



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ELECTION PETITION NO 1 OF 2017

(AS CONSOLIDATED WITH)

ELECTION PETITION NO. 4 OF 2017

HON SILVERSE LISAMULA ANAMI 1ST
PETITIONER

ADRIAN MAMBILI 2ND
PETITIONER

VERSUS

**THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION 1ST**
RESPONDENT

HENRY BAHATI LUMITI (RETURNING OFFICER) 2ND
RESPONDENT

JUSTUS GEISTO MUGALI M'MBAYA 3RD
RESPONDENT

RULING

1. The applicant, who is the 2nd petitioner herein, filed a notice of motion application dated 5th May 2023 seeking the following orders;

a) *SPENT*

b) *SPENT*

c) *SPENT*

d) *That a declaration be and is hereby made that the Applicant is only liable to pay a sum of Kshs. 2,267,914.00/= being half of the total taxed amount in the sum of Kshs. 4,535,828.00/= in terms of the Honourable Court's ruling of 29/06/2022 and certificate of taxation thereto dated 18/07/2022*

e) *That the Applicant's security for costs in the sum of Kshs. 500,000/= deposited with the Honourable Court upon the institution of the petition herein shall be applied to partly liquidate the said amount of Kshs. 2,267,914 due and owing from him.*

f) *That the Honourable Court be pleased to permit an application to liquidate the balance of the amount as per orders 4 and 5 above by way of monthly instalments with effect from the 30th day of the making of the order and thereafter on the last day of each succeeding month until payment in full.*

g) That the costs of this application be provided for.

2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn on the same day by the applicant/2nd petitioner, where he acknowledged that there was a Bill of costs taxed on both himself and his co- petitioner, who were represented by different counsel.
3. He admitted that he lodged an election petition before the court, which was consolidated with his co- petitioner's petition, which both did not succeed. They were condemned to pay costs to the respondent in a ruling dated 29/06/2022.
4. He confirmed that the respondent extracted the certificate of costs dated 18/07/2022 for the amount of Kshs. 4,535,282.00, which was to be settled between himself and the 1st petitioner, Hon. Silverse Lisamwa Anami.
5. He now claims that the respondents were attempting to execute the whole amount against him despite them being 2 petitioners and prays that the court make a declaration that they share the costs equally, being Kshs. 2,267,914.00 between the two petitioners.

6. The applicant acknowledged depositing Kshs. 500,000/ with the court, which he seeks to be utilised as a partial settlement of the said amount, Kshs. 2,267,914.00/=, and the balance is to be paid in monthly instalments of Kshs. 10,000/= from the 30th day of making the order until payment in full, stating that he is not in active employment and is not in a position to settle the whole amount at once.
7. He prays that the application be allowed as the
8. In response, the 1st and the 2nd respondent opposed the application.
9. They averred that it had been 3 years since the order was made, and the petitioners had not made any attempt to settle their costs and that it would be unfair to invoke a stay of execution in respect of costs, which is a move to deny them the fruits of their success.
10. They contested the applicant's prayer to be allowed to liquidate the balance of costs by way of monthly instalments of Kshs. 10,000/=, as made in bad faith in an attempt to frustrate and delay them from enjoying the costs which they assert have prejudiced them.
11. They further argue that the applicant has not demonstrated his inability to settle the debt, and the

allegation that he is a man of straw lacks evidence since he was an aspirant for the position of Member of Parliament for Shinyalu constituency and even deposited the security of costs of Kshs. 500,000/= which does not align with his claims that he is a man of straw.

12. They pray that the court dismisses the application as the applicant had not shown seriousness in settling the taxed costs.
13. The application was canvassed by way of written submissions.

Applicant's Submissions

14. In the submissions dated 5th February 2025, the applicant seeks equity in the payment of the costs where both the petitioners make the payment in equal shares, so that he is to pay the amount of Kshs. 2,267,914.00.
15. From the amount stated, the applicant prays that the amount he had deposited as security be paid off to offset his share of the costs, leaving a balance of Kshs. 1,767,914.00, which he proposes be liquidated by way of monthly instalments of Kshs. 10,000/= until full payment.

