



**REPUBLIC OF KENYA**

**IN THE MAGISTRATES' COURT AT MERU**

**ELECTION PETITION NO 1 OF 2017**

**IN THE MATTER OF THE ELECTIONS ACT, 2011 AND THE ELECTIONS (PARTY  
PRIMARIES AND PARTY LISTS) REGULATIONS, 2017**

**BETWEEN**

**YUSUF MUSA MBAYA.....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL & BOUNDARIES**

**COMMISSION (I.E.B.C).....1<sup>ST</sup> RESPONDENT**

**ESTHER KARIMI NJERU .....2<sup>ND</sup> RESPONDENT**

**KINOTI ROBERT KINYUA.....3<sup>RD</sup> RESPONDENT**

**JUBILEE PARTY OF KENYA .....4<sup>TH</sup> RESPONDENT**

**THE TOWN CLERK**

**COUNTY ASSEMBLY.....INTERESTED PARTY**

**RULING**

By a Notice of Motion filed under a Certificate of Urgency on 6<sup>th</sup> October 2017 this Petition was filed together with the said Motion and sought to get injunctive orders to stop the swearing in of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and more specifically:-

1. The matter be certified as urgent and heard *ex-parte* in the first instance
2. Pending the hearing and determination of the this Petition *inter-partes* an order do issue directing the interested parties to stop the swearing in of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as nominated members of the Meru County Assembly (Marginalized List)
3. That pending the hearing and determination of this Petition, the swearing in of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as nominated members of the Meru County Assembly (Marginalized List) be suspended

4. Costs of the application be provided for

The Petition sought for orders that:

1. A Declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents do not qualify to represent ethnic minorities in County Assembly of Meru
  2. An order directing the 1<sup>st</sup> Respondent to revoke the nomination of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as representatives of the ethnic minorities in County Assembly of Meru
  3. An order to the 4<sup>th</sup> Respondent to nominate duly qualified person to represent ethnic minorities under Article 177 (1) (c )
  4. Any other Orders that his Court may deem fit and just
5. Costs of the Petition

The same was directed by Court to be served as for mention on 17<sup>th</sup> October 2017, and the Court on its own Motion, went a step further to serve all the parties hereto with a Mention Notices in order to fast-track the hearing of the Petition.

On 13<sup>th</sup> September 2017, the 2<sup>nd</sup> Respondent entered Appearance through the firm of Kiogora Mugambi who was later replaced by a Notice of Change of Advocate by Ndubi Ondubi & Associates Advocates who filed her four Replying Affidavits on 19<sup>th</sup> September 2017 as well as her Response to the Petition.

On 3<sup>rd</sup> November 2017, the 2<sup>nd</sup> Respondent filed a Preliminary Objection together with a list of authorities, citing the lack of a deposit for security, the 2<sup>nd</sup> Respondent was filed out of time, that he Petitioner has no locus to file this Petition and the same raised no triable issues. He prayed the same be struck out with costs.

The 3<sup>rd</sup> Respondent filed a Notice of Motion filed under a Certificate of Urgency on 16<sup>th</sup> October 2017 praying for the:

1. The above-mentioned entire Petition be dismissed for want of compliance with the mandatory requirements on Service and Deposit of Security
2. Costs of the Petition
3. Costs of this Application

### **Hearing**

On the 17<sup>th</sup> October 2017, there was no appearance for the Petitioner, the 1<sup>st</sup> and 4<sup>th</sup> Respondents. Present were Mr. Ndubi for the 2<sup>nd</sup> Respondent, Mr. Ondari for 3<sup>rd</sup> Respondent and Mr. Maranya for the Interested Party. Mr Ndubi doubted there were Affidavits of Service to show all parties had been served and that in the absence of some parties, and seeing the nature of the matter, he prayed for blanket/liberal leave for parties present in Court to file and serve further responses or affidavits within 14 days from to date and that the application filed on 16/10/2017 be served on all parties in 14 days. Mr. Ondari concurred and sought to file more supporting authorities over the 2 already file with their Application of 16/10/2017. Mr. Maranya for the Interested Party also associated himself with the sentiments of his colleagues. The Court concurred with sentiments of the Counsel present in Court, and the orders sought by Counsels were granted for blanket/liberal leave to file and service further Responses/Affidavits by all the Respondents and the application dated 16/10/2017 be served with an additional list of authorities within the next 14 days. The matter be mentioned on 9/11/2017.

