



Mwami v Kipchumba & 3 others; United Disabled Persons of Kenya (Interested Party) (Election Petition E001 of 2025) [2025] KEHC 18989 (KLR) (Civ) (22 December 2025) (Ruling)

Neutral citation: [2025] KEHC 18989 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
ELECTION PETITION E001 OF 2025
JN MULWA, J
DECEMBER 22, 2025**

BETWEEN

MARY ARIVIZA MWAMI PETITIONER

AND

HAROLD KIMUNE KIPCHUMBA 1ST RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2ND
RESPONDENT**

ORANGE DEMOCRATIC PARTY (ODM) 3RD RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY 4TH RESPONDENT

AND

UNITED DISABLED PERSONS OF KENYA INTERESTED PARTY

RULING

1. For determination before this Court is the Preliminary Objection dated 23/09/2025, the motions dated 30/09/2025 and 02/10/2025 respectively. That said, the events leading hereto are as follows.
2. Mary Ariviza Mwami (hereafter the Petitioner) filed an Election Petition (hereafter Petition) dated 19/08/2025 as against Harold Kimune Kipchumba, Independent Electoral & Boundaries Commission, Orange Democratic Party (ODM) and Speaker of the National Assembly (hereafter the 1st, 2nd, 3rd & 4th Respondent). The Petition was brought pursuant to Article 81, 88(4), 90, 97(1)(c) & 105 of *the Constitution*, The *Elections Act* and The Elections (Parliamentary and County Elections) Petition Rules challenging the election of the 1st Respondent to fill a special seat that was left vacant after the appointment of Hon. John Mbadi as Treasury Cabinet Secretary, to wit, the 2nd Respondent



reallocated the seat on the back drop of the 3rd Respondent's Party List. The Petitioner therefore seeks inter alia-;

- a. A declaration that the 1st Respondent was not duly elected and his election vide Gazette Notice 10083 published on 24/07/2025 on Vol. CXXVII – No. 159 of the Kenya Gazette be invalidated.
 - b. A declaration the Gazette Notice 10083 published on 24/07/2025 on Vol. CXXVII – No. 159 of the Kenya Gazette is void ab initio to the extent that it provides and specifies that 1st Respondent stands validly nominated or elected on the 3rd Respondent Party List to represent persons with disability.
 - c. A declaration that the election and or nomination of the 1st Respondent to the National Assembly to represent persons with disabilities is unconstitutional as it offends the two-third gender rule and the regional and ethnic diversity of the Country.
 - d. An order quashing and or invalidating Gazette Notice 10083 published on 24/07/2025 on Vol. CXXVII – No. 159 of the Kenya Gazette to the extent that it specifies that the 1st Respondent is validly nominated or elected as a member of the National Assembly representing persons with disability under the list submitted by the 3rd Respondent for the general public pursuant to Article 90 of *the Constitution*.
 - e. A declaration be made that the Petitioner who was listed No. 5 on the 3rd Respondent Party List and a woman with disability is validly elected as the Nominated Member of the National Assembly representing persons with disabilities pursuant to Article 90 & 97(1)(c) of *the Constitution*.
 - f. An order be issued compelling the 2nd Respondent to Gazette and publish the Petitioner's name as the person duly elected to the National Assembly on the 3rd Respondent Party List for Nominated Member of the National Assembly pursuant to Article 90 & 97(1)(c) of *the Constitution* of Kenya.
 - g. A declaration that the National Assembly should consist of two members being one man and one woman, representing persons with disabilities.
 - h. The cost of the Petition be borne by the Respondents.
3. In response to the Petition, the 1st Respondent filed a Notice of Preliminary Objection dated 23/09/2025 challenging the Petition on grounds -;
- a. That the Petition offends Section 37(1) of the *Elections Act*.
 - b. That the honorable Court lacks jurisdiction to hear and determine the suit as the same falls under the ambit of the Political Parties Dispute Tribunal as provided for in Section 40(1)(a) & (b) of the *Political Parties Act*.
 - c. That the Petition offends the provisions of Section 13(2) of the *Elections Act*.
 - d. That the Petition is bad in law as the dispute of nomination falls under the ambit of the 3rd Respondent Political Party Dispute Resolution Mechanism as provided under Section 13(2A) of the *Elections Act*.



