



**Munya v Kithinji & 2 others (Civil Appeal (Application)  
38 of 2013) [2014] KECA 876 (KLR) (5 February 2014) (Ruling)**  
*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR*  
Neutral citation: [2014] KECA 876 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) 38 OF 2013  
ARM VISRAM, J MOHAMMED & JO ODEK, JJA  
FEBRUARY 5, 2014  
IN THE MATTER OF AN APPLICATION FOR SECURITY OF COSTS**

**BETWEEN**

**GATIRAU PETER MUNYA ..... APPLICANT**

**AND**

**DICKSON MWENDA KITHINJI ..... 1<sup>ST</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**COUNTY RETURNING OFFICER MERU COUNTY ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for security of costs in respect of the  
23rd day of September 2013 in Election Petition No 1 of 2013)*

**Jurisdiction and discretion in granting security for costs in election petition appeals**

*This was an application for security of costs brought by the appellant, Peter Gatirau Munya, in the appeal arising from the High Court's decision dismissing an election petition. The appellant sought orders requiring the 1st respondent to deposit security for costs, citing the respondent's limited financial means and his inability to meet costs should the appeal be unsuccessful. The court addressed issues regarding the jurisdiction of the Court of Appeal to order security for costs in election petition appeals, the right to access justice, and whether estoppel applied to preclude the appellant from making the application.*

Reported by John Ribia

***Jurisdiction*** - Jurisdiction of the Court of Appeal - security for costs - application for advancement of security for costs - where the High Court has awarded costs to the applicant - claim that the Court of Appeal has no jurisdiction - whether the Court of Appeal had jurisdiction to hear and determine an application for security for costs in an Election Petition appeal - Constitution of Kenya, 2010 article 164; Court of Appeal Rules rule 82(1)(d) & 107(3).



**Constitutional Law** - *Fundamental Rights and Freedoms - right of access to justice - right to have security for costs - enhancement of security for costs - application for enhancement of the costs deposit - whether the order for enhancement of security for costs is a violation of article 48 on the right of access to justice and should be granted - Constitution of Kenya 2010 article 48; Elections Act, section 78(2)(b).*

**Election Law** - *Election petition - security for costs - failure by the Petitioner to furnish sufficient security for costs - requirement that an aggrieved party remits security for costs to court upon filling of election petition - rationale for the requirement - Whether the order for enhancement for security for costs is a violation of the right of access to justice - Constitution of Kenya, 2010 article 28; Elections Act section 78(2)(b); Court of Appeal Rules, rule 82(1)(d).*

**Estoppel** - *doctrine of estoppel - meaning of the doctrine of estoppel and its application - estoppel by record-claim by applicant that estoppel by record is not applicable in court proceedings to stop filling of subsequent application upon withdrawal of a similar application - Whether the doctrine of estoppel is applicable in court proceedings to stop filling of subsequent similar application upon withdrawal.*

### **Brief facts**

The 1<sup>st</sup> Respondent (Dickson Mwenda Kithinji) filed an Election Petition in the High Court challenging the election of the Applicant as the Governor of Meru County. The High Court dismissed the Petition with costs to the Applicant not to exceed Kshs 2,800,000. That judgment was the subject of the pending appeal. The Applicant is seeking enhancement of the security for costs under rule 107(3) of the Court of Appeal Rules. The 1<sup>st</sup> Respondent had already paid Ksh 6,000 as deposit for security for costs which was assessed at the time of institution of the suit in compliance with rule 82(1)(d) of the rules.

### **Issues**

- i. Whether the Court of Appeal has jurisdiction to hear and determine an application for security for costs in an Election Petition appeal.
  - a. If the Court finds that it has jurisdiction, what matter(s) should it take into consideration in determining the instant application?
- ii. Whether the doctrine of estoppel is applicable in court proceedings to stop filling of subsequent application upon withdrawal of a similar application.
- iii. Whether an order for enhancement of security for costs is a violation of the right of access to justice and should be granted.

