



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT MIGORI

ELECTION PETITION NO.2 OF 2017

LEO ODOYO OBAMBO.....PETITIONER

VS

BONFACE OUMA OREMO.....1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....2ND RESPONDENT

RULING

The 2nd respondent has filed an application dated 16th October 2017 seeking the following orders;

- That the petition dated 1st September 2017 be struck out for failure to join the Returning Officer as a party to the proceedings.
- That the petition dated 1st September 2017 be struck out for failure by the Petitioner to deposit the security for payment of costs herein.
- That the costs of the application and the election petition be borne by the Petitioner.

The application is made on several grounds particularised in the application and supported by the affidavit of one Benson Sumbwa Abuko who has described himself as an employee of the 2nd respondent and the Returning Officer for Uriri Constituency and for the elections of the Member of County Assembly East Kanyamkago Ward.

The counsel for the 1st respondent supported the application in its entirety and wholly.

Counsel for the petitioner informed the court that his client could not raise the deposit for the security for costs and that he had no further instructions on how to proceed with the application.

The Elections (Parliamentary and County Elections) Petitions Rules, 2017 describes a respondent as;

- a) The person whose election is complained of
- b) *The returning officer*
- c) The commission and
- d) Any other person whose conduct is complained of in relation to an election.

Section 5(1) of the Rules provide that the effect of any failure to comply with these Rules shall be

determined at the Courts discretion in accordance with the provisions of Article 159(2) (d) of the Constitution.

Article 159(2) (d) of the Constitution of Kenya, 2010 provides as follows: *in exercising judicial authority, the courts and tribunals shall be guided by the following principles..... (d) justice shall be administered without undue regard to procedural technicalities.*

In my respectful view, and from the foregoing provisions of the Constitution, failure to enjoin the Returning Officer would not have rendered the petition as presented fatally defective since as an employee of the 2nd respondent he is ably represented.

Section 78 of the Elections Act provides that;

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
2. A person who presents a petition to challenge an election shall deposit.....(c) *one hundred thousand shillings in 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 respondents' costs.

In **Evans Nyambaso Zedekiah & another v IEBC & 2 others. Sitati J** expressed herself thus; *I entirely agree with the Learned Judges in holding that the deposit of the security for costs is a substantive issue that goes to the root of the proceedings as non- payment of the same deprives the court of the jurisdiction to deal with the matter further. I also agree that the requirement for the deposit of the security for costs keeps away from the court corridors some busy bodies who file cases in court while knowing that such cases have no chance of succeeding and also while knowing that they no intention of paying the costs once they lose their cases. There is no argument that a court which has no jurisdiction cannot move one single step in a matter that is before it.*

See High Court Kiambu Election Petition No. 2/17 Milton Kimani Waitinga v IEBC & 2 others

The law is very clear on the provisions of Section 78 as well the subsidiary legislation that a Petitioner is required to deposit the security for costs within 10 days of filing their petition.

The Petitioner herein had not filed the deposit for the security for costs by the time the matter had been scheduled for the pre-trial conference, 31 days after the filing of the petition.

In the circumstances the Notice of Motion dated 16th October 2017 is granted.

The effect of that is as follows;

- a) The Petition is hereby struck out.**
- b) The respondents are awarded costs of the application and petition.**
- c) A certificate of this determination in accordance with Section 86 of the Elections Act shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the Migori County Assembly.**

Orders accordingly.

Dated, signed and delivered in open court this 14th day of November 2017.

E. MURIUKI NYAGAH

PRINCIPAL MAGISTRATE

MIGORI LAW COURTS