- e. That the honorable Court lacks jurisdiction to hear and determine the Petition as the same falls under the ambit of the 3rd Respondent Political Party Dispute Resolution Mechanism as provided for under Section 38I of the *Political Parties Act*.
 - f. That the dispute is time barred as provided for under Section 13(2A) of the *Elections Act* and Section 38I of the *Political Parties Act*.
 - g. That the honorable Court lacks jurisdiction to hear and determine this Petition as it offends the provision under Rule 13(1) of the Elections (Parliamentary and County Elections) Petition Rules.
 - h. That for the foregoing inter alia reasons, the Petition is fatally defective, an abuse of the Court process, frivolous, vexatious and ought to be struck out with costs.
4. The 2nd Respondent on its part filed a response to the Petition dated 30/09/2025 and a motion of even date brought pursuant to Article 88(4) & 90 of *the Constitution*, Section 37 & 38 of the *Elections Act*, Rule 4, 8(4), 12(1), 13, 15 & 34 of the Elections (Parliamentary and County Elections) Petition Rules seeking inter alia-;
 - a. That the Petition dated 19/08/2025 be dismissed/struck out for being fatally defective, bad in law, frivolous, vexatious and an abuse of the Court process; and
 - b. That the 2nd Respondent be awarded costs of the motion and Petition.
 5. The motion is premised on grounds found at the supporting affidavit of even date sworn by Chrispine Owiye who cites being the Director of Legal Services at the 2nd Respondent thus duly authorized to depose on its behalf. The gist of his deposition is that on 22/09/2025 when the Petition came up for directions, the Petitioner confirmed to the Court that she had not deposited security for costs as mandatorily required by Section 78 of the *Elections Act* and Rule 13 of the Elections (Parliamentary and County Elections) Petition Rules, which breach persisted as at 29/09/2025. That failure to deposit security for costs within the statutory timelines breaches mandatory legal requirements thereby going to the root of the matter as to render the instant Petition fatally defective, incompetent and bad in law.
 6. He goes on to state that the mandatory requirement on deposit of security has variously been dealt with by this Court in numerous decisions. That the Petition discloses no reasonable cause of action against the 2nd Respondent as it fails to establish any breach of *the Constitution* or The *Elections Act* whereas the 2nd Respondent carried out its duties in line with the provisions of *the Constitution* or The *Elections Act*. He states that there is no legal justification to nullify the nomination of the 1st Respondent as he was validly elected through the 3rd Respondent's Party List Elections to the National Assembly. In conclusion, he deposes that it is in the interest of justice that the Petition be dismissed as it does not disclose any material elements of breach of the Petitioner's rights.
 7. In response to the 2nd Respondent's motion, the Petitioner filed a replying affidavit dated 02/11/2025. The kernel of her deposition is that she faced challenges with the judiciary e-filing system prior to filing of the Petition thus necessitating her counsel to seek assistance from the registry. That the security on costs invoice was generated from the registry on 22/09/2025 since her Advocate on record was unable to generate the same from their end. She goes on to state that being a person with disability and unemployed, she had to fund raise and seek assistance from friends and well-wishers, with one of the latter, eventually transferring the funds to her Advocates account on 29/09/2025. She states that notwithstanding the aforesaid, this Court has the discretion to extend time within which to comply with deposit on security. In summation, she deposes that having already deposited the security on costs, the Respondents stand to suffer no prejudice, if an extension is granted.



8. Subsequent, to the 2nd Respondent's motion, the Petitioner filed a motion dated 02/10/2025 brought pursuant to Article 48 & 159(2)(d) of the Constitution, Section 78(1) & (2) of the Elections Act, Rule 5, 13 & 19 of the Elections (Parliamentary and County Elections) Petition Rules, Section 1A, 1B, 3A & 95 of the Civil Procedure Act (CPA) and Order 50 Rule 6 of the Civil Procedure Rules (CPR) seeking inter alia;
 - a. Spent.
 - b. That this honorable Court be pleased to enlarge the time within which the Petitioner deposits the security for costs.
 - c. That upon granting the above, the security for costs deposited on 29/09/2025 be deemed as paid within the statutory prescribed timelines.
 - d. That the costs of the application be provided.
9. The motion is premised on grounds found at the supporting affidavit of even date sworn by the Petitioner on 30/09/2025. The gist of her deposition is that she has since deposited security however the same was done outside the prescribed time. That as at filing of the Petition, the Election Petition module had not yet been activated thereby rendering it impossible to file the Petition under the correct category. He goes on to state that as a result the Petition was filed in the Constitutional Petition & Human Rights Division of the High Court whereas the e-filing system did not provide for an option for payment of security on costs. Upon inquiry she had to wait for the formal appointment of an Election Court before any further steps could be taken, including processing of the requisite security invoice.
10. She goes on to state that delay was further occasioned by the fact that the Court had to manually generate the invoice for the security on costs from its end with the delay further compounded by the fact that being a person with disability and unemployed, she had to fund raise and seek assistance from friends and well-wishers. That unless the motion is allowed she stands to suffer grave injustice as the non-compliance was neither intentional nor due to negligence but rather due to procedural constraints and genuine financial hardship. She concludes by stating that unless the orders sought are granted, her fundamental political rights may be undermined whereas the Respondents will not suffer any irreparable prejudice if the motion is allowed.
11. The 1st Respondent opposes the Petitioner's motion by way of grounds of opposition dated 07/10/2025. He takes issue with the motion on grounds that; the Election Petition was filed on 19/08/2025 while the security for costs was deposited on 29/09/2025, way out of the mandatory ten (10) days as required by law; the orders of the Mugambi, J. of 21/08/2025 were in order and did not interfere with the Petition filed on 19/08/2025 as entitled an "Election Petition"; the delay of over forty (40) days is inordinate and no plausible reasons have been offered by the Petitioner for this delay; the delay and or omission is already a subject of a substantive application dated 30/09/2025 before this honorable Court awaiting response and hearing interpartes; the Petitioner is in blatant contravention of the mandatory provisions of Section 78 of the Elections Act and Rule 13 of the Elections (Parliamentary & County Elections) Petition Rules which obligate a Petitioner to deposit security for costs within ten (10) days of filing of an Election Petition; the Election Petition itself is extremely out of time since the Petitioner was nominated in August 2022; the Petitioner has not given any reason whatsoever for filing her Election Petition out of time neither has she sought an extension of time to file this Petition long after her nomination in 2022; the application and Petition are vexatious, frivolous and a complete waste of the honorable Court's precious time; the security of



