



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE’S COURT AT MIGORI

ELECTION PETITION NO 5 OF 2017

**IN THE MATTER OF : NOMINATION OF MEMBERS OF COUNTY ASSEMBLY IN
MIGORICOUNTY, SPECIAL INTEREST GATEGORY.**

**IN THE MATTER OF : CREATION & PUBLICATION OF PARTY LISTS FOR SPECAIL
SEATS & ALLOCATION OF SUCH SEATS TO POLITICAL PARTIES.**

**IN THE MATTER OF :PUBLICATION OF THE FINAL ORANGE DEMOCSTRATIC
MOVEMENT (ODM) PARTY LIST BY THE INDEPENDENT ELECTORAL & BOUNDARIES
COMMISSION (IEBC), SPECIAL INTEREST CATEGORY.**

**IN THE MATTER OF : CONTRAVENTION OF ARTICLES 90,35(1)(B) & 38(1) OF THE
CONSTITUTION OF KENYA 2010.**

AND

**IN THE MATTER OF : CONTRAVENTION OF REGULATION 54(8) OF THE
ELECTIONS(GENERAL) REGULATIONS 2012 .**

BETWEEN

**ERICK OUMA OPANY.....
PETITIONER**

AND

**THE INDEPENDENT ELECTORAL & BOUNDERIES
COMMISSION**

**(IEBC).....1ST
RESPONDENT**

**GRACE WANGARE NDEGWA.....2ND
RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT.....
INTRESETED PARTY**

RULING

Brief background

1]. Consequent to the holding of the general elections on 8/8/2017, the 2nd respondent and subsequent nomination of members of Migori County assembly by respective parties, the 2nd respondent was nominated as a member of Migori County Assembly and subsequently gazetted by the 1st respondent as such. Her nomination was challenged by the petitioner vide this petition, which petition was timeously filed and served upon the respondents.

2]. The petition was filed in Chief magistrates Court at Migori. This court was gazetted to hear this petition. The same on 11/10/2017 was transferred to this Court by Migori High Court for disposal. The same was mentioned before this court on 23/10/2017 where pre-trial conference was set for 9/11/2017 by consent of counsel on record for parties herein.

3]. When the matter came for pre-trial, Mr. Ayiecko appeared for the respondent. Mr. Onyacha appeared for the 2nd respondent whereas Mr. Mukonya appeared for 1st respondent. Mr. Onyacha sought leave to file an application seeking to have the petition dismissed for want of deposit of security of costs. Mr. Ayiecko filed an application on the same day seeking court's leave to enlarge time within which to deposit the security of costs. Mr. Mukonya had also filed an application dated 3/11/2017 seeking the petitioner to deposit security for costs, stay of proceedings pending the deposits of costs and in default of deposit of costs then 1st respondent be at liberty to seek dismissal of the petition.

4]. Directions was accordingly taken and that the three applications mentioned above be canvassed on the same day; 30/11/2017. The said applications were heard on 30/11/2017 as slated.

2nd Respondent's application.

5]. The 2nd respondent Notice of motion dated 29th day of November, 2017 was filed pursuant to section 78 of the Election Act, No. 24 of 2011 and Rule 13 of the Elections (Parliamentary and County) Election Regulations (hereinafter referred as the Act and the rules respectively) and the leave of the court. The applicant sought the following orders:-

- a) The petition be dismissed for want of deposit of security for payment of costs; and
- b) Costs of the application and the petition be met by petitioner.

6]. The application was supported by the grounds set out on the face of the application and supported by affidavit sworn by the applicant/2nd respondent. The main ground is that the Petitioner has not deposited security for payment of costs as section 78 of the Act and rule 13 of the rules hence the prayer to strike out the petition. The implication of none deposit of security for costs was laid out as one of the grounds. It was stated that petitioner continues to incur substantial expenses in mounting a defence to a petition that is otherwise incompetent and bad in law as it offends mandatory provisions of the law and that the applicant shall have no recompense in recovery of costs from the petitioner should the petition be dismissed. The applicant in her affidavit reiterated the above grounds.

Notice of Motion Dated 3/11/2017 by 1st respondent.

7]. The applicant sought the following prayers:-

- a) The petitioner does deposit security for costs in Migori petition 6 of 2017. (Court notes that it was erroneously indicated as petition 6 instead of petition 5)
- b) Pending the deposit of security for costs, the petitioner be stayed.
- c) In default of provision of security of costs, the applicant be at liberty to apply for the dismissal of the petition.
- d) Cost of the application be borne by the petitioner.

