



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**MAGISTRATE'S COURT AT MOMBASA**  
**ELECTION PETITION NO. 01 OF 2013**

**MWANAHAMISI OMAR KOMORA.....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....RESPONDENT**

**RULING**

MWANAHAMISI OMAR KOMORA the Petitioner came to this court on 11th day of March, 2013 by what a petition erroneously premised under Article 140 of the Constitution and rule 12, 13, 14 Supreme Court Rules. In the petition she averred that she was a candidate for the County Assembly elections for Kadzandani ward in Nyali constituency of the Mombasa County. She averred that she was duly nominated as such candidate on a Unity Party of Kenya ticket. She averred that during the elections of 4th March , 2013, her name was missing in the ballot papers in Baraka High School polling station , Kadzandani (020) and Mwatamba Grounds (029) polling stations.

As a result of her name missing in the ballot paper in those polling stations her supports were unable to vote for her and blames the irregularities and defect on the Respondent. She now prays for the following reliefs:-

- 'a) An order of certiorari quashing the decision of the Returning officer of Nyali Constituency elections for Kadzandani Ward Nyali Constituency for County Ward Assembly Representatives.*
- b) An order for mandamus compelling I.E.B.C to repeat the elections for Kadzandani Ward Assembly Representative.*
- c) Costs of the suit"*

On 6th May, 2013 A.B. Patel & Patel filed notice of appointment of advocate appearing for the Respondent I.E.B.C. This matter was then mentioned on 7.5.13 when Mr. Awino Counsel for the Petitioner sought extension of 7 days to enable him deposit security for costs as required by Section 78 of the Elections Act 2011. The request was granted on 15.5.13 he sought a further 7 days which the court reluctantly granted, and he was to do so on or before 22.5.13. By 22.5.2013 the Petitioner had not made such deposit. Mr. Simiyu for the Respondent applied that

In view of the failure of Petitioner to deposit security this petition should be dismissed with costs.

Section 78 of the Elections Act No.24 of 2011 provides:-

*“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 the 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*

*b) Five hundred thousand shillings in the case of petition against a member of parliament or governor or*

*c) One hundred thousand shillings in the case of a petition against a member of the County Assembly.*

*3) Where the Petitioner does not deposit security as required by this section or if the 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.”*

It is clear therefore that deposit of such security for costs has not been made since the petition was filed on 12th March, 2013. This court has powers to enlarge the time within which such deposits for security can be made on application of the Petitioner. Such application if made promptly and without inordinate delay, and will not occasion prejudice to the Respondent, would be judiciously allowed. In the incumbent case such application was made by Mr. Awino for the Petitioner and time enlarged. He however was unable, unwilling and/or refused to make such deposit. Where such deposit is not made Section 78(3) provides that on the application of the Respondent the court may order the dismissal of the petition and payment of the Respondent's costs.

At the beginning of this ruling, I set out the prayers sought by the Petitioner in this petition which included an order of certiorari and mandamus. An election petition is supposed to be in the Form E.P.1 of the schedule. Rule 10 of the Election

(Parliamentary and County Elections) Petition Rules 2013 provide in default the contents and form of an election petition rule 10(4) specifically provides:-

4 The Petition shall conclude with a prayer, requesting the court to make the appropriate relief which may include:-

a) A declaration on whether or not the candidate whose election is questioned was validly elected.

b) Declaration of which candidate was validly elected or

c) An order as to whether a fresh election should be held or not.

In this petition no such prayers were made; the candidate whose election was being challenged was not named nor made a party to this petition nor were the results of the election or the manner it was declared stated. In the absence of all these mandatory averments, in my view this petition would have and is incompetent; as the prerogative prayers sought are duly

available in the High Court.

Upon considering the application for the Respondent, and in view of the fact that the Petitioner has not made deposit for security of costs as required, I dismiss this petition with costs to the Respondent.

Dated at Mombasa this 10<sup>th</sup> day of July, 2013. S.N. RIECHI - CM

10.7.13

Court-Ruling read and delivered in Open Court in presence of Simiyu for Respondent and in the absence of Petitioner or his advocate due notice having been issued this 10<sup>th</sup> day of July, 2013.

**S.N. RIECHI**

**CHIEF MAGISTRATE**

**10.07.13**