- Kshs. 500,000/- offered by the Petitioner is the bare minimum and is neither adequate nor sufficient given the inordinate delay and the several issues of discrimination raised by the Petitioner.
12. The 2nd Respondent on its part opposes the Petitioner's motion by way of a replying affidavit dated 08/10/2025 sworn by Chrispine Owiye. He begins by assailing the Petitioner's motion by stating that the explanation advanced on failure to deposit security for costs within the prescribed time is incurably defective, misconceived and bad in law as it seeks to confer jurisdiction upon this Court contrary to the express and mandatory provisions of Section 78(1) & (2) of the Elections Act. He goes on to depose that despite filing the Petition on 20/08/2025, the Petitioner did not take any steps to deposit the requisite security for costs within the statutory ten (10) days prescribed under Section 78(1) & (2) of the Elections Act and Rule 13 of the Elections (Parliamentary and County Election) Petition Rules. That the belated payment cannot validate an otherwise incompetent Petition whereas the Petitioner's assertion that the Judiciary's election Petition platform was inactive, is unfounded and unsupported by any evidence.
 13. He goes on to state that while failure to deposit due financial hardship may be sympathetic, it does not operate to defeat mandatory provision on statute on deposit of security therefore the jurisdiction of this Court cannot be conferred on grounds of sympathy, equity or social consideration. Therefore, the Petitioner's claim of disability and financial hardship, however genuine, is immaterial when considering compliance with Section 78 of the Elections Act. Since jurisdiction cannot be vested where none exists. He deposes that election disputes are sui generis matters therefore Order 50 of the Civil Procedure Rules (CPR) is inapplicable in the circumstance. In conclusion he states that the Petitioner's motion ought to be dismissed and Petition struck out forthwith for want of compliance with the mandatory requirements of law.
 14. The 4th Respondent on its part opposes the Petitioner's motion by way of grounds of opposition dated 10/10/2025. It takes issue with the motion on grounds; that the timelines set out under the Elections Act, and the Elections (Parliamentary and County Elections) (Petitions) Rules are constitutional imperatives flowing from Article 87(1) of the Constitution therefore strict and immutable as follows; that whereas Rule 19(1) of Elections (Parliamentary and County Elections) (Petitions) Rules allows for extension and reduction of time, Rule 19(2) of Elections (Parliamentary and County Elections) (Petitions) Rules disallows the extension and reduction of time on statutory timelines prescribed by the Constitution and the Elections Act therefore cannot be invoked to cure non-compliance with Rule (13)(1) of Elections (Parliamentary and County Elections) (Petitions) Rules; that the application is an afterthought intended to circumvent the clear legal consequences of non-compliance with Article 87(1) of the Constitution, Section 78(1) of the Elections Act and Rule 13(1) of Elections (Parliamentary and County Elections) (Petitions) Rules; that the application offends the principles of certainty and expedition in electoral dispute resolution, which are the cornerstone of the constitutional and statutory framework governing elections; that apart from faulting technicalities on the Judiciary's e-filing system for the delay in depositing security, the Petitioner has failed to annex to her supporting affidavit, evidence corroborating the same; and that granting the orders sought would amount to the Court arrogating itself powers, contrary to statutory timelines fixed by Article 87(1) of the Constitution, Section 78(1) of the Elections Act and Rule 13(1) of Elections (Parliamentary and County Elections) (Petitions) Rules.
 15. United Disabled Persons of Kenya (hereafter the Interested Party) filed a motion dated 25/09/2025 seeking among other orders joinder to the instant proceedings as an Interested Party. The said motion was not opposed by either party and was allowed by consent on 22/10/2025 when the Petition came up for directions.
 16. The 3rd Respondent, despite service, did not participate in the instant proceedings.



17. Directions were taken on disposal of the 1st Respondent's Preliminary Objection dated 23/09/2025, the 2nd Respondent's motion dated 30/09/2025 and the Petitioner's motion dated 02/10/2025, by way of written submissions. The respective parties duly complied. That said, this Court has duly considered the material canvassed in respect of the Preliminary Objection and two (2) motions and postulates that the issues for determination concern:-
- a. Whether the Court lacks jurisdiction to entertain the Election Petition by dint of Section 38I, 40(1)(a)&(b) of the *Political Parties Act* as read with Section 13(2) & (2A) of the *Elections Act*?
 - b. Whether this Court ought to strike out and or sustain the Election Petition on the premise of Section 78(1) & (2) of the *Elections Act* as read with Section 13(1) & 19(1) Elections (Parliamentary and County Elections) (Petitions) Rules?
 - c. Whether the Court ought to strike out the Election Petition for being frivolous, vexatious, an abuse of the Court process and offending 37(1) of the *Elections Act*?
 - d. Who ought to bear the costs?