8]. The application was brought pursuant to section 78(2) of the Act, sections 1A, 1B, 3A and 66 of the Civil Procedure Act and section 13 of the Rules. The application was premised on the grounds set out on its face and the main ground was that it is the legal requirement that petitioner deposit security for costs of Kshs 100,000/= in the petition. The application was further supported by affidavit of an advocate, Kinyajui Theuri. The grounds were reiterated.

Notice of Motion Dated 9/11/2017 by the petitioner.

9]. The applicant vide application filed on even date, sought the following orders:-

- a) That leave be granted to the applicant to deposit Kshs. 100,000/= as security of Costs out of time.
- b) Costs of the application be on the cause.

10]. The application was supported by the affidavit by the applicant and the grounds on the face thereof. It was stated that the petitioner was unable to pay the entire security for costs of kshs 100,000/= required all at once within the prescribed period. It was averred that it was not the petitioner's intention delay in paying security of costs within the prescribed period but delay has been occasioned by reasons beyond his control. It was further averred that he was now ready and willing to deposit the said security upon such terms as the court may deem fit. The other ground is that pre-trial conference had not taken place thus no prejudice will be occasioned in any way. The court was told that it had inherent powers to enlarge time in the interest of justice. The supporting affidavit reiterated the grounds above outlined.

11]. All the above applications were heard simultaneously vide oral submissions. There were no written filed responses in each application as counsel on record in my view adopted position that issues in each application were similar and the each application was more less a response to corresponding application. Mr Onyacha started with his application, followed by Mr.Mukonyi's application and Mr Ayiecko argued his application and respondent to the two applications, thereafter Mr.Onyacha and Mr.Mukonyi respondent to Mr.Ayieko's response.

The Submissions.

12]. Counsel appearing made oral submission on the issues arising on respective applications. Mr.Onyacha and Mr Ayiecko filed their respective list of authorities to support their positions. Mr Ayiecko additionally filed written submissions.

13].The advocates for the respondent held the view that the deposit of costs was a substantive issue that goes to the root of the petition proceedings as no- payment of the same deprives the court of the jurisdiction to deal with the matter. On the Other hand , it was the position of the petitioner 's counsel that court has jurisdiction to enlarge time for payment of security of costs. Various opposing authorities were cited to support the opposing position.

Submission by Mr Onyacha for 2nd Respondent.

14]. It was submitted that none deposit of security of costs as required by section 78 of the Election Act was not a mere irregularity that could be waived by the court. Reliance was placed on **Milton Kimani Waitinga vs IEBC & 2 Others[2017]eKLR** where Ngugi J quoted Court of appeal decision to wit **Rotich Samuel Kimutai v Ezekiel Lenyongopeta & 2 Others [2005]**. The Court rendered itself thus:

Once again we think the intention of Parliament was clear in enacting the time limit in such peremptory language. "Not more than three days.....shall give" does not admit of ambiguity or further search for the intention of Parliament. Whether or not Parliament should have enacted a further provision for seeking extension of time in appropriate cases, would of course be academic for purposes of this appeal and in any event there was no attempt to apply for extension of time at all. Section 21(3) provides for the consequences of non-

compliance which is what in the end transpired in this case. Failure to deposit the money within time was not a mere irregularity which could be waived by the parties.

Mr Onyacha also relied on Evans Nyambaso Zedekiah & Another v IEBC & 2 Others as cited in Milton Kimani Case where in this case, Justice Sitati expressed herself thus:

I entirely agree with the Learned Judges in holding that the deposit of 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 deposit of 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 have 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.

It was thus submitted that it was not a technical requirement to furnish security for costs. It was further submitted that same position above was held in Zainabu Mohamed vs Ghati Dennitali & 10 others Kisii election no 6/2013 (unreported). They also relied on Esposito Franco vs Amason Kingi Joffa & 2 Others (Nairobi civil appeal No 248 of 2008) where it was explained that security for costs was meant to deter frivolous litigations.

Reliance was also placed on Jane Naicar Eshuchi v Maurice Sakwa & 2 Others [2017] eKLR where the trial magistrate decline to adopt consent where parties had consented to have petition struck out due to none-payment of costs. The learned magistrate held that consent was irrelevant went ahead to dismiss the petition. The learned magistrate cited Election petition no 11 of 2013 (Malindi) Anastacia wanjiru vs IEBC & Another where lady Justice Muchemi held that:-

The law is clear that no further proceedings shall be entertained by the court where the petitioner has defaulted in depositing security. I understand this provision to mean that the court shall not proceed to hear a petition where no such security has been deposited. However the law is clear that the court may proceed to hear the respondents' application for dismissal of the petition for non-compliance with section 78 of the Act.

