IN THE COURT OF APPEAL

AT NYERI

(CORAM: KIAGE, SICHALE & KANTAI, JJ.A.)

ELECTION PETITION APPEAL NO. 3 OF 2018

BETWEEN

HON. DICKSON DANIEL KARABA...................................APPELLANT

AND

HON. KIBIRU CHARLES REUBENSON..................1ST RESPONDENT

SAMUEL SEKI LEPATI..2ND RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC)....................3RD RESPONDENT

DUKE NYAIRO ONDIEKI...4TH RESPONDENT

STEPHEN KARAU NYOIKE......................................5TH RESPONDENT

JAMES KARIMI KARUBIU.......................................6TH RESPONDENT

(Appeal from the Rulings of the High Court of Kenya at Kerugoya (Mshila, J.)

dated 31st January, 2018 and 15th December, 2017

in

Election Petition No. 4 of 2017)

****

As Consolidated With

ELECTION PETITION APPEAL NO. 4 OF 2018

BETWEEN

DUKE NYAIRO ONDIEKI..................................1ST APPELLANT

STEPHEN KARAU NYOIKE.............................2ND APPELLANT

AND

HON. DICKSON DANIEL KARABA..............1ST RESPONDENT

HON.KIBIRU CHARLES REUBENSON.......2ND RESPONDENT

SAMUEL SEKI LEPATI..................................3RD RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC).........4TH RESPONDENT

JAMES KARIMI KARUBIU..........................5TH RESPONDENT

JUDGMENT OF THE COURT

There were four candidates who stood for the seat of Senator for Kirinyaga County in the National Elections that were held on 8th August, 2017. The results of those elections showed that ***Dickson Daniel Karaba*** of Jubilee Party ("*the appellant*") garnered 130,925 votes while ***Kibiru Charles Reubenson*** who stood as an Independent Candidate ("*the 1st respondent*") received 147,921 votes. The other candidates were Karubiu James Karimi ("*the 6th respondent*") who got 11,987 votes while Karimi Dishon Kirima got 9,089 votes. Those results were declared by the 2nd respondent, ***Samuel Seki Lepati*** who was the Returning Officer of the said county on behalf of ***Independent Electoral and Boundaries Commission (IEBC***), the ("*3rd respondent*"). The 4th, 5th and 6th respondents respectively, ***Duke Nyairo Ondieki, Stephen Karau Nyoike*** and ***James Karimi Karubiu*** entered the petition that was filed at the High Court of Kenya, Kerugoya, at the tail end of it as we will show in this judgment.

Following that declaration of the 1st respondent as the winner of that election the appellant filed an election petition being ***High Court Election Petition No. 4 of 2017*** in the said court. Various provisions and ***Articles*** of the ***Constitution of Kenya, 2010*** and other laws were relied on to show that the said election had not been held or conducted in accordance with the law. It was therefore prayed that the 2nd and 3rd respondents be ordered to produce certified copies of ***Forms 38A*** and ***38B*** for the Senator election in Kirinyaga County and copies of Day Book Diaries from polling stations within 7 days of the filing of the petition; that an order be made for scrutiny and audit of all the returns of the election for Senator of the said county including Day Book Diaries from all polling stations, ***Forms 38A, 38B*** and ***38C***; that a declaration be issued to declare that the 2nd respondent's declaration of the 1st respondent as the Senator of Kirinyaga County is invalid, null and void *ab initio*; that an order be issued for recount of the votes cast in all the 586 polling stations in Kirinyaga County's election for Senator; that a declaration be made that within the meaning of ***Article 86*** of the ***Constitution*** and ***Section 83*** of the ***Elections Act*** the irregularities, improprieties and non-compliance of the law by the 2nd and 3rd respondents directly, materially and substantially affected the declaration of the 1st respondent as the winner of the Senator election of the said county; that the court be pleased to order the 2nd and 3rd respondents to issue a certificate of election to the petitioner if the recount of the ballots cast showed that he received most votes in the election of Senator for the said county; that costs be met by the 3rd respondent and the court issues any other relief that it may deem expedient to grant. The appellant filed an affidavit in support of the petition and attached various annextures.

The 1st, 2nd, and 3rd respondents filed affidavits in reply.