On that date, Mr. Kibunja holding brief for Mr. Kinga appeared for the Petitioner, while Mr. Ndubi appeared for the 2<sup>nd</sup> Respondent, Mr. Ondari for the 3<sup>rd</sup> Respondent, and Mr. Maranya appeared for the Interested Party. There was no appearance for the 1<sup>st</sup> and 4<sup>th</sup> Respondents.

Mr. Kibunja informed the Court that the Petitioner no longer wished to proceed with this Petition and he had so shared that position with his colleagues. He undertook to file the requisite Notice by 1/12/2017 and also to address the Court on the issue of costs if parties would not have agreed on the same. Mr. Ndubi had absolutely no problem to the withdrawal of the Petition subject to their meeting their costs adding that it was clear the Petitioner never intended to proceed and this was an academic exercise as security was never deposited. Mr. Ondari stated the 3<sup>rd</sup> Respondent would have no objection provided costs were paid.

Mr. Maranya stated that like his colleagues, he had no objection but the Interested Party had incurred some costs and he would also be praying for costs. By Consent mention was set for 4<sup>th</sup> December, 2017.

Come 4/12/2017 and there was no appearance for the 1<sup>st</sup> and 4<sup>th</sup> Respondents and the Interested Party. Present were Mr. Kithinji holding brief for Mr. Kiunga for the Petitioner, Mr. Ndubi the 2<sup>nd</sup> Respondent and Mr. Ondari for 3<sup>rd</sup> Respondent.

Mr. Kithinji prayed for 7 more days saying the Petitioner had not formally signed the application which was ready, but in default he was willing to take a hearing date. The Defence Counsel opposed saying the Rules are clear. What was required was the application be filed and served. The Petitioner was a non-starter. No reason why the Notice has not been filed. There are concerns of the strict time lines to be followed. Court allowed the seven days and mention fixed for 14/12/2017.

On 4/12/2017, the Counsel for the Petitioner was absent and was the 1<sup>st</sup> and 4<sup>th</sup> Respondents. Present were Mr. Ndubi for the 2<sup>nd</sup> Respondent and Mr. Ondari for 3<sup>rd</sup> Respondents. Mr. Ondari submitted that the Petitioner was to have withdrawn but they had failed to file Notice to withdraw, and neither he nor his colleagues had been served and prayed the Petition be deemed as dismissed with costs. Mr. Ndubi associated with the submissions of the 3<sup>rd</sup> Respondent.

The Court noted that pursuant to Rules 21-23, Court is required to write a ruling dismissing the Petition and Counsel were at liberty to submit on costs to be included in the said Ruling. Mr. Ndubi submitted that on behalf of the 2<sup>nd</sup> Respondent, this was a matter they had proceeded to respond to the Petition and they had also made a number of appearances in Court. All things remaining the same, it was their desire for costs to the 2<sup>nd</sup> Respondent be awarded and capped at a liberal sum of only Kshs. 500,000.

Mr. Ondari submitted that equally for the 3<sup>rd</sup> Respondent, the Petition was not served and the 3<sup>rd</sup> Respondent had filed Response all the same.

The record could show they had appeared severally. Election Petitions were not simple matters and are a gravity matter. The 3<sup>rd</sup> Respondent having been dragged to Court, he was entitled to full costs and he humbly requested this Court to cap the costs at Kshs. 500,000.

The Petitioner did not depict the seriousness with which Petition for Election should be founded.