### **Held**

1. The Court of Appeal in determining an appeal from an Election Court is guided by rule 107 of the Court of Appeal Rules. By virtue of that provision, the Court had jurisdiction to entertain an application for security for costs.
2. In an application for security for costs, the applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would have been unable to pay costs due to poverty. It was not enough to allege that a Respondent would be unable to pay costs in the event that he was unsuccessful. The same had to be proven. In the instant application, it was not in dispute that the 1<sup>st</sup> Respondent was a man of limited means and in the event that he was unsuccessful, that he could not be in a position to pay the costs incurred by the Applicants.
3. For *estoppel* to arise there had to be a representation which was acted upon by the other party, to his detriment, the 1<sup>st</sup> withdrawal of the Application by the applicant altered his legal position and that consideration of the current application was to his detriment. In the instant case the 1<sup>st</sup> Respondent had not established that the Respondent; a) Had not established that the withdrawal of the Application by the Applicant altered his legal position and that consideration of the current application would be to his detriment. b) Had not demonstrated that he altered his position in reliance of any representation by the Applicant.
4. In any civil proceedings, a party may withdraw his/her application and may even file another similar application. Withdrawal of an application did not constitute *estoppel* in judicial proceedings.



5. *Estoppel* by record related to a judgment delivered by a Court determining the rights and issues between parties. Withdrawal of an application by a party did not constitute *estoppels* by record since no court of competent jurisdiction had determined the rights or the issue between the parties.
6. In the instant case, no *estoppel* arose by the withdrawal of the Application for security for costs by the Applicant in the High Court. That was in view of the fact that no representation was made expressly or impliedly hence the Applicant would not pursue enhancement of security for costs.
7. The rationale for security for costs was to ensure; a) That a party was not left without recompense for costs that might be awarded to him in the event that the unsuccessful party was unable to pay the same due to poverty; b) It ensured that a litigant who by reason of his financial ability was unable to pay costs of the litigation if he lost, was disabled from carrying on litigation indefinitely except on conditions that offered protection to the other party It was therefore imperative in consideration of an application for security for costs, for the Court to balance the competing rights of the parties, that was the right to access to justice and the right to security for costs.
8. In the circumstances of the case, it was therefore, in the interest of justice for the 1<sup>st</sup> Respondent to deposit security for costs. In respect of this application, the Court of Appeal had jurisdiction to order security for costs in this Court.
9. It was clear from the trial court that the Court did not assess the costs payable to the Applicant but only placed a cap in the costs that could be awarded; the costs to be assessed were not to exceed Kshs 2,800,000. Further, there was no justification for awarding Kshs 2,000,000 as security for costs in the instant appeal. Section 78(1) (b) of the Elections Act provided that a party who filed a Petition against a Governor had to deposit Kshs 500,000 as security for costs.
10. Parliament in its wisdom considered Kshs 500,000 did not impede access to justice and was an adequate security for costs in relation to petitions before the High Court challenging gubernatorial elections. Parliament did not make provision for security for costs in relation to appellate proceedings before the Court of Appeal. However, rule 107(3) permitted the Court of Appeal to consider an application for further security for costs.

*Application allowed 1<sup>st</sup> Respondent ordered to deposit a further security for costs of Ksh 500,000 within 7 day and costs of application to abide by the outcome of the Appeal.*