Mshila, J., having been duly gazetted as the Election Court by the Honourable the Chief Justice heard the petition. The record will show that various applications were made before the learned Judge some calling for recount of votes; others calling for scrutiny; there was an application for review; there was an application for recusal of the learned Judge from handling the petition and also relevant to this appeal were applications for substitution by the 4th, 5th, and 6th respondents who applied to take over the petition and there was an application for withdrawal of the petition filed by the appellant.

The memorandum of appeal filed in ***Election Petition Appeal No. 3 of 2018*** relates to rulings made by the learned Judge on 15th December, 2017 and a ruling made on 31st January, 2018. The first ruling related to an application for scrutiny of all votes cast in all the polling stations in Kirinyaga County's Senate election on 8th August, 2017; that the court order a recount of all the valid votes cast in respect of those elections; that the court order a scrutiny of all statutory forms in respect of all polling stations in Mwea, Ndia, Kirinyaga Central and Gichugu constituencies concerning the said election; that scrutiny include examination of the following: the signatures of the Presiding Officers and Deputy Presiding Officers, the affixing stamps by Independent Electoral and Boundaries Commission on statutory forms, alteration of forms without countersigning, transposition errors; statutory forms where there were no signature of Jubilee Party Agents, similarities in handwritings in the forms, both the electronic and hard copy of the register of votes as contained the biometric data and alpha numerical details of the voters entitled to vote at the stated polling stations; the Kenya Integrated Electronic Machine System and the information stored by it or the printouts in respect thereof, the declaration of results from ***Form 38C***, the packets of spoilt ballots, the marked copy registers, the packets of counterfoils of used ballot papers, the packets of counted ballot papers, the packets of rejected ballot papers and the information contained in the polling day dairies. It was also prayed that any party who was of the view that the resultant scrutiny report was inaccurate or failed to capture all the material evidence emanating from the scrutiny exercise be granted leave to file a supplementary affidavit within 3 days of receipt of the scrutiny report by the parties and the court be pleased to make any further orders or directions necessary to ensure expeditious, just and affordable enforcement of the orders.

In the considered ruling on the application the Judge found no merit in the application and dismissed it further ordering that costs of the application abide the outcome of the petition.

The petition was heard in full where the appellant and his witnesses testified as did the witnesses of the 1st, 2nd and 3rd respondents.

At the conclusion of the hearing, parties were ordered to file written submissions which were to be subject to an oral highlight before the learned Judge. The record shows that parties did indeed file written submissions but on 10th January, 2018 the appellant filed a notice of

motion in the said court said to be brought under ***rules 21*** and ***22*** of the ***Elections (Parliamentary and County Elections) Petition Rules 2017*** and all other enabling provisions of the law where the orders sought were:

1. ***That the petitioner be granted the requisite leave to withdraw the petition herein.***

2. ***That the petition dated 6th September, 2017 and all subsequent applications be marked withdrawn.***

3. ***That each party to bear their costs***.

In grounds in support of the motion it was stated:

> ***"a) The Petitioner of his own will and volition has chosen to withdraw the Petition, inter alia, on the following grounds.***
>
> ***b) The applicant has become irredeemably disillusioned with the electoral justice system and wishes to disengage from it forthwith.***
>
> ***c) Whereas in filing this Petition under Section 80 (4) of the Elections Act, the applicant expected to secure justice expeditiously in order for the confirmed true winner to serve the people of Kirinyaga free from electoral contestation it is now obvious that in the circumstances of this case the applicant cannot secure justice without a long drawn out and costly appeal process.***
>
> ***d) The applicant is apprehensive that prolonged electoral contestation over the outcome of the Senate election will be prejudicial to unity, public interest, cohesion and developmental vision of the Kirinyaga people.***
>
> ***e) In view of the foregoing, the applicant after deep soul searching and reflection during the festive season has decided that the time has now come for him to sacrifice his political ambitions by withdrawing this petition in order to serve the greater interest and public good of the people of Kirinyaga to move on with the divisive electoral politics of 2017.***
>
> ***f) No agreement or terms of any kind has been made and no undertaking has been entered into in relation to the withdrawal of the petition.***
>
> ***g) The Petitioner undertakes to publish in a newspaper of national circulation a notice in the prescribed form of his intention to withdrawal*** *(sic)* ***the Petition".***

The application was also supported by an affidavit of the appellant sworn at Nairobi on 9th January, 2018 which rehashes the grounds we have set out.