Whether the Court lacks jurisdiction to entertain the Election Petition by dint of Section 38I, 40(1) (a)&(b) of the *Political Parties Act* as read with Section 13(2) & (2A) of the *Elections Act*

18. From the material canvassed in respect of the matter, as earlier noted, in opposing the Petition, the 1st Respondent has filed a Preliminary Objection wherein he has canvassed a raft of grounds in support of the objection. That said, as to the nature of a Preliminary Objection, the same has since been settled within our jurisdiction in the celebrated decision of Mukisa Biscuits Manufacturing Company Ltd. It was held therein that -;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”

19. In the case of *Oraro v Mbaja* (2005) KLR 141, Ojwang J (as he then was) reiterated the above by stating that-;

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with



disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

20. Meanwhile, the Court of Appeal in *Kigwor Company Limited v Samedy Trading Company Limited* [2021] KECA 810 (KLR) cited with approval the decision of the Supreme Court in *Independent Electoral & Boundaries Commission v Cheperenger & 2 others* [2015] KESC 2 (KLR) where the latter court emphasized that:-

“(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others*, Civil Application No. 14 of 2014, [2014] eKLR).”

21. Among the objections raised by the Respondents is that the Court’s lack of jurisdiction to entertain the Petition by dint of Section 38I, 40(1)(a) & (b) of the *Political Parties Act* as read with Section 13(2) & (2A) of the *Elections Act*. This Court has held time without number that ordinarily in a proper case, an objection appertaining to jurisdiction constitutes a pure point of law, that ought to be determined in limine. The words of Nyarangi. JA, in the locus classicus decision in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 require no restatement save for the exhortation which still endures that “Jurisdiction is everything. Without it, a court has no power to make one more step.”

22. Palpably, the gist of the Petition challenges the validity of nomination or election by way of gazettelement of the 1st Respondent on the backdrop of the 3rd Respondent’s Party List on Nomination of Persons with disability as Member of the National of Assembly. That said, Section 38I of the *Political Parties Act*, provides that -;

A political party shall resolve any disputes arising out of the party nominations within thirty days after the date of the party nominations.

23. Whereas Section 40(1)(a)&(b) of the Act provides that the Political Parties Dispute Tribunal shall determine (a) disputes between the members of a political party; and (b) disputes between a member of a political party and the political party. Meanwhile, Section 13(2) of the *Elections Act* states that-;

A political party shall not change the candidate nominated after the nomination of that person has been received by the Commission:

Provided that in the event of the death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may, after notifying the candidate that the party seeks to substitute, where applicable substitute its candidate before the date of presentation of nomination papers to the Commission.

24. Meanwhile, Sub-Section 2A of the Section 13 of the Act provides that-;

A political party shall hear and determine all intra party disputes arising from political party nominations within thirty days.

25. With the above provisions in reserve, it is apparent that the last general election was held in the year 2022. Section 13(1) of the *Elections Act* prescribes that a political party shall nominate its candidates for an election under the Act at least ninety days before a general election under the



Act in accordance with its constitution and nomination rules. It is the latter provision that sets the basis for the subsequent Sub-Sections and eventually Section 40(1) of the Act. Therefore, at this juncture, it is important that the Court localizes the nature of the dispute presented in the instant Petition. The Petitioner challenges the gazettement of the 1st Respondent by the 2nd Respondent as 3rd Respondent's Nominated Member of Parliament on the premise of the latter's Party List.

26. My understanding of Section 13 as constituted, pertains pre-election processes. However, after occurrence of a general election and or eventual gazettement of nominated persons pursuant to Article 88(4), 90 & 97(1)(c) of *the Constitution* of Kenya the same constitutes as post-election process. Prior to general election or gazettement, at whatever stage the nomination process may be, any Party dispute pertaining a Party List would be within the purview of the Party's Internal Dispute Resolution Mechanism, the Independent and Electoral Boundaries Dispute Resolution Committee and Political Parties Dispute Tribunal.
27. Meanwhile, it was since settled in *Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] KESC 2 (KLR) once gazettement occurs a Party's Internal Dispute Resolution Mechanism, the Independent and Electoral Boundaries Dispute Resolution Committee and Political Parties Dispute Tribunal are ousted of jurisdiction to entertain disputes relating to Party List. Given that such a dispute transmutes to an election dispute that is only challengeable before an election Court. To the foregoing end, the objection on this Court's jurisdiction to entertain the Petition by dint of Section 38I, 40(1)(a)&(b) of the *Political Parties Act* as read with Section 13(2) & (2A) of the *Elections Act* is not well taken. The Preliminary Objection is therefore dismissed.

Whether this Court ought to strike out and or sustain the Election Petition on the premise of Section 78(1) & (2) of the *Elections Act* as read with Section 13(1) & 19(1) of the Elections (Parliamentary and County Elections) (Petitions) Rules?

28. As earlier noted, the Petition challenges the nomination by the 3rd Respondent and eventual gazettement of the 1st Respondent to serve as a Member of Parliament of the National Assembly under the category of Persons With Disability (PWD). Of particular relevance to the above is Section 78(1) & (2)(b) of the *Elections Act* which provides that-;
 - (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)
 - (b) five hundred thousand shillings, in the case of petition against a member of Parliament or a county governor; or
 - (c)
29. The above provision is echoed in Section 13(1) Elections (Parliamentary and County Elections) (Petitions) Rules which states that “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.” The above provision cannot be read in isolation of the other provisions of the Rules and particularly Section 19(1) of the Rules that provides that-;



Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the 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.