## **Citations**

### ***East Africa***

1. *Sheth, Harit t/a Harit Sheth Advocates v Shamas Charania* Civil Appeal No 68 of 2008 - (Explained)
2. *In the Matter of Advisory Opinion of the Court under article 163 of the Constitution* Application No 2 of 2011 - (Explained)
3. *Kamau, E Muriu t/a Muriu Njoroge & Co Advocate v National Bank of Kenya Ltd* Civil Application No 258 of 2009 - (Mentioned)
4. *Kay Jay Rubber Products v Development Finance Co (K) Ltd & another* [1991] KLR 195 - (Mentioned)
5. *Kenya Educational Trust Ltd v Katherine SM Whitton* Civil Appeal (Application) No 301 of 2009 - (Mentioned)
6. *Marco Tool & Explosives Ltd v Mamujee Brothers Ltd* [1988] KLR 730 - (Explained)
7. *Muthama, Johnson v Minister of Justice and Constitutional Affairs & another* Petition No 198 of 2011 - (Explained)
8. *Mwobi, Serah Njeri v John Kimani Njoroge* Civil Appeal No 314 of 2009 - (Explained)
9. *Ngetakimanzi, Patrick v Marcus Mutuamuluvi & 2 others* Election Petition No 8 of 2013 - (Explained)
10. *Noormohamed Abdulla v Ranchhodbhai J Patel & another* [1962] EA 448 - (Applied)
11. *Official Receiver and Liquidator of Seipai Ltd v Narandas Nanji Chandrani* [1961] EA 107 - (Applied)
12. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 - (Explained)



13. *Seascapes Limited v Development Finance Company of Kenya Limited* [2009] KLR 384 - (Mentioned)
14. *Waititu, Ferdinand Ndung'u v Independent Electoral & Boundaries Commission* Civil Application No 137 of 2013 - (Applied)

### **United Kingdom**

1. *Hall v Snowdon Hubbard & Co* [1899] 1 QB 593 - (Explained) **Texts & Journals**
2. Hogg, QM., (Lord Hailsham) *et al* (Eds) (1995) *Halsbury's Laws of England* London: Butterworths 4<sup>th</sup> Edn Vol 10 para 314
3. Treitel, GH., (Ed) (1970) *Law of Contract* London: Sweet & Maxwell 3<sup>rd</sup> Edn p 342

### **Statutes**

#### **East Africa**

1. Civil Procedure Act (cap 21) section 66 - (Interpreted)
2. Civil Procedure Rules (cap 21 Sub Leg) order 42 rule 14 - (Interpreted)
3. Constitution of Kenya, 2010 articles 24(1)(d); 48; 159(2)(a) - (Interpreted)
4. Court of Appeal Rules (cap 9 Sub Leg) rules 42, 82(1)(d); 107(3); 115(1) - (Interpreted)
5. Elections Act, 2011 (Act No 24 of 2011) section 78(1)(b),(2)(b) - (Interpreted)
6. Elections (Parliamentary and County Elections) Petition Rules, 2013 (Act No 24 of 2011 Sub leg) rule 35 - (Interpreted)

## **RULING**

1. Before this Court is an application expressed to be brought under section 66 of the [Civil Procedure Act](#), order 42 rule 14 of the Civil Procedure Rules, rules 42, 82(1)(d) & 107(3) of the Court of Appeal Rules (the Rules) seeking the 1<sup>st</sup> Respondent to deposit security for costs of Kshs 4,800,000 pending the hearing and determination of the Appeal.

### **Background:**

2. The 1<sup>st</sup> Respondent filed an Election Petition in the High Court challenging the election of the applicant as the Governor of Meru County. The High Court (Makau, J) vide a judgment dated 23<sup>rd</sup> September, 2013 dismissed the Petition with costs to the applicant. The learned Judge in the said judgment capped the 1<sup>st</sup> Respondent's costs which were to be assessed not to exceed Kshs 2,800,000. That judgment is the subject of the pending appeal.

### **Grounds in support of the Application:**

3. The grounds upon which the Applicant relies on in support of his application are that firstly, the Election Court awarded him costs of the Petition; secondly, the 1<sup>st</sup> Respondent admitted at the trial court that he was a teacher at a local High School and earned a monthly salary of Kshs 11,000; he had no other source of income; he could not afford to institute the Election Petition and Dr Kilemi Mwiria sponsored him to file the same by paying the security for costs of Kshs 500,000 required by the Election Court as well as the attendant legal fees. The Applicant is therefore apprehensive that in the event the pending appeal fails, the 1<sup>st</sup> Respondent will not have the capacity to meet the costs of the Appeal and the Applicant would not be able to enforce the same against Dr Kilemi Mwiria since he is not a party to the proceedings. Consequently, the Applicant stands to suffer irreparable loss as he will not be able to recover the costs incurred as a result of these proceedings should he succeed. Thirdly, it was in the interest of justice for the order sought to be granted.