Drama continued because on the 19th January, 2018 the firm of ***J. M. Njoroge & Company Advocates*** filing for an intended substituted petitioner gave notice that at the hearing of the application by the appellant to withdraw the petition their client ***James Karimi Karubiu***, the 6th respondent herein, intended to be substituted as a petitioner in place of the appellant. On the same day the said advocates filed a formal motion praying for substitution. It was further prayed in the motion that the court be pleased to make such orders as to security deposit of the original petitioner and costs of the proceedings upto the point of withdrawal of the petition; that the 6th respondent be granted leave to file supplementary final submissions; that the respondents in the petition be ordered to furnish the 6th respondent with copies of pleadings. The 6th respondent further stated that he was qualified to be the petitioner; that he had seen a notice in the issue of the Daily Nation newspaper of 12th January, 2018 stating that the appellant intended to withdraw the petition; that he was a candidate in the impugned election and he had a right to know the true winner of the election which was only possible if the court proceeded to deliver a judgment; that he suspected that the appellant had colluded with persons he did not name leading to the application for withdrawal of the petition and that he needed to file further submissions. The affidavit in support repeated the same matters.

On the same day 19th January, 2018 the firm of ***Ndegwa & Ndegwa Advocate***s acting for intended substituted petitioners filed a notice said to be under ***rule 4, 22*** and ***24 (1)*** and ***(2)*** of the ***Election (Parliamentary and County Elections) Petitions Rules 2017*** giving notice that the 4th and 5th respondents being registered voters in the Republic of Kenya including in Kirinyaga County intended to be substituted as petitioners in place of the appellant. In the motion in support the 4th and 5th respondents stated that they intended to be substituted as petitioners and that the court give an order on the security deposit that had been placed by the appellant as it may deem fit. In grounds in support of the motion the 4th and 5th respondents like the 6th respondent stated that they had seen the notice published in the Daily Nation newspaper on 12th January, 2018 indicating that the appellant intended to apply to withdraw the petition; that they intended to take over the petition so that justice could be done and be seen to be done by a final judgment of the Court on merit; that they were qualified to be substituted as petitioners; that the petition as filed raised profound issues touching on the rights of the 1st respondent to serve as Senator of Kirinyaga County when according to them he had not obtained the highest number of votes at the election; that, they, unlike the appellant, had faith in Kenya's electoral justice system; that they thought there was a scheme to defeat the course of justice and that the petition should be determined on merit.

The affidavit in support of the motion was sworn by the 4th respondent at Nairobi on 4th January, 2018. Apart from the matters we have already set out Mr. Ondieki stated that he was a registered voter in Nairobi County whilst his co-applicant (*the 5th respondent*) was a registered voter in Kisii and Muranga Counties and that they were both members of Jubilee Party.

For completion of the discussion on the events as they unfolded, we have seen the "NOTICE OF INTENTION TO WITHDRAWAL AN ELECTION PETITION" which was drawn by the firm of ***Kinoti & Kibe Company Advocates*** for the appellant and was published in the

Daily Nation of 12th January, 2018 as appears on Page 93 of Vol. IV of the Supplementary Record of Appeal.

When the petition was called out at the High Court for parties to highlight written submissions it was pointed out to the learned Judge that there was an application to withdraw the petition and there were two applications for substitution of the appellant and the 4th, 5th and 6th respondents to be petitioners. Parties were granted opportunities to give substantive submissions on the three applications – the application to withdraw the petition, the application for substitution by the 4th and 5th respondents on the one hand and the similar application by the 6th respondent, on the other - which were heard together. The learned Judge considered the applications and the submissions made and on reviewing the relevant material and the law, the Judge was satisfied that the reasons given by the appellant in asking for leave to withdraw the petition were sound and valid in law. On the issue of substitution the learned Judge first considered the application by the 4th and 5th respondents and found that they had not shown whether they were from the electoral area relevant to the petition; that they had stated in an affidavit that they were registered voters in Nairobi, Murang'a and Kisii Counties which is a contravention of electoral laws and had disentitled themselves from the court's exercise of discretion; that the application had been brought at the tail end of the proceedings when the petition had been heard in full; that they had not shown how they would be prejudiced by the withdrawal of the petition; that they had not demonstrated the ability to pay costs; that their *bona fides* were questionable; that the application was a crafty way of delaying the speedy resolution of the election petition. The application for substitution was therefore dismissed.