30. With the above in mind, perceivably, I gather it to be the Petitioner's submission that delay in depositing security has been reasonably explained whereas the objectives of the Elections (Parliamentary and County Elections) (Petitions) Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions. Therefore this Court ought to apply itself to Rule 5 of the Rules and consequently exercise its discretion in line with Article 159(2)(d) of *the Constitution*, by allowing the Petitioner's application seeking extension and or enlargement of time within which to comply with Section 78(1) & (2) of the *Elections Act* as read with Section 13(1) of the Elections (Parliamentary and County Elections) (Petitions) Rules. That in any event, the Petitioner has since deposited the security therefore no prejudice will be occasioned to the Respondents.
31. The decisions in Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 others [2013] KEHC 3481 (KLR), Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others [2013] KESC 6 (KLR), Salat v Independent Electoral and Boundaries Commission (supra), Fatuma Zainabu Mohamed v Ghati Dennitah & 10 others [2013] KEHC 3426 (KLR), Samwel Kazungu Kambi & another v Nelly Ilongo County Returning Officer, Kilifi County & 3 others [2017] KEHC 2818 (KLR) and Tom Onyango Agimba v Independent Electoral and Boundaries Commission, Returning Officer, Embakasi West Constituency & another [2017] KEHC 9515 (KLR) were relied in support of the above position.
32. On the part of the 1st, 2nd & 4th Respondent, the kernel of their argument is that the Petitioner has not provided sufficient reason, cause or evidence for the Court to exercise its discretion whereas Section 78(1) of the *Elections Act* is couched in mandatory terms meanwhile does not provide for exceptions based on financial and personal circumstances. It was further submitted that Rule 19(2) disallows extension and reduction of time on statutory timelines prescribed by *the Constitution* and the *Elections Act* therefore it cannot be invoked to cure non-compliance with Rule 13(1) of the Elections (Parliamentary and County Elections) (Petitions) Rules.
33. The decisions in Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others [2023] KESC 11 (KLR), Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others [2014] KECA 615 (KLR), Mwamlol Tchappu Mbwana v Independent Electoral & Boundaries Commission & 4 others [2017] KEHC 2313 (KLR), Elizabeth Jebet Kibor v Isaac Suare Oseur & 5 others [2020] KEHC 6764 (KLR), Evans Nyambaso Zedekiah & Mabutu Nyakeriga v IEBC & 2 Others (2013) KEHC 1037(KLR), Milton Kimani Waitinga v Independent Electoral and Boundaries Commission & 2 others (2017) KEHC 2670 (KLR), Robert Mwangi Kariuki v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR, and Morris Muindi Mutiso v Naomi Namsi Shaban & 2 others[2017] KEHC 2317 (KLR) were called to aid.
34. The Interested Party on its part equally supported the position taken up by the Respondents, that Section 78(1) & (2) of the *Elections Act* as read with Section 13(1) of the Elections (Parliamentary and County Elections) (Petitions) Rules are couched in mandatory terms, to wit, failure to comply with the same is fatal to the Petition.



35. Notably, the 1st & 2nd Respondent have specifically sought before this Court the striking out of the Petitioner's Petition for want of compliance with the mandatory statutory edicts on deposit of security for costs upon presentation of the Petition. In rebuttal, the Petitioner has explained want of timely compliance with above provision in her response meanwhile sought to assuage the situation by seeking to extend and or enlarge the time within which she ought to deposit security on costs. Perceptibly, by the rival submissions before this Court there is no dearth of authorities concerning the question of compliance with Section 78(1) & (2) of the Elections Act as read with Section 13(1) & 19(1) Elections (Parliamentary and County Elections) (Petitions) Rules. And I do not intend to reinvent the wheel on the issue.
36. That said, it is settled that failure to comply with the above provision in electoral disputes may be fatal given that by dint of Sub-Section (3) of Section 78 of the Act, the Court would be required not to proceed in any further with proceedings where an objection is raised. However, it can also be construed from the rival authorities that there two schools of thought on whether the Court's can extend and or enlarge time within which to comply with Section 78(1) of the Elections Act as read with Section 13(1) & 19(1) of the Elections (Parliamentary and County Elections) (Petitions) Rules. To which school of thought I belong to, will become axiomatic in the body of this ruling, without much ado.
37. The reasons advanced for failing to timeously comply with the provision of security have been explained by the Petitioner in her response and echoed in her application for enlargement of time. While it is imperative that one complies with the above statutory requirement, Courts have on occasion granted extension and or enlargement of time to comply, where sufficient and justifiable reasons have been advanced. As to the factors to be considered where a Court is faced with an application for extension and or enlargement of time, the Supreme Court in the case of *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR) while acknowledging the aforesaid involves discretion enunciated the principles applicable as follows-;

“(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7.”



38. Adjunct to the above decision, recently the same Court in *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others* [2023] KESC 11 (KLR) set out the guidelines that a Court ought to follow when issuing security for costs. The Apex Court observed that-;

62..... the imposition of security for costs by a court is in itself constitutional; there are no clear guiding principles on what a court considers when making an order for security for costs; at times the amount payable is left to the discretion of the court; in other times, the amount payable is set out in statute or regulations; in other times, although the amount payable is prescribed by legislation or regulation, the court has the discretion of reducing or enhancing the same or even waiving payment of the same; a suit maybe dismissed for non-payment of security for costs; and a dismissed suit may be reinstated upon the appellant or plaintiff showing cause for the non-payment of ordered costs. We are also cognizant of the fact that different courts in our judicial system have crafted their own rules of procedure to govern them including those of security for costs. However, there are no standard guidelines on factors to be considered whilst making an order for security for costs.