### **1<sup>st</sup> Respondent's reply:**

4. The 1<sup>st</sup> Respondent in opposing the Application, deposed that the Applicant was estopped from making the current application having previously voluntarily withdrawn a similar application that was filed before the Election Court; the Application was premature and speculative to the extent that it purported to pre-empt one of the grounds of appeal which was to be canvassed at the hearing of the appeal; the costs awarded by the Election Court were yet to be taxed. He also deposed that the application offended the letter and spirit of article 48 of *the Constitution* as read with section 78(2) (b) of the *Elections Act* to the extent that the amount sought as security constitutes an unreasonable impediment to the fundamental right of access to justice. He maintained that this Court has no jurisdiction under the *Elections Act* to require him to deposit security for costs. In the alternative, he urged this Court to exercise its discretion under rule 115(1) of the Rules and waive the requirement of security for costs.
5. The parties herein filed written submissions and orally highlighted the same during the inter partes hearing.

### **Applicant's submissions:**

6. The Applicant submitted that this Court had jurisdiction to issue orders for security for costs by virtue of rule 35 of the Elections (Parliamentary and County Elections) Petition Rules (Petition Rules) which provide that an appeal to this Court shall be governed by the Rules of the Court of Appeal. Pursuant to the foregoing, rule 82(1) (d) of the Court of Appeal Rules provides as follows:-
  - “(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the Notice of Appeal was lodged—
    - (a) a Memorandum of Appeal, in quadruplicate;
    - (b) the Record of Appeal, in quadruplicate;
    - (c) the prescribed fee; and
    - (d) security for the costs of the appeal.” [Emphasis added]
7. The Applicant submitted that the 1<sup>st</sup> Respondent had not complied with the mandatory provision as he had not deposited the security for costs; that this Court had not waived the 1<sup>st</sup> Respondent's obligation to deposit security for costs under rule 115 of the Rules; the Appeal as filed is incompetent and ought to be struck out.
8. The Applicant contended that whenever a Court is faced with an application for security for costs it takes into consideration a number of factors. Firstly, where an applicant can demonstrate that the Respondent, if unsuccessful, would be unable, through poverty, to pay the costs of an appeal, an order for security of costs ought to be made. In the instant case, the Applicant argued that the Respondent herein admitted at the trial court that he was a man of straw, incapable of paying costs in the lower court let alone the costs of the Appeal; he was a school teacher at Bishop Imathiu High School earning a monthly salary of Kshs 11,000 and had no other source of income. Placing reliance on the decisions in *The Official Receiver and Liquidator of Seipai Ltd v Narandas Nanji Chandrani* (1961) EACA & *Noormohamed Abdulla v Ranchhodbhai J Patel & another* (1962) EACA, the Applicant argued that the purpose of an order for security for costs is merely to secure costs that may become payable, irrespective of whether the amount is in dispute. This is to ensure that frivolous, vexatious and/ or unsuccessful proceedings do not prejudice defendants.



