



**REPUBLIC OF KENYA**

**IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MIGORI**

**ELECTION PETITION NUMBER 1 OF 2013**

**MICHAEL ODOYO NYAKWAKA .....PETITIONER**

**VERSUS**

**BOAZ OWITI OKOTH..... 1ST RESPONDENT**

**RETURNING OFFICER FOR NYATIKE CONSTITUENCY.....2ND RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION....3RD RESPONDENT**

**RULING:**

The petitioner herein Michael Odoyo Nyakwaka has filed an application dated 27/6/13 seeking for leave to withdraw this election Petition pursuant to Rule 23 of the Elections (Parliamentary and County Elections) Petition Rules 2013. The application is supported by the affidavit of the petitioner applicant sworn on even date and the following grounds namely:

- (1). That the Petitioner and the 1st Respondent have reached a mutual consent to have the petition withdrawn.
- (2). That is in the interest of the Petitioner and 1st Respondent and the people of North Kadem Ward in general that the Petition be withdrawn.
- (3). That the withdrawal will enhance peace and speedy development of North Kadem Ward.

The Petitioner subsequently published in the Kenya Gazette a notice of withdrawal in the prescribed form E P 6 set out in the schedule. The Gazette Notice is No.9750 dated 9/7/13 and published on the 12/7/13 as issue No. Vol. CXV – NO. 103.

The 1st Respondent and Counsel for the 2nd and 3rd Respondents filed replying affidavits in which they opposed the application on the ground that the same has been made rather, late in the day after the petition has been heard and submissions filed with the parties awaiting a date for Judgment. The Respondents further contended that in the event the application is granted. Costs should be awarded to the Respondents.

I have considered the submissions of the three learned Counsels representing the parties herein. I have considered the affidavits filed. Indeed this petition had been fully heard and that parties had filed written submissions and were awaiting to be given a date for Judgment when the present application was filed. In principle all the counsels for the Respondents have indicated that they have no objection to the withdrawal of the Petition but are pitching tent for costs to be awarded to them. As noted earlier the petitioner duly had the notice of withdrawal

in the Kenya Gazette and that at the hearing hereof the seven days had elapsed and no person had come forward seeking to be permitted to be substituted and to proceed with the petition. Hence the issue now is only between the petitioner and the Respondents.

Counsel for the petitioner submitted that the Petitioner and 1st Respondent held a meeting in which it was resolved to have petition withdrawn and each party bear their own costs, and further that the security for costs deposited herein to be released to petitioner's Advocate. Counsel for the petitioner further submitted that there should not be costs to 2nd and 3rd Respondent since they are funded from public coffers and tax payers and that the petitioner herein who is also a tax payer should not be penalised.

Counsels for the respondents urged this Court to consider the strict provisions of the Elections Act and Rules mainly on the fact that costs follow the event. The Respondents Counsels further argued that the case had proceeded and submissions only awaiting a date for the Judgment and as such the Court should consider the amount of time involved in the hearing, research, travelling and attendances.

The guiding provisions of the Law in this matter are found in section 78 and 84 of the Elections Act 2011 as well as rules 34 to 36 of the Elections Act (parliamentary and county elections) Petition Rules 2013. Sections 78(4) and (5) of the elections Act provides for costs regarding election petitions. The rationale for costs is reinforced by the strict provisions vide section 78(1) which demands that the petitioner shall deposit security for costs which may become payable by him or her within 10 days after the presentation of petition. Again section 84 of the said Act Provides that an election Court shall award costs of and incidental to a petition and such costs shall follow the cause.

Under Rules 34 – 36 an election Court is mandated to tax and or assess costs payable in accordance with provision of the Civil Procedure Act and Rules. It follows therefore that the issue of costs is a serious matter which must be contemplated by a petitioner when he intends to file a petition because of the mandatory provisions for depositing of security for costs soon after the filing of a petition.

In the present circumstances all the respondents have sought for costs upon withdrawal of the petition by the petitioner. The Petitioner averred that he had reached an understanding with the 1st Respondent to forego costs. However the 1st respondent in his replying affidavit sought for costs. The petitioner was given leave and time to file a further affidavit to respond to the 1st respondent's alleged regarding of turnaround to the earlier agreement. However no such further affidavit was filed by the petitioner and hence the 1st respondents claims to costs remain uncontroverted.

The court records shows that this matter has been contentious from the beginning upto the main trial. This court made several rulings along the way. All the parties participated in the trial and counsels finally filed submissions and were to take a date for judgement when the present application was filed. As per the provisions of section 84 of the Elections Act costs shall follow the event. The event herein is the withdrawal of the petition. I find it would be unfair to deny the respondents costs yet they had been sued and they participated in the trial upto this juncture. The petitioner's plea that the 2nd and 3rd Respondents should not get costs as they are funded by the taxpayers is not convincing because the petitioner was one of those who had contested and was not just an ordinary voter who would assume the elective seat if he won and in any case such costs paid to the 2nd and 3rd Respondents would still revert back to the public coffers for use by the state and other organs towards provision of services to the citizenry.

Moreover the 3rd Respondent is a body corporate capable of suing and being sued it goes without saying that a lot of work has been put into the petition by counsels by the Respondents while defending the Respondents. The intensity of the work herein composed of preparing pleadings, research, submissions, and travelling to court for the hearing of the petition.

In the result I allow the petitioner's application to withdraw this petition and hereby order that the petition herein marked as withdrawn. All the three Respondents are awarded costs of the petition. A certificate of this determination in accordance with Section 86(1) of the Elections Act shall be issued to the Independent Electoral and boundaries commission and who shall then notify relevant speaker once the costs hereof have been assessed. As time to finalise this matter as stipulated by the constitution is coming to a close, I order the counsels herein to file other bills/ costs for taxation and or assessment within seven days from the date hereof and to be ready for assessment on the 14th Day of August, 2013.

Orders Accordingly.

Dated and delivered at Migori this day 7th Day of August 2013.

DAVID K. KEMEI

S.P.M