14.] It was thus submitted that deposit of security was statutory requirement under the election act and that there was no provision for extension of time. It was submitted that if parliament had intention of extension of time it would have expressly say so.

Mr Onyacha further argued that extension of time was only under the rules, which rules were subsidiary to the Election Act. He noted that in Noah Wekesa case relied on by the petition was distinguishable with the current one in that Kshs 100,000/= had been deposited unlike the current case where no cent had been deposited. He further argued that no demonstration had been made that the petitioner was a man of humble background

Submission by Mr. Mukoya.

15].Mr. Mukoya aligned himself with the submission by Mr. Onyacha. He added that section 78 of the Election Act makes it mandatory that deposits for costs must be made 10 days after filing the petition. He submitted that 60 days had lapsed since the petition was filled and not even half the deposit had been made and that no other reason for none payment had been made other than that of the petitioner being a man of humble background. It was submitted that where the jurisdiction of the court has been curtailed by an act of parliament, proceedings cannot take place.

It was further submitted that in Zainabu case (supra), it was stated that rules cannot legislate extension of time which has not been expressly authorized by statutes, thus would be unfair to grant petitioner extension of time based on the rules. It was thus sought to have the petition struck out with costs.

Submissions by Mr Ayieko.

16].The counsel for the petitioner submitted that they were seeking courts leave to deposit security out of time. He submitted that rule 19 of the Elections petition Rules, 2017 grants power to the election court to extend time . It was submitted that the time line that could not be tampered with is time of filling petition.

The court was referred to article **259(9)** of the constitution which stipulates that:

If any person or state organ has authority under the constitution to extend a period of time prescribed under this Constitution, the authority may be exercised either before or after the end of the period, unless contrary intention is expressly mentioned in the provision conferring the authority.

The court was also referred to Section 59 of the Interpretations and General Provisions Act, Cap 2 which provides as follows:-

Where in a written law a time is prescribed for doing an act or taking proceedings and power is given to court to or other authority to extend that time, then unless contrary intention appears, the power may be exercised by the court or other authority although application for extension is not made until after the expiry of the time prescribed.

Mr Ayieko cited Noah Makhalanga Wekesa vs Albert Adome & 2 Others [2013]eKLR where the petitioner sought leave for extension of time within which to furnish security for costs. The learned judge held:-

“In that regard, the petitioner without reasonable cause breached the law by failing to deposit the required security. However, the fact that he deposited part of the security (i.e. Ksh. 100,000/=) and has by this application requested for time to deposit the outstanding balance of the amount is a strong indication of his seriousness in pursuing his Constitutional rights to access justice and fair-hearing of the petition as well as the right to free and fair elections. The Constitution is the Supreme Law of the land. It's provisions and in particular those relating to fundamental rights must, in disputes such as the present one, be interpreted in a broad and liberal manner if the circumstances so allow”.

The court was also referred to Yaite Philip Okoronon v Jakaa Gardy Odara & another [2017] eKLR where the court held thus:-

Although Section 78 (1) of the Act does not expressly provide for extension of time to deposit security, Section 78 (3) of the Act implies that there is a path created for extension of time. This is because the provision ((section 78 (3)) pre-supposes that the failure to deposit security could lead to an objection being raised by the respondent and in the event of such objection, the proceedings would be stayed or put to a halt unless the objection is removed. If the objection is not removed, the respondent would have the liberty to apply to the court for dismissal of the petition and for payment of the respondent's costs.

The wordings of Section 78 (4) of the Act clearly indicate that a petitioner may make an application to the court for the removal of any objection which exists. If there is no objection in place it may be forestalled by a petitioner by necessary application for extension of time to deposit security”

The court was further referred Yaite case (Supra) on the issues whether security of costs is substantive or procedural. In this case at Page 9, the court stated as follows:

“Is Security for Costs substantive or procedural requirement" As I understand it, the law on security for costs provides that no proceeding should be had before security for costs is given for the protection of the defendant, where it ordered in exercise of discretion by the court or

by statutory requirement. In order to protect a defendant or a person who occupies the position of a defendant, such as a Respondent in an election petition, from unrecoverable costs, further proceedings in the matter are prohibited before provision of security for costs. In the case of election petitions, section 78(3) of the Elections Act, provides that in default of deposit of security for costs “no further proceedings shall be heard on the petition and the Respondent may apply to the election court for and order to dismiss the petition”. However, for reasons set out below, I do not find that an application for extension of time to make the deposit of security for costs is barred by this provision. The section would bar the hearing of the petition but not an interlocutory application for extension of time to make the deposit of security for costs.