9. Secondly, that the Respondent's appeal is devoid of reasonable probability of success and the Applicant remains at risk of being highly prejudiced should the appeal proceed without security for costs.
10. The Applicant maintained that despite withdrawing the Application dated 30<sup>th</sup> April, 2013 in the trial court, the current application was not res judicata. This is in view of the fact that the application dated 30<sup>th</sup> April, 2013 for security for costs filed in the trial court was different from the current application; the Application in the trial court was for enhancement of the amount of Kshs 500,000 which was paid as security for costs in the trial court while the current application is in respect of provision of security for costs both in the Appeal and for past costs in the trial court.
11. The Applicant also argued that in as far as the 1<sup>st</sup> Respondent had a right to access to justice, the same should not in any way prejudice the Applicant's right to justice in terms of costs in the event the Appeal fails. It was submitted that if the order for security for costs is granted, it would advance the ends of justice.
12. The Applicant in his written submissions, submitted that section 78(2)(b) of the *Elections Act* provides that the security for costs for an Election Petition in respect of a Governor shall be Kshs 500,000. Accordingly, the interest of justice, equity and fairness dictates that the Court ought to exercise its discretion and order the Respondent to deposit Kshs 2,000,000 as security for costs. According to the applicant, the amount of Ksh 2,000,000 is justified by the complexity of the matter.
13. Mr Okongo Omogeni, learned counsel for the Applicant reiterated and emphasised the aforementioned submissions. He urged us to allow the application as prayed.

#### **1<sup>st</sup> Respondent's submissions:**

14. It was the 1<sup>st</sup> Respondent's contention that the current application is founded on the erroneous assumption that he had not paid security for costs of the appeal as required under the provisions of rule 82(1) (d) of the Rules. He argued that on 22<sup>nd</sup> October, 2013 he paid Kshs 6,000 as security for costs as assessed by this Court.
15. The 1<sup>st</sup> Respondent submitted that the main ground upon which the Applicant's application was anchored upon was the fact that the 1<sup>st</sup> Respondent is a poor man. It was argued that article 48 of *the Constitution* requires the Court to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice; article 159(2)(a) requires the court in exercising judicial authority to be guided by the principle that, "justice shall be done to all, irrespective of status." It was submitted that the right of access to justice extended to poor people and in this case, to the 1<sup>st</sup> Respondent. It was the 1<sup>st</sup> Respondent's case that the motive behind the application was to deny him a chance of having his appeal determined on its merits; that if the orders sought are granted, they would establish a dangerous precedent that would preclude indigent voters from challenging the validity of elections; such a precedent would gravely erode public confidence in the Courts.
16. The 1<sup>st</sup> Respondent submitted that this Court has no jurisdiction to issue orders for security for costs. In relying on this Court's decision in *Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission- Civil Application No 137 of 2013*, the 1<sup>st</sup> Respondent argued that the applicant could not invoke the Civil Procedure Rules or judicial decisions based on those rules as a basis for requiring him to deposit security for costs. According to the 1<sup>st</sup> Respondent, Parliament in its wisdom provided for security for costs in electoral disputes only at the trial level; there is no provision in the *Elections Act* for security for costs at the appellate level. It was also submitted that rule 107 of the Rules could not be used as a basis for asking this Court to order the 1<sup>st</sup> Respondent to deposit security



higher than the prescribed amount of Kshs 6,000; the Rule only applies to civil appeals and the matter before the court was not a civil appeal.

17. The 1<sup>st</sup> Respondent argued that in the alternative, if the Court finds that rule 107 empowers it to order him to pay a higher amount than Kshs 6,000 as security for costs, the exercise of the Court's discretion under that Rule would serve no purpose other than shutting the doors of justice to a litigant. Secondly, that the exercise of the discretion under rule 107 was subject to rule 115 of the Rules which empower the Court to waive the requirement for security for costs. The Court ought to waive the requirement for additional security for costs to ensure the 1<sup>st</sup> Respondent has access to justice.
18. It was submitted that on 30<sup>th</sup> April, 2013 the applicant filed an application before the trial court seeking an order enhancing the security for costs deposited in court from Kshs 500,000 to Kshs 2,000,000. The 1<sup>st</sup> Respondent contends that the Applicant by making the said application made a representation that Kshs 2,000,000 was sufficient to cover his costs. Subsequently, on 2<sup>nd</sup> May, 2013 the Applicant withdrew the application making a representation that Kshs. 500,000 which had been deposited by the 1<sup>st</sup> Respondent would adequately cater for his costs. According to the 1<sup>st</sup> Respondent, the applicant is estopped from making the current application by his conduct and the record of the trial court which allowed the said withdrawal.
19. The 1<sup>st</sup> Respondent contended that the current application purports to pre-empt the issue of costs which is raised in the memorandum of appeal. He further contended that it was also premature and speculative since it was based on a wrong assumption that the Applicant had been awarded costs of Kshs 2,800,000 yet the said amount was the cap placed by the trial court on costs; costs are yet to be taxed by the taxing master.
20. Mr Muthomi, learned counsel for the 1<sup>st</sup> Respondent, reiterated the aforementioned submissions and urged us to dismiss the Application.
21. We have carefully considered the written submissions, the oral highlighting by the counsel and the law.
22. The issues for determination are as follows:
  1. Whether this Court has jurisdiction to hear and determine an application for security for costs in an Election Petition appeal.
  2. If the Court finds that it has jurisdiction, what matter(s) should it take into consideration in determining the instant application?
  3. Whether the doctrine of estoppel is applicable.
  4. Whether the order sought should be granted.