63. In the result, and conscious of this court's core mandate under section 3 of the *Supreme Court Act* as the court with final judicial authority, we deem it fit to set guiding principles which will assist courts below when considering an application by a defendant or respondent for security for costs. Thus, in determining whether it is appropriate to make an order that a party gives security for costs, the court may have regard to the following matters and such other matters as it considers relevant in the peculiar circumstances of each case: –i.the prospects of success or merits of the proceedings, ii.the genuineness of the proceedings,iii.the impecuniosity of the plaintiff, iv.whether the plaintiff's impecuniosity is attributable to the defendant's conduct,v.whether the plaintiff is effectively in the position of a defendant, vi.whether an order for security for costs would stifle the proceedings and/or impede access to justice, vii.whether the proceedings involve a matter of public importance, viii.whether there has been an admission or payment in court, ix.whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant,x.the costs of the proceedings,xi.whether the security sought is proportionate to the importance and complexity of the subject matter in dispute,xii.the timing of the application for security for costs, xiii.whether an order for costs made against the plaintiff would be enforceable within the republic of Kenya, xiv.the ease and convenience or otherwise of enforcing a Kenyan court judgment or order in the country of a non-resident plaintiff or appellant. xv.if the plaintiff is a natural person, an order for security for costs cannot be made merely on account of his or her impecuniosity. xvi.security for costs is to be given in such manner, at such time and on such terms (if any) as the court may by order direct. xvii.if the plaintiff fails to comply with an order under this rule, the court may order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed. xviii.the provisions of any Act under which the court may require security for costs to be given such as the *Elections Act*.xix.a second motion for security for costs will not succeed unless there is an unforeseen and material change in circumstances since the first order for security. An example of an unforeseen and material change in circumstances might be where a plaintiff has come into a sum of money sufficiently large that they could no longer make an impecuniosity argument. xx.the defendant seeking increased security bears the onus of demonstrating a significant gap between the security ordered and the actual expenses which were not foreseeable and that in



hindsight the original request for security for costs was based on an assessment of the complexity of the case which hindsight has established was not realistic. xxi.the jurisdiction to increase or decrease the amount of security already ordered should not be exercised lightly or be used to second guess the court that made the original order, whether on consent or otherwise, unless the gap between what was ordered and what later appears to be necessary is significant.

64. We agree with the jurisprudence from other jurisdictions that a court ought to take into consideration several factors before making an order for security for costs.

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69. To that end, we are of the considered view that a court may impose a condition precedent when imposing an order for security for costs in special and exceptional circumstances such as extraordinary and important cases, for instance, election petitions. The same should, however, be done in a manner that is reasonable and not to punish or subdue a genuine claim. In that regard, imposing a condition precedent is not in itself unconstitutional provided it is not unreasonable to the extent that it impedes a party's access to justice.

39. Here, the 1st, 2nd and 4th Respondent's position on Section 78(1) & (2) of the *Elections Act* as read with Section 13(1) & 19(1) Elections (Parliamentary and County Elections) (Petitions) Rules is resolute and that failure to comply with the statutory timelines breaches mandatory legal requirements thereby going to the root of the matter as to render the instant Petition fatally defective, incompetent and bad in law. Meanwhile, what I garner to be the Petitioner's explanation for failure to timeously comply with the above statutory requirement appears to be anchored on the following reasons -; firstly, as at filing of the Petition, purportedly the Election Petition module on the Judiciary's e-filing system was yet to be activated thereby rendering challenges in filing the Petition; secondly; that upon inquiry, the Petitioner had to wait for a formal gazette of an election Court before any further steps could be taken, which included processing of the security deposit invoice; thirdly, that the invoice had to be manually generated by the Court; fourthly, the Petitioner being a person with disability and unemployed, she had to fund raise and seek assistance from friends and well-wishers; and fifthly, as at lodging of the motion for extension and or enlargement of time, the Petitioner has since deposited the security.

40. It does not necessitate a reminder that election disputes are sui generis proceedings with strict statutory adherences, given the nature of litigation involved therein. To the above end, the apex Court in *Westmont Holdings SDN BHD (supra)* rightly recognizes the imposition on security for costs being specifically provided for in electoral dispute statutes. That said, I am inclined to concur with the rendition of Njoki Mwangi, J. in *Omari Juma Mwakamole v Independent Electoral & Boundaries Commission & 2 others [2017] KEHC 1730 (KLR)* wherein while addressing herself to the purport of Section 78(1) of the *Elections Act*, on the backdrop of an application such as the one presented by the Petitioner herein, she observed that-;

33.My understanding of the provisions of Section 78(1) of the *Elections Act* is that it sets in mandatory terms the timelines for deposit of security as being within 10 days



from the date of filing of a petition. The legislature did not make it mandatory for the deposit of security for costs to be made at the same time as when a petition is filed. This therefore gives a petitioner a grace period of 10 days from the time of filing the petition to the time for deposit of security for costs. This essentially factors in any exogenous factors that may come into play to hinder the deposit of security for costs as at the time of filing the petition. This therefore means that a petitioner who fails to exploit the 10 days window of opportunity granted under the provisions of Section 78(1) of the Elections Act runs afoul of the law. Situations may arise where a deposit of security for costs has been made but not captured on the court records, such a petitioner would have the opportunity to address the court on the said issue under the provisions of section 78(3) of the Elections Act.