Counsel thus submitted that court has power to enlarge time for making deposits and that security of costs was procedural.

It was further submitted that petitioner was unable to pay the deposits all at once as required as at the time of filling the petition. The petitioner was now able and ready to pay deposits for costs and that petition heard on merit and should not be defeated by none payment of costs. It was further submitted that pre-trial conference had not taken place thus no prejudice will be occasioned in any way.

Response Mr.Onyacha

18].Advocate Onyacha submitted that when they last appeared in court the matter was for pre-trial and that was the same day the application seeking enlargement of time was filed. It was on the same day when he sought leave to file an application for dismissal of petition for want of deposits of costs as leave was necessary and no other application would have been made without leave the matter having been set for pre-trial. It was submitted that the election rules does not give life to the Act.

Response by Mr. Mukoyo

19].It was submitted that section 78 of the election Act is so express that deposits must be made within ten days, otherwise the court is bereft of jurisdiction after the lapse of the ten days.

Issues for determination

20]. After hearing each counsel for the parties, having considered the respective applications and prayers being sought, and having considered the submissions filed and authorities thereof, in my considered view the following are the emergent issues for determination:-

- 1. Whether the requirement that petitioner pays security for costs is a technical requirement or a substantive requirement.**
- 2. Whether election court has jurisdiction to grant leave for enlargement of time within which to deposit security for costs.**
- 3. Whether the court in this matter can enlarge time for deposit of security of costs out of time, if 2 in the above is in the affirmative.**
- 4. Who shall bear costs.**

Deposits of Costs: is it a technical or substantive requirement?

20].This courts notes from the submission and arguments from counsel on record that all the applications are in respect of deposit of security for costs. It is common ground that security for costs has not been deposited to date by the petition thus the filling of the three application I am considering in this ruling.

In answering the above issue, it suffices to reproduces the provision of section 78 of the Election Act.

Section 78 of the Elections Act, 2011 provides as follows:

- (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 under this Part.**
- (2) A person who presents a petition to challenge an election shall deposit—**
 - (a) one million shillings, in the case of a petition against a presidential candidate; member of Parliament or a county governor; or**
 - (c) one hundred thousand shillings, in the 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 respondent's costs.**

21]. Rule 13 of the Elections (Parliamentary and County) Election Regulations, 2017 gives effect to this statutory provision in the following terms:

- (1) Within ten days of the filing of 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 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 the directions of an election court, be vested in, and drawn upon from time to time by, the Registrar for the purposes for which security is required.**

22].Section 21 of the then National Assembly and Presidential Election Act is the replica of section 78 of the Election Act saves for the number of days within which to deposit security and the amount of the security for costs. It provided:-

- “21.(1) Not more than three days after the presentation of a petition, the petitioner shall give security for the payment of all costs that may become payable by the petitioner.**
- (2) The amount of security under this section shall be two hundred and fifty thousand shillings and shall be given by deposit of money.**
- (3) If no security is given as required by this section, or proceedings shall be had on the petition, and the respondent may apply to the election court for an order directing the dismissal of the petition and for the payment of the respondent's costs; and the costs of hearing and deciding that application shall be paid as ordered by the election court, or if no order is made shall form part of the general costs of the petition.**

23]. The Court of Appeal in **Rotich Samuel Kimutai v Ezekiel Lenyongopeta & 2 Others**[2005] interpreted the implication of the said section, which section is equivalent to the current section 78 of the election Act. The court pronounced itself as follows:-

Once again we think the intention of Parliament was clear in enacting the time limit in such peremptory language. “Not more than three days.....shall give” does not admit of ambiguity or further search for the intention of Parliament. Whether or not Parliament should have

enacted a further provision for seeking extension of time in appropriate cases, would of course be academic for purposes of this appeal and in any event there was no attempt to apply for extension of time at all. Section 21(3) provides for the consequences of non-compliance which is what in the end transpired in this case. Failure to deposit the money within time was not a mere irregularity which could be waived by the parties.