In respect of the application for substitution by the 6th respondent the learned Judge considered the past conduct of the 6th respondent. The Judge took judicial notice of the various petitions that the 6th respondent had filed including Kerugoya High Court ***Election Petition No. 1 of 2017*** where the 6th respondent sought orders for cancellation of the declared results of the County Senator of Kirinyaga County where he also sought orders that fresh elections be conducted. That election petition was withdrawn by the 6th respondent on the same day that it was filed without any reasons being given for withdrawal.

The Judge visited ***Election Petition No. 3 of 2017*** also filed at the High Court of Kenya, Kerugoya by the 6th respondent which was substantially similar to ***Election Petition No. 1 of 2017*** involving the same parties. That petition was gazetted as an election petition and it was observed that the 6th respondent was given a lot of indulgence by the said Judge and that the petition had been dismissed on 3rd September, 2017 after the 6th respondent, as petitioner, could not prosecute it. The other issue considered by the Judge in respect of the application by the 6th respondent was that orders of dismissal in ***Election Petition No. 3 of 2017*** had not been validly set aside or appealed and the Judge wondered how the 6th respondent who had not prosecuted the said election petition could have a proper interest to take over a similar petition when he could not prosecute his own. For all those reasons the application was found lacking in merit. At paragraph 84 of the ruling the judge observed:

> ***"This court reiterates that it is the duty of the court to ensure that the withdrawal of an election petition is not terminated if there are qualified persons to take it over; but in this instance this court finds that there are no qualified persons who can take over the matter; the upshot is that the petitioner should not be held against his will and should be allowed to walk away with his head held up high…".***

The application for withdrawal of the petition was granted; the applications for substitution were dismissed with no order as to costs. On the withdrawn petition it was ordered that the appellant pays costs of the application and costs of the election petition to the 1st respondent capped at Ksh. 5 million. It was further ordered that he pays costs to the 2nd and 3rd respondents jointly capped at Kshs. 5 million; that bills of costs be filed and be taxed subject to the orders on capping. Security deposit held by the court was ordered to be divided equally towards payment of the respondents' taxed costs.

Those orders resulted in two appeals - this appeal and ***Election Petition Appeal No. 4 of 2018***. In the latter appeal the appellants are ***Duke Nyairo Ondieki*** and ***Stephen Karau Nyoike***. The respondents there are ***Dickson Daniel Karaba*** as 1st respondent, ***Kibiru Charles Ruebenson*** as 2nd respondent, ***Samuel Seki Lepati*** as 3rd respondent, ***Independent Electoral & Boundaries Commission*** as 4th respondent and ***James Karimi Karubiu*** as 5th respondent.