34.

35... ...It is clear that the time specified for deposit of security for costs is not a matter prescribed under the Constitution but one provided by the provisions of section 78(1) of the Elections Act..... Courts derive jurisdiction from either the Constitution or statutes, in the applications before me, jurisdiction to entertain them is conferred on this court by the Elections Act and rules thereof.....

36... ...

37... ...Although Counsel for petitioner has cited the provisions of Rule 19(1) of the Election (Parliamentary and County) Petition Rules, 2017 which give a court powers to exercise its discretion under the rules or as ordered by the court, I hold that the said provisions are subservient to the provisions of Section 78 of the Elections Act. Rule 13 of the Election (Parliamentary and County) Petition Rules, 2017 borrows its provisions from section 78 of the Elections Act by stating that a petitioner shall deposit security for the payment of costs within 10 days of the filing of a petition in compliance with section 78(2) and (c) of the Act. It is therefore clear that section 78 and rule 13 of the Election (Parliamentary and County) Petition Rules leave no room for ambiguity on the non-elasticity of the timelines for deposit of security for costs.

41. The present Petition was filed on 20/08/2025. Reading of Section 78(1) of the Elections Act, the Petitioner ought to have complied with the above provision on or before the 30/08/2025. It appears it was not until 29/09/2025 that the Petitioner deposited the said security for costs. That said, I find the Petitioner's explanation for failure to comply within time to be quite peculiar and wanting. Firstly, she appears to lay blame at the door-steps of the Judiciary for having failed to set up an election petition module on its e-filing portal thereby delaying the filing of the Petition and or deposit of security. For arguments sake, if this was the case, no protest letter(s) was evinced by the Petitioner or notice by the Court on the issue, whereas given the strict electoral edicts, some industry ought to have been employed by the Petitioner given the provision of Section 13(2) of the Elections (Parliamentary and County Elections) (Petitions) Rules, either by drawing a banker's cheque for deposit in favour of the Registrar of the Constitutional & Human Right Division where the Petition was originally filed or the Registrar of the Civil Division upon Gazettement of this Court, as an election Court on 04/09/2025. No industry whatsoever was employed on this front to assuage the situation, the Petitioner found herself in.

42. Secondly, and at the risk of repetition, while no reasonable material has been advanced in respect of the first explanation, the Petitioner further pivots on the fact that being a person with disability and unemployed, she had to fund raise the security and seek assistance from friends and well-wishers.



It appears that the Petitioner equally hinges delay and or non-compliance on the fact of financial constraint. Similarly, on this explanation, no material has been evinced demonstrating the Petitioner's attempt to lobby or solicit funds from well wishes and or a demonstration of her financial position save for her deposition. That said, it warrants mentioning that the purport of Section 78(1) of the [Elections Act](#) has repeatedly been addressed within our jurisdiction, that it serves the purpose of securing costs that may be awarded as against the Petitioner and to deter frivolous election disputes.

43. Nevertheless, notwithstanding the purport of the aforecaptioned provision, I draw reverence from the Court of Appeal's rendition in *Abdinasir Yasin Ahmed & 2 others v Ahmed Ibrahim Abass & 2 others* [2014] KECA 104 (KLR) while addressing itself to the question of security for costs, wherein it observed that -;

“ 11.....It was stated by the predecessor of this Court in *Noormohamed Abdulla v Patel* [1962] EA 447 at 453:

“It is right that a litigant, however poor, should be permitted to bring his proceedings without hindrance and have his case decided.”

This principle had been stated in the earlier case of *Siri Ram Kaura v Morgan* [1961] EA 462. It is the principle applicable in this matter as the appellants are natural persons and not limited liability companies.

12. This is indeed a laudable principle. Roadblocks should not be erected to prevent poor people, who unfortunately are the majority in our country, from urging their causes. An application for security should not even be entertained if the respondent's poverty has been occasioned or contributed to by the act of the applicant.

13. In our view, however, poverty is just but one criterion that should be considered in applications for security for costs. The other criteria include the types and bona fides of the litigants and the nature and merits of their cases. Known vexatious litigants should be required to deposit security for costs before their cases are heard. On the merits of the suit or appeal, clear frivolity will attract orders for security for costs. Each case should, however, be decided on its own merits care always being taken to ensure that the grounds upon which such applications are based are proved to the required standard.

14. The nature of the dispute in this case is an election dispute. Election disputes are a class of their own which attract additional considerations. Elections world over are competitive features. Presidents in many parts of the world, and especially in Africa, wield a lot of power. The influence that comes with the office makes its very attractive. That influence cascades down through all elective positions to the lowest. Candidates and political parties often do anything to be elected. Incumbent presidents who are eligible for re-election marshal state power and all means at their disposal to get re-elected. Besides the candidates, the electorate themselves, hoping for an improved standard of living, get equally excited. All these factors make elections at every level extremely high-pressure events.

15. Election disputes are therefore not ordinary disputes which concern only the parties to it. They are important disputes in rem the outcomes of which are the concerns of constituents and sometimes an entire nation. It is for this reason



that we think the law permits not only the contestants in any particular election but also voters to institute election petitions.

