sup> Respondent. From the replying affidavit the 1<sup>st</sup> Respondent opposes the application. She has deponed that the application is incompetent, devoid of merit, frivolous, vexatious and abuse of the court process. That the court is already functus officio. That the application is an afterthought as it's main reasons the petition was withdrawn was because the petitioner had not complied with provisions of section 74 of the Elections Act (sic).

That the court lacks jurisdiction to set aside consent order recorded on the 30.10 2017 (sic). That the application is made in bad faith and only intended to frustrate the party (sic).

The 1<sup>st</sup> Respondent further deponed that the petitioner has not come to court with clean hands and that she fraudulently forged documents to fulfill her selfish interest. That the nomination of the 1<sup>st</sup> Respondent was done in accordance with the provisions of the constitution and all requisite provisions of the law.

I have carefully considered the Notice of motion dated 30.10.2017. From the record, it is important to clarify that no consent was recorded on the 16.10.2017 or 30.10.2017 as alleged by the 1<sup>st</sup> Respondent. On the 16.10.2017, the petitioner's advocate applied orally to have the petition withdrawn. The counsels for the interested party and 1<sup>st</sup> Respondent on one hand and counsel for the 3<sup>rd</sup> Respondent on the other hand did not object to the oral application to withdraw.

I reserved a ruling for 19.10.2017. In my considered ruling delivered on the said date, I disallowed the oral application to withdraw the petition and directed the petitioner to make a formal application if she intended to withdraw within 5 days from the 19.10.2017. The reasons for the decision are clearly spelt out in the ruling.

In a strange turn of events the applicant/petitioner has abandoned her quest to withdraw the petition. This court has no jurisdiction to force a party to withdraw her /his petition. I can only deal with the petition based on the law and rules governing petitions. It is therefore my finding that no orders were made on the 16.10.2017 or on the 30.10.2017 and so there is none to be set aside.

The only issue for determination is whether this court can grant leave to the applicant/ petitioner to furnish security out of time.

Rule 11 (1) of the Elections (Parliamentary and County ) Petition Rules 2017 requires that a petitioner shall deposit security for payment of costs that may become payable to the petitioner. The deposit should be made within 10 days of the filing of a petition. The deposit for security ought to have been made by 17.9.2017. The petitioner is seeking to deposit security over 53 days after filing her petition.

Section 78 of the Elections Act provides that a petitioner shall deposit security of payment of costs that may become payable by the petitioner not more than 10 days after presentation of petition.

A person who presents a petition in challenge of an election shall deposit one hundred thousand shillings in the case of petition against a member of a county assembly.

The question is, does the court have jurisdiction to extend time within which to furnish security?

In the case of Fatuma Zainabu Mohammed and Ghati Dennita & 10 others (unreported) , Murithi Judge in Kisii Election Petition No. 6 of 2013 held,

“ The rules cannot legislate a power of extension of time which is not expressly authorized under the relevant sections of the statute by the authority of which the rules were made. There is no express provision under the Election Act 2011 for the enlargement of time to deposit the security for costs. Accordingly the power to extend time cannot be authorized by the general power under Rule 20(read rule 21) of the Elections Rules to extend time for the doing of any act under the Rules.” Even with amendments to the Elections Act, there is no provision for the enlargement of time to deposit security. The decision in the Zainabu Mohamed case ( supra) was quoted with approval by justice Sitati R. N. in the case of Evans Nyambane Zedekiah & another -vs- IEBC and 2 others Kisii High Court Election Petition No. 10 of 2013. The decision in the 2 cases are binding on this court. The upshot of my finding is that the Elections Act does not give power to the court to extend the time for making of the deposit. On this ground alone, I find that the application must fail and it is so dismissed.

However, even if the court had jurisdiction, in the case of Nicholas Kiptoo Arap Salat -vs IEBC & 7 others, ( the supreme court civil application No. 10 of 2014 ) the supreme court set the guiding principles that a court should consider in exercise of discretion for determination of application for extension of time. They include;

- i. Whether there is reason for the delay.
- ii. Whether there will be prejudice suffered by the Respondents if the extension is granted.
- iii. Whether the application has been brought without undue delay.
- iv. Whether public interest should be a consideration for extension of time.

Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of court. A party who seeks extension time has the burden of laying a basis to the satisfaction of court. Of course every case has to be considered on the basis of its own remit.

The applicant filed the petition on the 6.9.2017. On the 6.10.2017 the applicant appointed her advocate who is still on record. Even if we were to take into account the fact that the petition was filed by the applicant in person, there is no explanation why the advocate never moved the court to seek extension of time to furnish security. The parties appeared in court on the 11.10.2017 and agreed on a date to argue the preliminary issues raised. The applicant never took cue from the intended preliminary issues raised to seek extension of time. Instead the applicant sought to orally withdraw the petition. When directed to file a formal application, she brought the current application. The applicant has a flippant attitude and this application appear more of an afterthought . She has failed to satisfactorily explain the delay and/or that she deserves a discretionary remedy from court. In the entire circumstances of this case, I find that even if the court had jurisdiction, the application fails the merit tests. As already indicated herein above it is disallowed.

**DATED AT KIMILILI THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2017**

**D.O. ONYANGO,**

**SENIOR PRINCIPAL MAGISTRATE,**

**7.11.2017**