



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE’S COURT AT KIAMBU

ELECTION PETITION NO.1 OF 2017

**IN THE MATTER OF THE ELECTIONS ACT, 2011 AND THE
THE ELECTIONS (PARLIAMEN TRAY AND COUNTY ELECTIONS) PETITION RULES, 2017**

AND

**IN THE MATTER OF THE MEMBERS OF THE MEMBERS NOMINATED TO THE KIAMBU
COUNTY ASSEMBLY AND GAZETTE NOTICE 8380 PUBLISHED IN THE KENYA
GAZETTE DATED 28TH AUGUST 2017**

CHEGE ANN WANJIKU.....PETITIONER

VERSUS

THE CLERK COUNTY KIAMBU ASSEMBLY.....1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISION.....2ND RESPONDENT

JUBILEE PARTY OF KENYA.....3RD RESPONDENT

LUCY NJOKI MUGURE.....4TH RESPONDENT

NDUNGU NUNGARI MMERCY.....5TH RESPONDENT

GATHIGA JANE WANJIRU.....6TH RESPONDENT

SUSAN WANJIRU MWAURA.....7TH RESPONDENT

NANCY NYAMBURA MWAURA.....8TH RESPONDENT

YVONNE WANJIKU WAWERU.....9TH RESPONDENT

RULING

1. By petition dated 5th day of September 2017 brought together with a Notice of motion under a certificate of urgency and filed on 6th day of September 2017 the Petitioner sought:

(a) A declaration that the 4th to 14th Respondents were not validly elected as members of the Kiambu County Assembly on the Women's Members Nominated to the County Assembly List of the 3rd Respondent pursuant to Articles 90, 177 and 193 of the constitution, Sec. 25 of the Elections Act and Regulation m of Elections (Party Primaries and Party Lists) Regulations 2017.

(b) A declaration that the Gazette Notice No. 8380 published on the 28th August 2017 is *void ab initio* to the extent that it provides and specifies that the 4th to 14th Respondents stood validly nominated or elected to the Kiambu County Assembly on the Jubilee Party List of Women Members Nominated to the Senate following the General Elections held on 8th August 2017.

(c) An order quashing and/or invalidating Gazette Notice No. 8380 dated 28th August 2017 to the extent that it specifically provides that the 4th to 14th Respondents are validly nominated or elected as members of the Kiambu County Assembly under the list of Women's Members Nominated to the Kiambu County Assembly submitted by the 3rd Respondent for General Elections held on the 8th August 2017 pursuant to Article 90 of the Constitution.

(d) An order be made by this court that the 2nd Respondent gazette the Petitioner as one of the persons duly elected on the 8th Augusts 2017 to Kiambu County Assembly on the Women's Members Nominated to the Kiambu County Assembly on Kiambu County Assembly party List submitted to the 3rd Respondent pursuant to Article 90 of the Constitution.

(e) It be ordered that the Respondents be condemned to pay the costs of this Petition.

(f) Such further or other relief or orders be made as may be just.

2. The matter was mentioned severally from 6/9/2017 before another court awaiting gazettelement of magistrate to handle the same. When the matter came for directions before me on 31st October 2017, Mr. Karanja for the Petitioner applied to withdraw the application dated 5/9/2017 with no orders as to costs as it had been overtaken by events and this was allowed.

3. The matter came again for further directions on 21/11/2017 Mr. Njomo for the 9th Respondent sought a confirmation as to whether the Petitioner had deposited the security for costs to enable him file the necessary application as he filed his response to the petition.

4. Mr. Karanja for the Petitioner then admitted that he had not deposited the same and sought to deposit the same in two weeks for the reasons that:

(i) When they filed the Petition they were only told to wait for gazettelement.

(ii) That this was the 2nd time this court was handling the matter.

5. Mr Waithaka for the 4th, 7th and 8th Respondents opposed the application and sought that the petition be struck out with costs on the grounds that the security for costs ought to have been deposited at the time of filing the petition and in any event not later than 10 days after filing the petition.

6. Mr Ombasa for the 3rd Respondent associated himself with the submissions by Mr Waithaka and submitted that failure to deposit the security for costs made the petition incompetent and allied that it be struck out. However he told the court that the 3rd respondent would not ask for costs since the Petitioner was a member of the Jubilee party.

7. Mr Maina for the 2nd Respondent opposed the application on the grounds that the issue of costs is a procedural preliquisite which cannot be excused by a judicial discretion, that failure to deposit the same as required was fatal to the petition. He urged the court to strike it out with costs.

8. Mr Njomo further submitted that since the Petitioner had admitted no compliance with the mandatory provisions then the petition is incompetent, then the petition is incompetent and ought to be struck out with costs.

9. Mr. Karanja for the Petitioner wished that the court would take judicial notice of the difficulty the Petitioner underwent when filing the matter in that:

(i) There was no court gazette to handle the matter.

(ii) They were taken to my colleague for directions and the matter came up three (3) times before this court was gazette.

(iii) They were even anticipating to withdraw the petition as the court was not being gazetted.

(iv) It is pre mature for the court to handle the issue of costa before the matter even went for pretrial when it should be handled by all parties as they might even find that some Respondents had failed to comply with the law.

(v) The issue should be handled by way of an application and that it is prejudicial for the court to handle the application when the matter was only coming for directions.

(vi) The petition is meritorious and relying on Art. 159 of the Constitution, he submitted that the issue of costs is a procedural technicality and therefore justice should be done without undue regard to technicalities.