### **1. On the issue of Jurisdiction:**

23. Halsbury's Laws of England 4<sup>th</sup> Edition, Vol 10, paragraph 314, defines jurisdiction as:-

'By 'jurisdiction' is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.'
24. The jurisdiction of the court flows from *the Constitution* and Statute.



25. In The Matter of Advisory Opinion of the Court under article 163 of *the Constitution* - Application No 2 of 2011 at paragraph 30, the Supreme Court held:-

“It is trite law that a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament, where the legislation is clear and there is no ambiguity.”

See also this Court’s decision in The Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Ltd (1989) KLR 1.

26. Rule 35 of the Elections Petition Rules provides:-

“An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules.”

27. Accordingly, this Court in determining an appeal from an Election Court is governed by the Court of Appeal Rules. By virtue of the foregoing provisions, we find that this Court has jurisdiction to entertain an application for security for costs under rule 107 of the Rules.

28. We note that the 1<sup>st</sup> Respondent deposited Kshs 6,000 which was assessed as security for costs at the time of institution of the Appeal in compliance with rule 82(1)(d) of the Rules. Evidence of the same was produced in Court by the 1<sup>st</sup> Respondent’s advocate. Based on the foregoing fact, it is clear that the Application before us seeks for enhancement of the security for costs already deposited and is brought pursuant to rule 107(3) of the Rules.

29. Rule 107(3) provides:-

“The Court may at any time if it thinks fit, direct that further security for costs be given and may direct that security be given for the payment of past costs relating to the matters in question in the Appeal.” [Emphasis added].

## **2. What matters should the court take into consideration in determining the instant application”**

30. The exercise of the Court’s power under rule 107 is discretionary. In Marco Tool & Explosives Ltd v Mamujee Brothers Ltd (1988) KLR 730, this Court at page 733 held:-

“As the cases show the Court has unfettered though judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though the guidance from Noormohamed’s case is that the final result must be reasonable and modest.”

See also this Court’s decision in Kenya Educational Trust Ltd v Katherine SM Whitton- Civil Appeal (Application) No 301 of 2009.

31. In an application for security for costs, the applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a Respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven. See Hall v Snowdon Hubbard & Co (I) (1899) 1 QB 593, the learned Judge at page 594 stated:-

“The ordinary rule of this Court is that, except in applications for new trials, when the Respondent can show that the Appellant, if unsuccessful, would be unable through poverty to pay the costs of the Appeal, an order for security for costs is made.”



32. In *Marco Tool & Explosives Ltd v Mamujee Brothers Ltd* (supra), this Court expressed itself thus:-

“The onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable.”

See also *Kenya Educational Trust Ltd v Katherine SM Whitton* (supra).

33. In the instant application, it is not in dispute that the 1<sup>st</sup> Respondent is a man of limited means and in the event that he is unsuccessful, he may not be in a position to pay the costs incurred by the Applicant.