There are 26 grounds set out in the Memorandum of Appeal drawn by M***/s Kinoti & Kibe Company Advocates*** for the appellant in ***Election Petition No. 3 of 2018*** while there are 14 grounds of appeal set out in the Memorandum of Appeal drawn by ***M/s Ndegwa & Ndegwa Company Advocates*** for the appellants in ***Election Petition Appeal No. 4 of 2018***. In the first 4 grounds in ***Election Petition Appeal No. 3 of 2018***, it is said that the learned Judge erred in not appreciating the law and jurisprudence on withdrawal of an election petition on substitution of a petitioner and also erred on the order for costs. In the next set of grounds the appellant says that the effect of the ruling and orders of the Judge is to place him in the same position he would have been had he not applied to withdraw the petition. It is also said that the learned Judge ignored submissions made and that the rulings and order appealed from negate the public interest nature and inherent right of all Kenyans and the public at large to uphold the integrity of the electoral systems and outcomes. It is stated that the costs awarded were punitive, exorbitant and excessive and that the ruling and orders appealed from negate, compromise and subvert the values, principles and standards that underpin various articles of the ***Constitution of Kenya, 2010***. At ground 13, the complaint is that the learned Judge erred by not ordering a recount of votes to determine the candidate who garnered the highest number of votes when a basis for a recount had been laid. There is an attack on reliance by the judge of certain exhibits and it also said that the Judge was wrong not to find that votes for Kirinyaga Central and Gichugu Constituencies should be recounted. There is also a complaint in regard to findings on polling stations in Mwea constituency. At ground 19 of the Memorandum of Appeal it is said that the ruling of 15th December, 2017 was founded on a fundamental failure and refusal by the Judge to acknowledge that as a matter of law and logic the appellant's matter could not be determined without recount of all the ballots cast. There are also issues raised by the appellant on loyalty of party agents and the learned Judge is faulted for formulating a table to compare votes in polling stations. It is prayed that the appeal be allowed; that the ruling and orders of 31st January, 2018 be set aside; that an order be issued for recount of all the votes cast in the election for Senator in Kirinyaga County and in alternative the award of costs to the 1st, 2nd and 3rd respondents in the ruling dated 31st January, 2018 be set aside; that the ruling dated 15th December, 2017 be set aside and that prayer 2 of the application dated 23rd October, 2017 seeking recount of all the valid votes cast in respect of the Kirinyaga County Senate Elections be allowed with costs and that costs of the appeal be awarded to the appellant.

In ***Election Petition No. 4 of 2018*** the learned Judge is faulted for not finding that the appellants had *locus standi* to take over the petition. It is said that the appellants being Kenyan citizens were qualified to be substituted and take over the petition; that the learned Judge was wrong to lock out the appellants from the process. The learned Judge is said to have erred in holding that the appellants required to lay a basis to be allowed to take over the petition and the learned Judge is further faulted for finding that the appellants takeover bid of the petition was a tactic to delay the determination of the petition. It is prayed that the appeal be allowed; that the ruling dated 31st January, 2018 be set aside to the extent that it dismissed the appellants' application dated 19th January, 2018; that the appellants' application dated 19th January, 2018 be allowed and that costs of the appeal be paid to the appellants.

When the two appeals came up for directions on 19th March, 2018 we ordered by consent of the parties that the they be consolidated to be heard together and that ***Election Petition No. 3 of 2018*** be the lead file.

The consolidated appeals came up for hearing before us on 22nd May, 2018 when ***Mr. Kibe Mungai***, learned counsel appeared for the appellant in ***Election Petition Appeal No. 3 of 2018***. ***Mr. Ongoya***, learned counsel with ***Miss Manegene*** appeared for the 1st respondent while ***Mr. Mwongela***, learned counsel appeared for the 2nd and 3rd respondents. ***Mr. Mungai***, learned counsel appeared for the 4th and 5th respondents while the 6th respondent was present in court in person unrepresented. Learned counsel had filed written submissions and in oral highlight they addressed us substantively on the written submissions. Because of the position we have taken in these appeals we will not discuss those submissions in full in this judgment.

The broad issues that we recognize for our determination in the appeals are:

1. ***The effect of the application for withdrawal of the petition by the appellant which application was allowed.***
2. ***Whether the learned Judge erred in refusing the applications for substitution.***
3. ***The order on costs.***

Starting with the first issue, as have seen in this judgment the appellant by a notice of motion filed at the High Court on 10th January, 2018 applied for leave to withdraw the petition and further that the petition dated 6th September, 2018 and all subsequent applications be marked as withdrawn. (Emphasis added).

That application was heard where the other parties opposed the application to withdraw the petition principally on the basis that the petition had been heard in full and what remained was for submissions to be highlighted and judgment written and be delivered. The learned Judge considered the application for withdrawal of the petition in the face of opposition by the 1st, 2nd and 3rd respondents and granted it. The petition was marked as withdrawn. The effect of that order is that the application by the appellant succeeded.