24]. The High in in the following cases have adopted the above Court of Appeal Conclusion in the interpretation of section 78 of the Election Act. In Milton Kimani Waitinga v IEBC & 2 Others [2017]eKLR which is the most recent case touching on the same issue the court rendered itself as follows:-

Consequently, our decisional law has consistently concluded that the requirement that a Petitioner pays security for costs is not a technical requirement but a substantive question that goes to the root of the Court’s jurisdiction. Courts have explained that the purpose of the requirement to deposit security for costs is to discourage frivolous or vexatious litigants from challenging the results of elections (See *Esposito Franco v Amason Kingi Jeffah & 2 Others (Nairobi Civil Appeal No. 248 of 2008)*). The security so deposited also ensures that Respondents recover some of their costs from defending unsuccessful election petitions.

Further, our case law is categorical that the payment of the prescribed amount of security of costs within the stipulated time is an essential prerequisite for the hearing of election petitions.

25]. Similar position was held in Kisii Election Petition No.6 of 2013 – Fatuma Zainabu Mohamed – vs- Ghati Dennitali & 10 Others (unreported) on an application for extension of time to make the deposit. The Learned Judge noted that the law commands that where no security for costs is given, “whether it is ordered in exercise of discretion by the court or by statutory requirement” then no further proceedings in the matter should be undertaken by the court. He concluded the matter by saying the following:-

Accordingly, security for costs, whether it is required by statutory provision or order of the court, must be taken as going to the root of the jurisdiction of the court to entertain the dispute. If no security for costs is deposited, then the petition or other proceeding though validly lodged before the court in accordance with the applicable procedure rules cannot proceed to hearing and determination as further. Proceedings are prohibited. As such, the provision for security for costs is, in my view, a substantive requirement underpinning the jurisdiction of the court to deal with the dispute in the proceeding in which the security for costs is required, and is based on the sound principle for the protection of the defendant from unrecoverable costs.

26]. Justice Muchemi in Kubambatha Naomi Cidi v County Returning officer, Kilifi & 3 Others [2013 eKLR] on the same issue held that:-

The provisions of Section 78 (2) of the Act and Rule 11(1) are very clear that the deposit is for the purpose of payment of costs that may become payable by the petitioner to the other parties in the case. The provisions state in no uncertain terms that where a petitioner does not deposit security as required by the law, no further proceedings shall be heard on the petition and the respondent may apply for dismissal of the petition and for payment of costs.

27]. Being guided by the above authorities of the higher Court, it is apparent to me that that the deposit of security of costs is a substantive issue that goes to the root of the proceedings as non- payment of the same deprives the court the jurisdiction to deal with the matter further. I thus agree with the counsel for the respondents that the issue of deposit of security of costs is not technical or procedural but substantive.

Can the Election Court Can extend time for depositing costs for security?

28] I have considered the rival submission and authorities relied on by parties herein. Whereas the petition counsel position is that this court by dint of Rule 19 of the election rules 2017, article 159 of the Constitution and Section 59 of the Interpretation and General Provision Act is clothed with powers to enlarge time within which to deposit security for costs, the respondents' counsel position is that no such extension is possible since the requirement is statutory. I have come across a number of High Court decisions which have held different views in this issue. Some Courts have expressed the view that a Court can so extend the ten day period stipulated in the law in appropriate cases where the court is properly moved while others have indicated that no such extension is possible since the requirement is statutory. This is the similar situation in this current case. There are two views as to the effect of the failure to deposit the security within the prescribed time. The first view is found in the cases of **Evans Nyambaso Zedekiah & another v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR**; **Said Buya Hiribae v Hassan Dukicha Abdi & 2 others, Mombasa Election Petition No. 7 of 2013**; **Kumbatha Naomi Cidi v County Returning Officer, Kilifi & 3 others, Malindi Election Petition No. 13 of 2013**; and **Simon Kiprop Sang v Zakayo K. Cheruiyot & 2 others Nairobi Election Petition No. 1 of 2013**. The second view is that failure to deposit security for costs is not fatal to an election petition as the election court has discretion to enlarge time. Authorities in support of this position are **Fatuma Zainabu Mohamed v Ghati Dennitah & 10 others, Kisii Election Petition No. 6 of 2013**; **Charles Maywa Chedotum & another v IEBC & 2 others, Kitale Election Petition No. 11 of 2013**; and **Charles Ong'ondo Were v Joseph Oyugi Magwanga & 3 others, Homa Bay Election Petition No. 1 of 2103**.