16. While election disputes pend in court, the election mood is perpetuated in the constituencies concerned and sometimes, as already stated, in the entire nation. That engenders acts of thuggery and other crimes and therefore raises security concerns. That is why Articles 105 and 140 of our Constitution and Sections 85 and 85A of the [Elections Act](#) set timelines within which they should be disposed off so that people can go on with their lives. So as the courts hear election petitions, they should not look only at the parties before them, but should always have at the back of their minds the bigger picture and the ramifications of their decisions and that the costs of staging them are astronomical.
 17. While courts should endeavour to expeditiously dispose of election related disputes they should never lose sight of the fact that justice cuts both ways and the respondents should also be accorded a reasonable opportunity to present their cases. They should also remember that because of the high stakes politicians place on elective positions as stated above, election related disputes are expensive litigation. While every opportunity should be accorded to petitioners to be heard, respondents should not be made to needlessly suffer astronomical costs they will have no chance of recovering. Besides keeping busy bodies away from election disputes, contentions like the one in this case that the appellants are proxies of the losers in the election should not be dismissed off hand either. Where there is proof they should seriously be considered. This is also the rationale behind the requirement for deposit for costs.”
44. Here, despite the proviso of statute, the Petitioner has not advanced any compelling reasons to warrant an order of extension and or enlargement of time within which to comply with Section 78(1) & (2) of the [Elections Act](#) as read with Section 13(1) of the Elections (Parliamentary and County Elections) (Petitions) Rules. Further, the motion dated 02/10/2024 ex facie seems to have been prompted by the 2nd Respondent’s motion dated 30/09/2024. The delay herein, in depositing security is thirty (30) days and as earlier stated no tangible explanation or evidentiary material has been tendered to justify issuance of the orders sought for by the Petitioner. Had the latter promptly intended to assuage the situation, other than supplying tangible explanation she ought to have moved the Court immediately the funds were deposited in Court. She did not pick up the said gauntlet, to which I am inclined to agree with the Respondents that no reasonable explanation has been advanced by the Petitioner for failure to timeously deposit security.
45. Whereas this Court is likewise cognizant of the fact that the Petitioner may have been faced with financial hinderance, the explanation advanced is not sufficient without more nor and exception to Section 78(1) & (2) of the [Elections Act](#) as read with Section 13(1) of the Elections (Parliamentary and County Elections) (Petitions) Rules, as rightly argued by the Respondents. If it were, mischievous and vexatious litigants would apply the said explanation to avoid complying with the aforestated provision in electoral dispute. If financial constraint was a hindrance, the Petitioner ought to have applied herself or trod an extra mile to demonstrate and or justify the said explanation. Merely, stating that delay and eventual deposit was pegged on a well-wisher furnishing funds would not suffice, in the circumstance. Finally, it would be remiss if I were not to mention that the Petitioner has saliently relied on decisions originating from Courts of concurrent jurisdiction, of which, are merely persuasive in nature therefore they do not offer succor to the Petitioner’s cause. Consequently, I believe I have reasonably addressed



myself to issue on whether to strike out and or sustain the Election Petition on the premise of Section 78(1) & (2) of the *Elections Act* as read with Section 13(1) & 19(1) of the Elections (Parliamentary and County Elections) (Petitions) Rules.

For the foregoing the court is not persuaded to allow or grant prayers sought in the Petitioner's application dated 2/10/2025. That said, it is dismissed.

Whether the Court ought to strike out the Election Petition for being frivolous, vexatious, an abuse of the Court process and offending 37(1) of the *Elections Act*?

46. In light of this Court earlier finding on the second issue, it would be otiose to address myself on the aforesaid framed question. Therefore, the Court will respectfully refrain from addressing itself on the matter. The petition is hereby struck out upon the answer to the issue under review being in the affirmative.

Who ought to bear the costs of the respect motions?

47. An award of costs, with respect to a Petition such as the one presented before this Court, is anchored on Section 30 of Elections (Parliamentary and County Elections) (Petitions) Rules. Here, I concur with the rendition of Mutende, J. in *Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others* [2013] KEHC 5939 (KLR) who had this to say on the issue of costs-;

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so.”

48. Earlier, the Court of Appeal in the case of *Devram Dattan versus Dawda* [1949] EACA 35, held inter alia that it is trite law that the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case. Being a judicial discretion, the law demands that it must be exercised judiciously. Consequently, given the stage at which the instant proceedings terminate, the Petitioner's plight of being a Person with Disability, thus applying the principles enunciated from the superior Courts decisions, and upon exercise of the Court's discretion, I find it fair and just that each party bears its own costs in respect of the matters presented for determination before this Court.

Determination

49. The commending orders in light of this Court's disposition are as follows-;

- a. The Petition dated 19/08/2025 alongside the accompanying motion of an even date are struck out for want of compliance with Section 78(1) & (2) of the *Elections Act* as read with Section 13(1) of the Elections (Parliamentary and County Elections) (Petitions) Rules.
- b. Each party is directed to bear own costs of the Petition, Preliminary Objection dated 23/09/2025 and the motions dated 30/09/2025 and 02/10/2025.

Orders Accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 22ND DAY OF DECEMBER, 2025.

.....



JANET MULWA.
JUDGE