### **3. Whether the doctrine of estoppel is applicable.**

34. It was the 1<sup>st</sup> Respondent’s contention that having filed an application dated 30<sup>th</sup> April, 2013 and subsequently withdrawing it, the applicant was estopped from making the current application. According to the 1<sup>st</sup> Respondent, by withdrawing the Application, the Applicant made a representation that Kshs 500,000 which had been deposited by the 1<sup>st</sup> Respondent would adequately cater for his costs.

35. In *Serah Njeri Mwobi v John Kimani Njoroge - Civil Appeal No 314 of 2009*, this Court held:-

“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.”

See *Seascapes Limited v Development Finance Company of Kenya Limited*, Nai Civil Appeal No 247 of 2002.

36. This Court further expressed itself in *Serah Njeri Mwobi v John Kimani Njoroge* (supra) as follows:-

“It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced.”

37. However, for estoppel to arise there has to be a representation which is acted upon by the other party, to his detriment. See *The Law of Contract 3rdEd By GH Treitel - P 342*). In this case, the 1<sup>st</sup> Respondent has not established that the withdrawal of the Application by the Applicant altered his legal position and that consideration of the current application would be to his detriment. The 1<sup>st</sup> Respondent has not demonstrated that he altered his position in reliance of any representation by the Applicant. In any civil proceedings, a party may withdraw his/her application and may even file another similar application. Withdrawal of an application does not constitute estoppel in judicial proceedings. It was the 1<sup>st</sup> Respondent’s contention that since the Court record shows the Application for security for costs was withdrawn, estoppel by record is applicable. This is a misapprehension of the nature of estoppel by record. Estoppel by record relates to a judgment delivered by a court determining the rights and issues between parties. Withdrawal of an application by a party does not constitute estoppels by record since no court of competent jurisdiction has determined the rights or the issue between the parties. It is our considered view that in the instant case, no estoppel arose by the withdrawal of the Application for security for costs by the applicant in the lower court. This is in view of the fact that no representation was made expressly or impliedly that the applicant would not pursue enhancement of security for costs.



See this Court's decision in *Kay Jay Rubber Products v Development Finance Co (K) Ltd & another*- Civil Appeal No 55 of 1989.

#### 4. Whether the order sought should be granted”

38. It is the 1<sup>st</sup> Respondent's case that the order for security for costs sought would impede on his right to access to justice as enshrined under *the Constitution*. Article 48 guarantees the right of access to justice. Article 159(1) requires the Court in exercising judicial authority to be guided with the principle that justice shall be done to all irrespective of status. The 1<sup>st</sup> Respondent argued that the current application was tantamount to seeking this Court to deny him access to justice on account of his financial status.
39. The rationale for security for costs is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party. In *Noormohamed Abdulla v Ranchhodbhal J Patel & another* (1962) EA 448, it was held:-

The order for security for costs in such a case is not directed towards enforcing payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties...”

40. It is therefore imperative in consideration of an application for security of costs, for the Court to balance the competing rights of the parties, that is the right to access to justice and the right to security for costs. Article 24(1)(d) of the Constitution, provides:-

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- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-
- a. ...
  - d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others;...”

41. In *Johnson Muthama v Minister of Justice and Constitutional Affairs and others* - Nairobi Petition No 198 of 2011, the Petitioner sought a declaration that section 78 of the *Elections Act* as unconstitutional on the ground that it violated article 48 of *the Constitution* which guaranteed the right to access to justice. The High Court in dismissing the Petition held:-

- (69) Provision of payment of costs by a party coming before the court does not in my view, violate any provision for *the constitution*. It is a common practice in civil proceedings intended to safeguard the interests of the party against who a claim is brought and to prevent abuse of the Court process. Given the nature of elections, it serves a useful and rational purpose of ensuring that only those who have a serious interest in challenging the outcome of an election do so.”



42. Further, the High Court (Majanja, J) in Patrick Ngetakimanzi v Marcus Mutuamuluvi & 2 others- High Court Election Petition No 8 of 2013 held:-

Security of costs ensures that the Respondent is not left without recompense for any costs or charges payable to him. The duty of the court is therefore to create a level ground for all the parties involved, in this case, the proportionality of the right of the Petitioner to access to justice vis-a-vis the Respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him."