29]. To address this issue, it is imperative to consider the provision of section 78 of the Election Act vis a viz the provision of Rule 19 of the Election Rules. Rule 19 provides as follows:-

(1) where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an Election Court, the election court may, for ensuring that injustice is not done to any party, extend or limit time within which the Act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the court may have expired.

(2) Sub-rule 1 shall not apply to in relation to the period within which a petition is required to be filed, heard and determined.

In the current case, the petitioner filed an application for enlargement of time when the matter came up for pre-trial. It was at the pre-trial stage that that interlocutory application be heard concurrently as it was done.

Decisional law

30]. In **Noah Wekesa case (Supra)**, the High Court enlarged time for deposit of security of costs where the petitioner had deposited part of the security. **Similarly in In Yaite Case (supra)**, My Colleague enlarged time within which to deposit security in a case where security had not been deposited with the stipulated time. It was the reasoning of my colleague that section 78(3) of the Election Act bars only the hearing of the petition and not interlocutory application.

31]. Similarly in recent case **Tom Onyango Agimba v Independent Electoral and Boundaries Commission, Returning Officer, Embakasi West Constituency & another [2017] eKL** the High Court held the position that the election court has the discretion to enlarge time to deposit security by dint of rule 19 of the election rules. The Court thus rendered itself thus:-

whereas it was the argument of both Mr. Maloba and Mr. Amalemba that the Court lacks the power to extend time under Rule 19 of the Election Petition Rules for the reason that that provision is limited to the timelines set by the Rules as opposed to timelines that are within the purview of the Elections Act under which the Rules were made; and that Rule 19 cannot override the provisions of Section 78 of the Elections Act, the effect of Rule 13, to my mind, is to subject the 10 day period for the payment of security deposit to the provisions of Rule

19 and therefore make it amenable to extension by the Court. Accordingly, I take the view that the Court does have the discretion to extend time for the payment of security deposit under Rule 19 of the Election Petition Rules; and that failure to deposit security is not necessarily fatal to a petition. This was the decision reached in the Fatuma Zainabu Mohamed Petition (supra) in which the Election Court, in a similar application, reached the following conclusion:

"I consider that if section 78(3) of the Elections Act were construed as not allowing for any good cause an extension of time to deposit security for costs, it would unreasonably restrict the right to approach the court for a determination whether one has been elected to hold office, inconsistently with the constitutional right under Article 38(3)(c) of the Constitution for *"every adult citizen has the right without unreasonable restrictions to be a candidate for public office or office within a political party of which the citizen is a member and if elected to hold office"*. Accordingly, I find that the time prescribed for deposit of security for costs is a matter of procedure rather than substance of the right to petition the court on election dispute, which is granted by the Constitution itself."

In the premises, I would, with due respect, diverge from the position taken in Evans Nyambasi Zedekiah & Another vs. Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR, that was relied on by the Respondents.

32]. This was the case in Samwel Kazungu Kambi & another v Nelly Ilongo County Returning Officer, Kilifi County & 3 others [2017] eKLR, where the court held that it had authority to enlarge time for deposit of security for costs. The court stated:-

Looking at the decisions in Evans Nyambasi Zedekiah & another (supra) and Fatuma Zainabu Mohamed (supra) and considering that the time for depositing the security for costs is found in the Elections Act and cannot therefore be enlarged using the provision for extension of time found in the Elections Petitions Rules, 2017, one is tempted to agree with Ruth Nekoye Sitati, J that an election court has no authority to enlarge time for depositing security for costs in an election petition.

However, the finding by Edward M. Muriithi, J that the manner in which Section 78(3) of the Elections Act is drafted in itself gives the Court an opportunity to enlarge time if sufficient cause for non-compliance with the provision is shown by the petitioner, in my view, is the correct reading of that provision. My reasoning receives backing from the language used in another Section of the Act.

The Court went ahead to hold:

Sub-sections (2) and (3) of Section 96 leaves no doubt as to the fact that unless a deposit of security for costs is made within ten days from the date of presenting the referendum petition, the petition shall be struck out. Unlike Section 96(2) and (3) which commands the striking out of a referendum petition if no security for costs is deposited, Section 78(3) puts an election petition in comatose if no security for costs is deposited. My understanding is that an election petition can be revived, with the leave of the court, upon payment of the security deposit so long as the period for hearing the petition has not lapsed. Nothing would have been easier for Parliament than to use the language used in Section 96 in Section 78 if the intention was to completely take away the discretion of an election court to enlarge time. I therefore agree with Edward M. Muriithi, J that if sufficient cause is shown, an election court has jurisdiction to extend the time for depositing security for costs in an election petition.

