



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

ELECTION PETITION NO.3 OF 2017

BETWEEN

OKOBA JOHANES BOY.....PETITIONER

=VERSUS=

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

THE CHAIRPERSON OF THE INDEPENDENT

ELECTORAL & BOUNDARIES COMMISSION.....2ND RESPONDENT

THE HONOURABLE OMANYI FELIX OPONDO.....3RD RESPONDENT

R U L I N G .

This is a ruling on the Notice of Motion dated 10th November, 2017 by the 3rd petitioner filed by Okutta and Co. Advocates for orders that;-

1. The Amended petition dated 5th October, 2017 and or election petition dated 4th September be and is hereby dismissed for want of compliance.
2. That costs of the petition be paid by the petitioner to the Applicant.

The petition is supported by the sworn affidavit of Felix Opondo the 3rd Respondent and the grounds on the face of the application;-

- a) That the petitioner did not pay the requisite security for cost of Kshs.100,000/= within prescribed time or at all.
- b) That the purported amended petition was filed without leave of court and is therefore an abuse of the due process of court and
- c) That the amended petition was not filed within 28 days of declaration of Results and hence a misnomer. Earlier there was a Notice of Motion dated 3rd November, 2017 by the Applicants' /1st and 2nd Respondents for orders that:

1. The petition be dismissed and/or struck out.
2. That the Applicant be granted costs for this application and the petition.

It is supported by the grounds on the face of the application.

1. That on the 6th of September, 2017, the Petitioner filed a petition contesting the Member of County Assembly Election Bunyala Central, Budalangi Constituency held on the 8th August, 2017.
2. That the Petitioner failed to provide security for costs as required under the Election Act, No. 11 of 2011 and Elections (Parliamentary and County Rules Elections) Petitions Rules, 2017.
3. That security for costs is a pre-condition to the validity of an election petition to deter frivolous challenges to elections results.
4. That failure to deposit the security for costs within the stipulated period, renders the petition fundamentally defective.
5. That cost be granted.

The application is supported by their annexed Affidavit of Peter Tiyo duly sworn on 6th November, 2017. On 16th November, 2017 the Petitioner filed Replying Affidavit dated 16th November, 2017. The parties filed their written submissions which included list of authorities. Section 78 of the Election Act provides as follows;-

A Petitioner shall deposit security for payment of costs that may become payable by the petition not more than 10 days under the presentation of their petition.

One hundred thousand shillings in the case of a petition by a member of the County Assembly. It is clear that the requirement under Section 78(1) and 2 (c) that the petitioner did not deposit Kshs.100,000/= within 10 days of filing petition was not complied.

He did not also comply with Rule 33 (1) of the Election Parliamentary and county Election petition which stipulates that security of costs must be made within 10 days. He claims to have done so on 8th November, 2017 after two months.

He never sought any leave to deposit the amount or given any explanation why he was late and or seek to lift the objection for late payment. The fact that the same was lodged at the Registry does not assist the petitioner. On the issue of the Amended petition dated 5th October, 2017, the same was not done with the leave of the court which decrees that all petitions must be filed within 28 days after the declaration of the Results. The Petitioner did not seek leave.

After considering all the proceedings and the submissions, I find that the petitioner did not follow the procedure by seeking leave to deposit costs at that time. I find that this is a substantive issue which wrests the court of its jurisdiction to hear it. He had an opportunity to applying for extension of time to pay the security later or give an explanation for late payment. He failed to do so. He also failed to seek for leave to amend the petition outside the pre-requisite time. These are not mere technicalities which can be cured by Section 159 (2) of the Constitution.

I find that the amended petition without leave is irregular and will therefore dismiss it. I also find that under section 78 of the Election Act the petitioner failed to comply with the same and proceed to dismiss the petition. For want of security of costs and for non-compliance with seeking leave to amend the petition before doing so. On the issue of costs as provided by Section 78(4) of the Election Act and find the circumstance of the entire petition is dismissed with costs to be paid by the petitioner to the Respondents 1st, 2nd and 3rd Respondents as the law governing petitions.

Okutta for 3rd Respondent and H.R. For Inbembe for IEBC.

Dated, signed and delivered at Busia this 5th day of December, 2017.

W. K. CHEPSEBA

CHIEF MAGISTRATE.

In the Presence of;

Petitioner - Makokha holds brief for Kuloba.

Respondents - Okutta for 3rd Respondent and holds brief for 1st and 2nd Respondents.

Counsel of Petitioner - Kuloba & Wangila & co. Advocates.

Counsel for Respondent - Mukele Moni & Co Advocates for 1st and 2nd Respondents.

Okutta for 3rd Respondent.

W.K. CHEPSEBA

CHIEF MAGISTRATE,

BUSIA.