16. On the settlement of the decretal sum in instalments, he quotes Order 21 Rule 12 (2) of the Civil Procedure Rules, 2010 and the case of **CIC General Insurance Limited vs Global Trucks Limited (Miscellaneous Civil Application 324 of 2018 (2022) KEHC 10173 (KLR))**.
17. He submits that he is not in gainful employment and, as such, does not have a stable source of income and is unable to settle the whole amount at once, and prays that he be allowed to settle the amount by way of a monthly instalment of Kshs. 10,000/=
18. He finally submits that he is willing to pay the costs owed, but due to his financial constraints, he is unable to liquidate the whole amount at once and prays that the court allows him to make payment by way of regular monthly instalments.

Respondents' Submissions

19. The respondents raised one issue for determination, which is whether the payment of the decretal sum by instalments of Kshs. 10,000/= constitutes an attempt to deny them the fruits of the taxed costs.
20. They state that the petitioners had filed a petition challenging the election of the 3rd respondent, which

they lost, and the Honourable court awarded them the costs of Kshs. 4,535,828/= and they were later issued with the certificate of costs, which they duly served upon the 1st and the 2nd petitioners.

21. They submit that, despite being served with the certificate of costs, the applicant has made no attempt to settle the decretal sum and now invokes the equitable remedy for stay, denying them the fruits of their success.
22. They contend that the 2nd petitioner's proposal to pay Kshs. 10,000/= monthly was made in bad faith in an attempt to prejudice them, and quote the case of **Kehval Jethabhai & Brothers Ltd vs Saleh Abdul (1959) EA 260**. They contend that the applicant's proposal is unfair and would frustrate their enjoyment of the fruits of their costs.
23. They refute the allegations that the 2nd petitioner is a man of straw and quote the case of **Diamond Star General Forwarding Ltd vs Ambrose D.O Rachier (2018) eKLR**, stating that he had vied for an electoral position as an MP and further deposited a security of Kshs. 500,000/= in the election petition. They further argue that financial hardship is not a sufficient basis to

justify non-payment of costs and that the applicant failed to demonstrate goodwill, having delayed payment for more than 3 years after he was served with the certificate of costs.

Analysis and Determination

24. I have perused the application dated 5th May 2023, the subsequent affidavits, as well as the parties' rival submissions. The main issues for determination are;
- (i) Whether a declaration should issue that the Petitioners share the taxed costs equally;*
 - (ii) Whether the Applicant's security deposit of Kshs. 500,000.00 should be applied towards his share of the costs.*
 - (iii) Whether the remaining balance should be liquidated by monthly instalments of Kshs. 10,000/=.*
25. On the first issue, whether the 1st and 2nd Petitioners should jointly and severally share the cost of the suit, I note that in a judgment delivered on 19th February 2018, by Justice Njagi, the Honourable court dismissed the two petitions filed by the petitioners for lack of merit and awarded the costs of the petition to the

respondents without specifying apportionment to the petitioners.

26. Section 27 of the Civil Procedure Act is very clear that costs follow the event. In consolidated matters involving multiple petitioners, equity often dictates proportionate sharing in the absence of contrary orders.
27. The respondents do not oppose the proposed mode of sharing of the costs and only pray that they be paid what is due to them. The taxed sum of Kshs. 4,535,828.00 is joint, but fairness demands a declaration of equal liability. I therefore declare that the 1st and 2nd Petitioners are each liable for half, being Kshs. 2,267,914.00 with interest thereon and allow this prayer to ensure equitable distribution.
28. As regards the second issue, Section 96 of the Elections Act, 2011, provides that security deposited in election petitions may be applied towards costs upon determination. In ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] KESC 30 (KLR)***, the apex court held that such deposits are not refundable to unsuccessful petitioners but may be offset against awarded costs. The two petitioners each deposited Kshs. 500,000/=. The Respondents have not

opposed the proposal, as it aligns with the statutory intent to secure costs, and, during the pendency of this application, a consent was filed to release the deposits to them.