33]. The contrary view was taken in the following cases:-

1. Evans Nyambaso Zedekiah & Another v IEBC & 2 Others[2013] eKLR, where Lady Justice Sitati rendered herself thus:-

I have read the decision by Muriithi J in Fatuma Zainabu Mohamend case(supra) and Majanja J in Patrick Ngeta Kimanzi case(supra) respectively in which the learned Judges granted extension of time for deposit of security. In my view the circumstance in those two cases are distinguishable in the instant case. In the former, the petitioners made the application to court to consider extending time. Both Judges were convinced that the court has power to enlarge time under section 78 of the Act. With all due respect, I do not share the learned Judge's view, unless my understanding is seriously mistaken, that no further proceedings shall be heard on the petition where; a petitioner does not deposit the security as required by the section; or if an objection is allowed and not removed.

The court thus held that it had no power to validate late deposits.

34]. This was the case in Malindi Petition 3 of 2013 where lady Justice Muchemi did make the same findings as in Evans Yambaso zedekiah & another (supra) case.

35] The above cited authorities although conflicting in decision, it is apparent that the 2017 decisions are inclined to enlarging time when the court is properly moved and for sufficient reasons. It has adopted the liberal approach unlike the 2013 decisions. The current Jurisprudence which I associate myself with is that an election court can enlarge time within which to deposit security for costs when properly moved and with sufficient cause.

On whether, in the circumstances of this case, the Court should exercise its discretion to extend time in the Petitioner's favour.

36]. "Judicial Discretion" is defined in **Black's law Dictionary, Ninth Edition**, to mean:

"The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."

Thus, it is now trite that for the Court to exercise its discretion in favour of a party, sufficient cause must be shown to the Court's satisfaction. This was acknowledged by the Election Court in the Fatuma Petition (supra) thus:

"...the procedure for application to court for an order to dismiss the petition provides an avenue for the Petitioner to show cause why the petition should not be dismissed on the ground of default of security by seeking leave of court to lodge the security out of time. The discretion to grant such leave must, of course, be exercised judicially for good cause shown..."

37]. The petitioner must therefore must have properly moved the court and have sufficient reason for non-compliance of the Act. Generally, interlocutory application relating to an election petition must be filed before the commencement of the trial of election petition as per Rule 15(1) of the election act. In this case, the application for extension of time was filed when the matter came for pre-trial and court gave direction that same be heard alongside the application by the respondent. It thus suffices to say that the court was properly moved.

38] As to the reason advanced for non-compliance of the law, the petitioner deponed that he was not in a position to pay entire sum of Kshs.100,000/= as required at once within the prescribed period. He stated that the delay in paying the costs was not intentional but beyond his control. He further stated that he was a man of humble beginning.

39] Respondents counsel both submitted that the petitioner has not demonstrated why he did not deposit

the security and that the only reason for not depositing is that he was a man of humble beginning and that no evidence was adduced to that effect. It was also held that no schedule on how and when the deposit will be made has been provide by the petitioner.

40]. From the supporting affidavit , it is apparent that the only reason that the petitioner was unable to comply with the law on deposits of security is that he is a man of humble background. It was also indicated that the delay was not intentional but by reasons beyond his control. This pegs the question whether these are sufficient reason to warrant the court exercise discretion for extension of time. In my humble view, the answer is negative for the following reasons:

a. The petitioner has merely indicated in his affidavit that the delay in payment of deposits for cost was because of reasons beyond his control. No attempt was made to elaborate what were these reasons beyond his control that hampered payment of deposits within ten days of filling the suit so as to guide the court to judiciously exercise discretion to either extend time or not. In other words the reasons for none payment of deposits were not disclosed to the court . The genuine reasons if any, ought to have been expressly stated in the supporting affidavit.

b. It was also deponed that the petitioner is a man of humble background. To me, being a man of humble background does not necessarily indicated that one is unable to pay the requisite deposit. In the affidavit the petitioner has not disclose his financial status as at the time of filling the petition for the court to believe that indeed he was unable to pay at once kshs 100,000/= as alleged in the affidavit. It has not been demonstrated in the affidavit that he is an ordinary litigant. In fact his means have not been disclosed.