### **ISSUE FOR DETERMINATION**

**1. DID THE PETITIONER A) PAY THE REQUISITE COSTS FOR SECURITY B) FILE THE PETITION ON THE RESPONDENTS/INTERESTED PARTY WITHIN THE TIME STIPULATED BY LAW, AND IF NOT, WHAT ARE THE CONSEQUENCES OF SUCH NON-COMPLIANCE**

## **2. ARE THE RESPONDENTS ENTITLED TO COSTS, AND IF SO, WHAT IS THE SUM AWARDABLE**

### **FINDINGS**

#### **DID THE PETITIONER PAY THE REQUISITE COSTS FOR SECURITY WITHIN THE TIME STIPULATED BY LAW, AND IF NOT, WHAT ARE THE CONSEQUENCES OF SUCH NON-COMPLIANCE**

The Petitioner being in breach of the statutory requirement of depositing the mandatory sum of Kshs. 100,000 as by law stipulated, and the Respondents having raised an objection to the same, which objection remains on record, it is trite law that no further proceedings shall be heard on the Petition.

Section 78 (1) and (2) (c) in particular of the Elections Act, 2011 on Security for costs is so manifestly clear and provides:-

**“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.”**

**“A person who presents a Petition to challenge an election shall deposit . . . one hundred thousand shillings, in the case of a Petition against a member of a county assembly.”**

This is reinforced in Rule 13 of the Elections Parliamentary and County Elections Petition Rules 2017. The consequences of failure to make such a deposit is provided for in Section 78(3) provides:-

**“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.”**

Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents has furnished this Court with a total of seven (7) authorities all of which buttress the need to comply with the mandatory and express procedural requirements of the Elections Acts and Regulations. Further, the Petitioner cannot hide under Article 159 of the Constitution to avoid technical procedures required to be complied with in Election Petitions as decided in **MOMBASA HIGH COURT ELECTION PETITION NUMBER 9 OF 2017 JIMMY MKALLA VS IEBC & OTHERS** at page10) and that also held that such non-compliance is incurably defective and an abuse of the Court process. It was also re-iterated in the case in the list of authorities by the 3<sup>rd</sup> Respondent **KITALE HIGH COURT ELECTION PETITION NUMBER 11 OF 2013 PHILEMON CHEPKWONY LOTUDU VS IEBC & ANOTHER** at page 11 held that payment of security was mandatory.

To-date, no deposit of the security has been made, nor has any application been to extend time to allow the same be expanded to allow for the same. In the cited case of **TRANS-NZIOA KITALE HIGH COURT ELECTION PETITION NO 6 OF 2013 NOAH MAKHALANGANGANGA WEKESA VS MR. ALBERT ADOME, RETURNING OFFICER IEBC** where the Petitioner was granted an extension of time to file further deposit for security on the Courts discretion.

Further, the Petitioner made an undertaking in Court to have withdrawn this Petition and to have filed the requisite Notice under Rule 24, but they again failed to do so by the time allowed. There is no doubt whatsoever they in clear and flagrant breach of the requirements of Section 78 (1) and (2) of the Elections Act. As a result,

#### **1. WERE THE RESPONDENTS SERVED AS REQUIRED BY LAW**

It is clear to the Court that this Petitioner appeared only to have been filed to get interim orders for the Notice of Motion filed under a Certificate of Urgency on 16<sup>th</sup> October 2017 to get injunctive remedies to

stop the swearing in of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The same was to be served as ordered on 17<sup>th</sup> October 2017 but it was.

He who comes to Court must come with clean hands. This Motion has since been overtaken by events, and in any case, the same was unprosecuted is dismissed with costs.