10. In response to this line of submissions, Mr Maina for the 2nd Respondent argued that:

(i) It does not matter if the court is gazette or not as the security for costs should be deposited with the Registrar and that the Rules define the Registrar as the executive officer where the petition is filed.

(ii) Art. 159 of the Constitution does not apply here as an election petition is governed by its own rules and timelines and therefore the issue cannot be cured by the oxygen rule under Civil Procedure Rules.

11. While associating himself with the submissions by Mr. Maina, Mr Waithaka further submitted that:

(i) Parties cannot hide behind Art. 159 of the Constitution to circumvent rules of procedure.

(ii) The issue of security is a substantive procedure and Sect. 13 of the Election Petition Rules is in mandatory terms which the court cannot be asked to amend.

(iii) The institution where the security for costs was to be deposited was available at the time of filing the petition and no good reason has been given for no compliance.

DETERMINATION

12. I have considered the submissions by the parties herein. Contrary to arguments by counsel for the Petitioner, the issue of deposit of security for costs is a point of law which can be raised at any time and even orally. It does not have to await pre- trial stage or be raised by way of a formal application. It is therefore not premature to handle the issue.

13. It is not a technicality either so as to be cured by Art. 159 of the Constitution or Civil Procedure Rules. The issue of costs in an election petitions is governed by the Elections Act and Rules.

14. The Petitioner has admitted that the security for costs for Ksh. 100, 000/= has never been deposited

since the Petition was filed on 6/9/2017 as provided for under Section 78 (1) and (2) (c) of the Elections Act No. 24 of 2011.

15. The time lines for such deposit are provided for under Section 78 (1) of the Elections Act in mandatory terms that:

“A petitioner shall deposit security for costs that they become payable by the petitioner not more than ten days after presentation of a petition under this part.”

16. Further Rule 13 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides that:

(1) Within ten days of filing a petition, a petitioner shall deposit security for the payment of costs in compliance with Section 78 (2) (b) and (c) of the Act.

(2) The security for costs to be deposited under sub rule (1) shall-

(a) be paid to the Registrar;

(b) be for the payment of costs, charges or expenses payable by the petitioner; and

(c) subject to directions of an election court, be vested in, and drawn upon from the time to time by, the Registrar for the purposes for which security is required.

17. There is no provision in the Elections Act or Rules that the court has to be gazetted before the Petitioner can deposit the security for costs. It is therefore immaterial that no court had been gazetted or that they came to court severally for mentions for direction before the court was gazetted.

18. The Petitioner is simply required to deposit the same with the Registrar and under Rule 2 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, “**Registrar**” means-

(a) the Registrar of the High Court; or

(b) an executive officer, where the petition is filed in the magistrate’s court.”

19. The Petitioners never attempted to deposit the security or even make an application to do so. The oral application by their counsel was a reaction to Mr. Njomo for the 9th Respondent’s request for confirmation of compliance. I find no provision in the Elections Act or Rules for the court to grant leave to the petitioner and to extend time within which the deposit can be made. It is not also material that the Petition may be meritorious. Once the security for costs is not deposited as provided for in mandatory terms, then the court lacks jurisdiction to go further into merits of the petition.

20. Failure to deposit security for costs in compliance with the said provisions above and the consequences for such failure was one of the issues dwelt at length by Sitati J, in *Evans Nyambaso Zedekiah & another v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR*. Some of the issues for consideration were whether the security for costs is a substantive or procedural requirement and whether the court had jurisdiction to validate the late deposit made by the petitioners.

21. While striking out the petition, the court held:

“ I entirely agree.....in the holding that the deposit for costs is a substantive issue that goes to the root of the proceedings as a non-payment of the same deprives the court of the jurisdiction to deal with the matter further....This court has no jurisdiction to extend time for making the deposit or validating the deposit.”

22. In *Milton Kimani Waitinga v Independent Electoral and Boundaries Commission & 2 others*

[2017] eKLR Joel Ngugi, J also struck out the petition with costs in similar circumstances to those before me. In that case he held:

“In the circumstances, given the clear stipulation of Section 78(2) (b), Rule 13 and our decisional law, it follows that the Notice of Motion dated 21/09/2017 must succeed. The clear requirement of the statute and subsidiary legislation is that a Petitioner is required to deposit security for costs within ten days of filing their Petition. This did not happen here. Indeed, more than thirty-seven (37) days later (at the time of arguing the Application), the Petitioner had not paid the security deposit. The Petitioner had, also, not made any efforts to get the leave of the Court to deposit the security for costs out of time. What is more is that in this case the Court had instructed the Petitioner to respond to the Application seeking to strike out the Petition and he failed to do so. The clear indication is that the Petitioner is not serious about prosecuting the Petition. There is simply no good reason to keep this Petition alive. As I have already indicated, failure to pay security deposit in Election petitions goes to the root of the jurisdiction of the Court to hear the Petition. The logical conclusion, then, is that the Court has no jurisdiction to take any further action in the Petition.”

23. Guided by the above authorities I dismiss the oral application for leave to extend time to deposit security for costs. As a consequence thereof I strike out this petition and order that a certificate do issue pursuant to Section 86 (1) of the Elections Act, 2011. Considering the stage at which the matter has been disposed of, I order that each party bear their own costs.

Dated, signed and delivered this 1st day of December, 2017

P. Gichohi

Chief Magistrate