c. The petition was filed on 22/9/2017. The ten days lapsed on 2/10/2017 without deposit of the entire sum or part of it to date. It is now over 2 months since the time for depositing security lapsed. The petitioner is represented by an advocate from the time the petition was filed thus ought to have known the requirements of filing the petition including the deposits of costs. I note in the cases referred to by the Petitioner are distinguishable with the current case, in that due diligence was exercised by the respective petitioners and the requisite deposit paid, albeit after the prescribed period; such that by the time their applications were being argued, the security deposit had been paid. Additionally, satisfactory explanation was offered for the late payment. For instance, in **Kisii Petition No. 6 of 2013: Fatuma Zainabu Mohamed vs. Ghati Dennitah & Others [2013] eKLR**, the Petitioner's explanation, as set out in her supporting affidavit to her application for extension of time, was that she sold her vehicle to raise the security money and was paid **Kshs.680,000/=** but was robbed of the money on the same day and was consequently unable to deliver the money to her advocates for them to pay the deposit within time. She produced a bundle of documents including an agreement for sale of her motor vehicle, log book and medical treatment note in support of the application. It is also significant that the application for extension of time was made only 6 days after the lapse of the 10 day period aforementioned. Similarly, In **Noah Wekesa Case(supra)**, the petitioner had paid kshs 100,000/= out of the required Kshs 500,000/= as the time of filling application for request to pay the remainder. The Trial judge stated that for the reason that he had paid part of security there was some serious indication on the part of petitioner to pursue the petition to its logical conclusion. Similarly in **Election Petition (Kitale) No.11 of 2013: Charles Maywa Chedotum & Another vs. Independent Electoral and Boundaries Commission & 2 Others [2013] eKLRs** the deposits had been made outside the prescribed time, the payment had nevertheless been made by the time the extension of time was sought. Similary in **Yaite case(supra)** relied on by the petitioner, the petitioner in that case had deposited Kshs 60,000/- as at the time of filing application for extension of time. Petitioner's late deposit was validated.

d. The petitioner has also indicated in his affidavit that he is willing and ready now to pay the required amount for security of costs. His financial status as to readiness to deposit has not been exhibited. No cheque or any form of security has been annexed to the supporting affidavit to buttress this fact.

e. The burden on proof was on the petitioner to show justifiable reason for non-compliance of the law in respect of deposit and for extension of time. This burden in my humble view was not discharged.

41]. In the light of the above, it is my considered view that the petitioner case is not one which cannot be salvaged by the provision of article 159(2) of the Constitution. In Charles Maywa Chedotum case (supra) the import of the said article was rendered as follows:-

...Article 159(2)(d) of the Constitution ought to be interpreted in plain language with a purposeful approach. It should not be overstretched to the extent that any obligation imposed by the law with regard to procedure becomes a mere insignificant technicality. Haphazard application of the Article would open the field of justice to gross abuse. The Article was not intended to be a “coup d'etat” of procedural rules which are created and exist for the purposes of ensuring an orderly and efficient system of the management and administration of justice...Quite clearly, Article 159(2)(d) of the Constitution was not invented as a panacea for the indolence and the lack of due diligence often displayed by some litigants in preparation of their cases.

42]. The upshot of the foregoing, I humbly find that no justifiable reason for none payment of security of costs and for extension of time within which to deposit security as sought in his application dated 9/11/2017 has been demonstrated. The petitioner application is hereby dismissed with costs to the respondents.

43]. The implication of none payment of the security of costs as per section 78 of the election Act, is that that the proceedings is either stayed or when an application for dismissal for want of deposit is made, the shall court shall dismissed the petition. In this petition the 2nd respondent made such an application dated 29/11/2017 which application was argued alongside the petitioner's application. The same is allowed with costs to the 2nd respondent. The petitioner's petition is dismissed with costs to the respondents. The second respondent application was for stay of proceedings and order for the petitioner to deposit security for costs. The same was abandon and the 1st respondent's counsel aligned himself to the application for 2nd respondent. I make no orders for costs in the said application.

Final Orders.

44]. These are the final orders:-

1. The petition herein is hereby struck out;
2. The 2nd respondent is hereby awarded costs for the petitioner's application dated 9/11/2017;
3. The 2nd respondent is warded costs for her application dated 29/11/2017;
4. The costs for the petition awarded to both the respondents;
5. A certificate of this determination in accordance with section 86(1) of the Election Act shall issue to the Independent Boundaries and Electoral Commission and the Speaker of the County Assembly of Migori County.

45]. Orders accordingly.

Dated and Delivered at Rongo this 8th day of December 2017.

R.K.LANGAT.

(S.R.M)

In Presence of :-

- 1.
- 2.
- 3.