Further the Petitioner failed to serve the Petition as by law required, and as the 3<sup>rd</sup> Respondent deponed, he learnt of this Petition by media and obtained copies of the Petition at his cost. It is on record that by a letter dated 4<sup>th</sup> October 2017, he applied to Court for Proceedings. I note the 2<sup>nd</sup> Respondent appeared to have been served by her own admission as deponed in the opening paragraph of her Affidavit filed on 19<sup>th</sup> October, however there was no Affidavit of service and it is unclear as to when she was served. Similarly, it is unclear how and whether the Interested Party was served by the Petitioner, as again, there is no Affidavit of Service on record by the Petitioner.

As quoted in the cited case of **MACHAKOS HC ELECTION PETITION NUMBER 8 OF 2013 PATRICK KANGETA KIMANZI & ANOR VS MARCUS MUTUA MULUVI** at pages 6 and 7 has exhaustively dealt with the mandatory nature of service from paragraphs 24 to 32. At Paragraph 30, he held that although the regime of service was liberalised, the requirement of Service was not dispensed with and service is still a requirement under the Constitution, the (Election) Act and the Rules. Without service, the other side is denied the opportunity to defend the case. J Majanja concluded by citing the Supreme Court in **NAIROBI PETITION NO. 5 OF 2013 RAILA ODINGA AND OTHERS VS. IEBC & 3 OTHERS [2013] eKLR** to address the meaning of Article 159(2) (d) that:-

**“The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This Principle of merit, however in our opinion bears no meaning cast-in-stone, and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and requirements of a particular case and conscientiously determine the best course.”**

From the foregoing, it is clear that the Petitioner failed to serve the Petition within the prescribed time, or at all, as by law required, and consequently he is in breach of the law guiding and regulation Service of Petitions as set out in law. There is not a single Affidavit of Service filed by him to prove service, which the Respondents’ have denied.

## **2. ARE THE RESPONDENTS ENTITLED TO COSTS, AND IF SO, WHAT IS THE SUM AWARDABLE**

On the issue of costs, Section 78(2) states:-

**“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.**

Further to the above, other costs may accrue pursuant to Section (4) which provides that

**“The costs of hearing and deciding an application under subsection (3) 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.”**

As quoted in the cited case of **KISII HCCC ELECTION PETITION NUMBER 10 OF 2013 EVANS NYAMBASO & ANOTHER VS IEBC & OTHERS** at paragraph 99, there is no doubt he respondents, and in the instant case the Interested Party, have incurred cost in preparation to defend this Petition, filed a number of Affidavits, an application to strike out and as provided by Section 84 of the Act

**“An election Court shall award the costs of and incidental to a Petition and such costs shall follow the cause.’**

This is coupled with Rule 36(1) that provides

**“That the Court shall at the conclusion of an election Petition make an order for the total costs payable and the person by and to whom costs shall be paid.’**

Sub-section 2 thereof provides that:

**“The burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not in order to discourage any such expense.”**

This Petition was instigated by the Petitioner knowing well it was doomed to fail. His Counsel kept the Parties attending Court with the eventual admission that the Petition would be withdrawn. It was not withdrawn and instead the Counsel suddenly disappeared. I find the Petitioner has been the cause of vexatious conduct in the filing and prosecuting of this Petition. Consequently, all such costs incurred by the Respondents and the Interested Party shall be recoverable from the Petitioner. The 2<sup>rd</sup> and 3<sup>rd</sup> Respondents and the Interested Party were the only active defence teams who all filed documents and made various appearances in Court, and I find and hold that costs are awardable to them. There was no appearance by the 1<sup>st</sup> and 4<sup>th</sup> Respondents, and for the avoidance of doubt, no costs accrue to them.

#### **DISPOSITION**

1. It is hereby ordered by this Court that this present Petition Number 1 of 2017 be and is hereby struck out with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the Interested Party.
2. The Petitioner shall bear the costs for each of the Respondents and the Interested Party for the Petition capped at Kshs. 500,000 for each of the three aforesaid parties.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT MERU THIS 18TH DAY OF DECEMBER 2017.**

**MRS. L. AMBASI**

**CHIEF MAGISTRATE, MERU**