29. I will thus allow the release of the applicant's Kshs. 500,000. /= deposit if not already done, towards partial settlement of his share of the costs, leaving a balance of Kshs. 1,767,914.00/=
30. Regarding the proposal for settlement of the balance in monthly instalments of Kshs. 10,000.00/=, Order 21 Rule 12(2) of the Civil Procedure Rules empowers the court to order payment by instalments upon sufficient cause being shown.
31. In **A. Rajabali Alidina v Remtulla Investments Ltd & Another [1961] EA 565**, it was held that such discretion must balance the decree-holder's right to the fruits of the judgment against the judgment-debtor's circumstances, and proposals must be reasonable and made in good faith.
32. It is well noted that the applicant has expressed willingness to pay the sum of the costs. He has proposed that he be allowed to pay Kshs. 10,000/= monthly to offset the remaining balance of Kshs.

1,767,914/=. The applicant was issued the certificate of costs in 2022, which is more than three years ago. To date, he has not made any effort to settle the costs. This inaction casts doubt on his claim to be willing to make the payment. If he is allowed to pay as per his proposal, it would take approximately 15 years for him to settle the debt owed, which is an unreasonable amount of time and a mockery of the administration of justice, as it would deny the Respondents the fruits of their judgment.

33. In **Keshavlal Jethabhai & Brothers Ltd v Saleh Abdul [1959] EA 260**, the East African Court of Appeal rejected a similarly protracted instalment plan as frustrating the decree-holder. It stated that:-

“The mere fact that the debtor is hard pressed or unable to pay in full at once is not sufficient reason. Ordinarily, he should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt.”

34. Further, in **Diamond Star General Trading LLC v Ambrose D.O Rachier carrying on business as Rachier & Amollo Advocates [2018] KEHC 9034 (KLR)**, the court dismissed an application for payment

by instalments where the applicant failed to demonstrate genuine inability beyond bare assertions, especially given prior financial capacity.

35. Despite claiming to be a man of straw, the applicant has not provided any tangible evidence to support his allegations of financial hardship, such as bank statements, affidavits of means, or other documentary proof of his income and assets. Mere assertions of unemployment and inability to pay, without credible evidence, are insufficient to warrant the court's indulgence. In **Spot Trading Import Export SRL v Orbit Products Africa Limited [2025] KEHC 12058 (KLR)**, the court held that while a defendant may assert financial hardship, there must be credible evidence to demonstrate it, and the burden lies on the applicant to show entitlement to such relief. Absent this, the pattern of non-compliance weighs against granting instalments. Similarly, in **Lyomu v Standard Group PLC [2025] KEELRC 1146 (KLR)**, the court emphasized that without adducing evidence to prove financial inability or constraints, there is no tangible basis to guide the court in determining reasonable instalments, rendering bare claims inadequate.

36. It is not in dispute that the applicant vied for a parliamentary seat; he even deposited substantial security of Kshs. 500,000/=, yet provides no evidence of attempts to liquidate his debt over the past three years. The respondents have been prejudiced by the delay long enough, and equity aids the vigilant, not the indolent. I find the proposal unreasonable and not made in good faith. Accordingly, it is denied.

37. In conclusion, the Court makes the following orders:-

- (a) The Petitioners shall share the taxed costs equally. Each shall bear Kshs. 2,267,914/= together with interest thereon.
- (b) The sum of Kshs. 500,000/= deposited by the applicant as security for costs shall be released, if not yet done, and applied towards partial satisfaction of his share of the costs.
- (c) The prayer for liquidation of the balance by monthly instalments of Kshs. 10,000/= is declined.
- (d) The respondents shall be at liberty to execute for the balance due.

(e) The applicant shall bear the costs of this application.

38. It is so ordered.

Dated, signed and delivered at Kakamega this 12th day of February 2026.

**A. C. BETT
JUDGE**

In the presence of:

Mr Lungwe for the Applicant

Ms Onyango holding brief for Mr Macharia for 1st and 2nd
Respondents

Court Assistant: Polycap