Mr. Kibe Mungai, learned counsel for the appellant, has made heavy weather in submissions before us but we cannot see any merit in the complaint by the appellant. The appellant stated in the motion to withdraw the petition that of his own will and volition he had chosen to withdraw the petition; that he had become irredeemably disillusioned with the electoral justice system and wished to disengage from it; that he expected to secure justice expeditiously but he had found himself in circumstances where he could not secure justice without a long drawn out and costly appeal process; that he was apprehensive that prolonged electoral contestation over the outcome of the Senate election would be prejudicial to the unity, public interest, cohesion and developmental vision of the people of Kirinyaga county; that he had over the festive Christmas season engaged in deep soul searching and reflection and had come to the conclusion that he needed to sacrifice his political ambitions by withdrawing the petition in order to serve the greater interest and public good of the people of that county and that he had not entered into any agreement or made any undertaking in relation to withdrawal of the petition. He proceeded on 12th January, 2018 to publish in the Daily Nation newspaper a requisite notice to withdraw the petition as required by the rules.

The notice published in the said newspaper was in compliance with the requisite rules.

The learned Judge considered the reasons given by the appellant for seeking leave to withdraw the petition. She found the reasons to be sound and valid. She allowed the application to withdraw the petition. The petition was marked as withdrawn. The appellant cannot turn back and raise complaints on the withdrawn petition when his application was granted.

We do not in the event agree with learned counsel for the appellant that the appellant can revisit the ruling of 15th December, 2017 when an order of recount of votes was refused. Reading the notice of motion seeking leave to withdraw the election petition, it is obvious as we have highlighted that the appellant applied for leave to withdraw the petition and further applied that the petition itself and the subsequent applications filed in the petition be marked as withdrawn. When the application to withdraw the petition was granted all the applications which had been filed in the petition were also withdrawn. Withdrawal of the petition destroyed the substratum of the matter before the election Court with respect to the appellant and he could not revisit applications that had been filed or rulings delivered as he had compromised everything when the application to withdraw the petition was allowed. It is true, as submitted by learned counsel for the appellant, that a petitioner in an election petition reserves the right to take up, on appeal, issues regarding rulings made in the election petition as appeals are not allowed against rulings in interlocutory applications. See this Court's decision in the case of ***Cornel Rasanga & Another v William Odhiambo Oduol [2013] eKLR*** where we stated that:

> ***"What is of significance is the fact that a party who is aggrieved by a decision of the High Court in an interlocutory application has a clear remedy when a final decision on the election petition has been pronounced".***

That case did not, however, state that an appellant can revive rulings in an election petition that has been withdrawn. The appellant here prayed, in the motion to withdraw the petition, that he should be granted leave to withdraw the petition and all applications filed in the

petition. Once that motion succeeded the appellant did not retain any other rights at all. He could not go back to rulings made at interlocutory stage of the hearing of the petition. In so far as the appellant was concerned the petition and applications made in the petition and rulings made thereon were no more. There was nothing left that the appellant could pursue. The only pending issue was taxation of costs.

Coming to the application for substitution, we, like the learned Judge will deal with them separately. As we have seen, the 4th and 5th respondents gave notices of the intention to be substituted as petitioners on 19th January, 2018. In the accompanying application the 4th and 5th respondents prayed to be allowed to become petitioners in the petition that was sought to be withdrawn and in grounds in support of the motion they stated that they had seen the advertisement published in the Daily Nation newspaper of 12th January, 2018; that they were qualified to be substituted as petitioners; that they were entitled like other Kenyans to a final hearing and determination on merits of the election petition; that the petition as filed raised profound issues touching on the right of the 1st respondent to serve as the Senator of Kirinyaga County when, according to them, he had not obtained the highest number votes in the election; that they had faith in Kenya's justice system and they were ready to be substituted and abide by the orders or directions regarding security deposit as the court may determine. Again, as we have seen, the 4th respondent in an affidavit in support of the motion deposed amongst other things:

> "***THAT I am a registered voter Nairobi County whilst co-applicants*** (sic) ***and I are registered as voters in Kisii and Muranga Counties respectively and members of the Jubilee Party of Kenya".***

The learned Judge in the ruling delivered on 31st January, 2018 considered the application by the 4th and 5th respondents and recognized that the petition before her was in the nature of public interest litigation. She considered the effect of ***rule 24 (1)*** and ***(2)*** of the ***Election (Parliamentary and County Elections) Petitions Rules, 2017*** and found that there was no automatic right to joinder of action. She found that the 4th and 5th respondents had deposed in an affidavit that they were registered as voters in three different counties, namely, Nairobi, Muranga and Kisii. She found that to be in contravention of electoral laws and that it disqualified the said respondents from a favourable exercise of a court's discretion. In addition the learned Judge considered that the applications had been filed at the tail end of the petition which had been heard in full and written submissions had been filed which awaited a highlight. She was not persuaded that the said respondents' intentions were *bona fide*. She held that the application was a crafty way to delay the determination of the election petition.