43. In Harit Sheth Advocate v Shamas Charania - Civil Appeal No 68 of 2008, this Court held:-

The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing."

See E Muriu Kamau t/a Muriu Njoroge & Co Advocate v National Bank of Kenya Ltd Civil Application No Nai 258/2009 (Unreported).

44. In the circumstances of this case, it is therefore, in the interest of justice for the 1<sup>st</sup> Respondent to deposit security for costs.

45. The Applicant sought security for costs for both past costs in the High Court and costs in the appeal. Rule 107(3) of the Court of Appeal Rules provides:-

The Court may at any time if it thinks fit, direct that further security for costs be given and may direct that security be given for the payment of past costs relating to the matters in question in the Appeal"

46. In Noormohamed Abdulla v Ranchhodbhal J Patel & another (supra), the predecessor of this Court while considering rule 60 of the Eastern African Court of Appeal Rules which is a replica of rule 107(3) of the Court of Appeal Rules held:-

but there is a marked change in the latter part of rule 60, which empowers this court to order security 'for payment of past costs relating to the matters in question in the appeal'. If the intention was not to include power to order security for unpaid costs in the court below the concluding words of the rule appear to be redundant "

47. Based on the foregoing, we find and hold that in respect of this Application, this Court has jurisdiction to order security of costs in this Court.

48. The 1<sup>st</sup> Respondent also contended that the Application was premature and speculative since the costs awarded at the trial court had not yet been assessed at the time the current application was filed. This Court can issue the order for security for costs in appeal. In The Official Receiver and Liquidator of Sejpal Ltd v Narandas Nanji Chandrani- (1961) EA 107, Sir Owen Corrie, Ag, JA held:-

In my view it is not essential to the making of an order for security for past costs that a bill of such costs should even have been drawn up."



**Conclusion:**

- 49. In this Application the Applicant seeks that a sum of Kshs 4,800,000 be deposited by the 1<sup>st</sup> Respondent as security for costs both at the trial court and in the Appeal Court. The Applicant justified the amount on the basis that the trial court had granted him costs of Kshs 2,800,000 and that this Court ought to quantify the payable costs in the Appeal at Kshs 2,000,000.
- 50. It is clear from the trial court judgment that the Court did not assess the costs payable to the applicant but only placed a cap on the costs that can be awarded; the costs to be assessed are not to exceed Kshs 2,800,000. Further, there is no justification for awarding Kshs 2,000,000 as security for costs in this Appeal. Section 78(1)(b) of the Elections Act provides that a party who files a Petition against a Governor shall deposit Kshs 500,000 as security for costs.
- 51. We are called upon to balance the rights of both parties in regard to access justice on the one hand and the costs to be paid to the applicant in the event that the Appeal does not succeed.
- 52. In the circumstances of this Application, we find that Parliament in its wisdom considered the sum of Ksh 500,000 does not impede access to justice and is an adequate security for costs in relation to petitions before the High Court challenging gubernatorial elections. Parliament did not make provision for security for costs in relation to appellate proceedings before the Court Appeal. However, rule 107(3) permits this Court to consider an application for further security for costs in appeal. Taking into account the sum of Ksh 500,000 as provided for in the section 78(1)(b) of the Elections Act, it is our considered view that for appellate proceedings arising from election petitions, a further sum of Ksh 500,000 is not excessive as a deposit for enhanced or further security for costs. We allow the Application for security of costs and order that the 1<sup>st</sup> Respondent deposits a further security for costs of Kshs 500,000 (Five Hundred Thousand Only) within 7 days from the date hereof. The costs of this Application shall abide by the outcome of the Appeal.

**DATED AND DELIVERED AT NYERI THIS 5<sup>TH</sup> DAY OF FEBRUARY, 2014.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