We hold the view that electoral disputes are serious matters and their resolutions should be determined within a reasonable time and within the timelines set out in law. It is an electoral offence under ***Section 4 (1) (a) (i)*** and ***(c)*** of the ***Elections Act, 2016*** for a voter to be registered twice or in two different places. The 4th respondent in the affidavit that he swore on his own behalf and on behalf of his colleague the 5th respondent stated that the two of them were registered as voters in three different counties Nairobi, Muranga and Kisii. This disposition amounted to confessing that they had committed an electoral or criminal offence by being registered in three different counties which the law did not allow. The learned Judge was right to find that the 4th and 5th respondents *bona fides* was questionable. She exercised her discretion properly when she refused them to take over the petition and was right to find that as an election court the law allowed her to consider an application for substitution as the one before her and decide whether to allow it or not. The election petition had been heard in full and submissions filed. The parties were required to give an oral highlight of written submissions but instead, applications were filed as we have shown. The election petition had to be determined within time-lines which are set in law and the learned Judge did not err in finding that it was her responsibility to conclude the petition within time-lines that were set in law and which time-lines were about to expire. The 4th and 5th respondents' bid to take over the petition at its tail-end would have interfered with the conclusion of the petition which had to be done within 6 months as required in law.

In respect of the 6th respondent the motion for him to be allowed to be substituted as the petitioner in the election petition stated that the 6th petitioner wished to be substituted and take over the petition; that the court be pleased to make such orders as to security deposit of the original petitioner and costs of the proceedings up to the point of withdrawal of the petitioner as the court may deem fit; that he be granted leave to file supplementary final submissions; and that he be supplied with copies of pleadings.

In grounds in support the 6th respondent stated that he was one of the candidates for the Senate seat subject of the petition; that he was aggrieved when the 1st respondent was declared the winner of Senate seat for Kirinyaga County; that he had wished that the hearing and determination of the petition would conclusively determine who was validly elected; that he was qualified to be a petitioner in the petition; that he suspected collusion on the part of the appellant with persons he did not name to withdraw the petition; that the submissions filed by the appellant were not exhaustive and he was ready to be substituted as the petitioner and abide by any directions made by the court.

The affidavit in support repeated the same averments. The learned Judge considered that application and as we have already summarized in this judgment, she found that the 6th respondent was a petitioner in two different election petitions filed at High Court of Kenya at Kerugoya. He was the petitioner in ***Election Petition No. 1 of 2017*** which he filed and thereafter withdrew and he was also the petitioner in ***Election Petition No. 3 of 2017***. This latter petition was gazetted as an election petition as required in law but the 6th respondent did not prosecute it and it was eventually dismissed.

The learned Judge considered that issue and came to the conclusion that having been the petitioner in the said two petitions, the 6th respondent should not be allowed to take over the petition that was being withdrawn. One other issue that influenced the learned Judge was whether the 6th respondent who had not challenged in any way the decision in the latter petition could validly take over the petition before the court when the order for dismissal of his own petition stood unchallenged, had not been reviewed or set aside.

We note from the record that in the motion for leave to be substituted as petitioner, the 6th respondent did not disclose to the court that he had filed his own election petitions at all. Those issues were material and should have been brought to the attention of the court. It was the duty of the 6th respondent to bring those matters to the attention of the Court. A court is entitled to draw a negative inference of a party in whose possession material evidence reposes but who does not disclose such material to court. The record shows that by the time the 6th respondent was applying to be substituted as petitioner he had not met the costs of the dismissed ***Election Petition No. 3 of 2017***. The learned Judge was

right to reject the application by the 6th respondent to be substituted as petitioner when he had within his knowledge material which was relevant to the application but which material the 6th respondent had withheld and not disclosed to the court. The 6th respondent filed election petitions, the latter which was dismissed and had not been appealed. The order for dismissal remained in place and had not been challenged in any way at all. How could the 6th respondent, whose election petition had been dismissed, be allowed to take over an election petition where the parties were the same and issues in contestation the same when he had been unable to prosecute his own petition? We are of the considered opinion in the circumstances that were before the learned Judge that she exercised her discretion correctly when she held that the 6th respondent had not demonstrated his ability to continue or take over the petition that was being withdrawn. He had his own petition dismissed and had not challenged those orders. He had not even paid costs ordered in the dismissed petition. As we have stated electoral disputes arising after an election are serious matters to be litigated with the seriousness they deserve and be determined within timelines set in law which in the case before the Judge was 6 months. The 6th respondent had filed 2 election petitions concerning the same election of Senator of Kirinyaga County. He had not shown any seriousness in prosecuting the second petition after withdrawing the first. He was now applying, at the tail end of the hearing, to take over the petition and reopen it where he was asking to be supplied with pleadings, that he be allowed to file further submissions – in effect, that the petition be re-opened when, what remained was highlighting of written submissions. Time for hearing the petition to conclusion was running out and the learned Judge was right to reject the application by the 6th respondent which we find, like the learned Judge, not to have been filed with any seriousness at all.

The last issue for our consideration was on the costs awarded by the learned Judge. It was ordered that the appellant pay to the 1st respondent costs capped at 5 million and to pay to the 2nd and 3rd respondents costs capped at 5 million both subject to taxation.

It is the appellant's case before us that the costs awarded were exorbitant and excessive and we should set the same aside but the respondents think otherwise, contending that costs awarded were reflective of the work expended by various advocates engaged by the 1st, 2nd and 3rd respondents to oppose the petition.

Mr. Kibe Mungai for the appellant cited the case of ***Martha Wangari Karua vs Independent Electoral & Boundaries Commission & 3 Others*** ***[2018] KLR*** where costs of 10 million ordered by the High Court were set aside by this Court. He proposed that costs awarded to the 1st respondent be capped at 1million and similarly to the 2nd and 3rd respondents.

Miss Manegene learned counsel who addressed us on the issue of the costs supported the learned Judge on the order on costs and capping of the same. According to her the petition was heard on a day to day basis and involved complex issues and each party was represented by more than one lawyer. The petition had proceeded for full hearing. She distinguished the case of ***Martha Karua*** on the basis that it was decided on a preliminary stage.

Mr. Mwongela also supported the order that was made on costs.

We have considered this issue at length as was recognized by the learned Judge who handled the petition on electoral disputes are in the nature of public interest litigation. They do not belong to the petitioner. The public in the electoral area and the general public in the Republic has an interest on how those matters are handled and determined. A balance must be drawn on the issue of costs where successful litigants are awarded costs but those who lose in electoral disputes should not appear to be punished by award of costs that may send the wrong message that a party should not approach the court if they feel aggrieved in the manner elections are conducted. We think these are necessary principles to guide a court in awarding costs in election petition.

Section 84 of the ***Elections Act*** requires the election court to award costs to the winner of an election petition which accords with the general principle that costs follow the event which is the same as saying that the party who succeeds in court will normally get the costs of the litigation. This Court in the case of ***Philip Kyalo Kituti Kaloki v Independent Electoral and Boundaries Commission and 2 Others*** ***[2018] eKLR*** citing its decision in ***Martha Wangari Karua*** *(supra)* stated on the issue of costs:

> ***"It is up to the election court to determine whether a party would be awarded costs or not and in doing so the court must be guided by the principles of fairness, justice and access to justice".***

Applying these principles to the matter at hand, we think that the award of a total of Kshs.10,000,000/= by the election court to the respondents was excessive and we are entitled to interfere with the same as such an award does not appear fair, just or aimed at promoting access to justice. We think that reducing the same by half will be a reasonable approach in this matter. The final orders that we make therefore are that both appeals are dismissed with costs to the 1st, 2nd and 3rd respondents. Costs awarded in the High Court are varied to the extent that costs in respect of the 1st respondent are capped at Kshs.2,500,000/= and those to the 2nd and 3rd respondents are capped at Kshs.2,500,000/= both subject to taxation.

Those, then, are our orders.

Dated and delivered at Nyeri this 11th day of July, 2018.

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR