REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OMOLO, GITHINJI & WAKI JJ.A

CIVIL APPEAL 273 OF 2003

BETWEEN

ROTICH SAMUEL KIMUTAI……..…….…….APPELLANT

AND

EZEKIEL LENYONGOPETA……..……..…….1ST RESPONDENT

ELECTORAL COMMISSION OF KENYA…….……..2ND RESPONDENT

DR. RUTTO SAMMY KIPKEMOI…….……...3RD RESPONDENT

(Appeal from the orders of the High Court of Kenya at Eldoret (Omondi Tunya J) dated 26 th September, 2003 in High Court Election Petition No 3 of 2003)
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JUDGMENT OF THE C0URT

Section 21 of the **National Assembly and Presidential Elections** Act, Cap 7, Laws of Kenya relates to security for costs in election petitions and provides as follows:-

> **"21 (1) Not more than three days after the presentation of a petition, the petitioner shall give security for the payment of all costs that may become payable by the petitioner.**
>
> **(2) The amount of security under this section shall be two hundred and fifty thousand shillings and shall be given by deposit of money.**
>
> **(3) If no security is given as required by this section, or if an objection is allowed and removed, no further proceedings shall be had on the petition, and the respondent may apply to the election court for an order directing the dismissal of the petition and for the payment of the respondent's costs; and the costs of hearing and deciding that application shall be paid as ordered by the election court, or if no order is made shall form part of the general costs of the petition."**

The appeal before us relates to the interpretation of that section and, particularly to two issues: firstly, whether the "deposit of money" referred to in the section denotes "cash", and secondly whether failure to deposit the money within the prescribed period is fatal to the petition.

The election petition in issue arose from the general elections held in this Country on **27th December, 2002.** The 3rd respondent, **Dr Rutto Sammy Kipkemoi (Kipkemoi)** was declared the winner of that election in Kipkelion Parliamentary Constituency, gannering some 20,384 votes against four other candidates, the nearest of whom was the appellant herein, **Mr Rotich Samuel Kimutai (Kimutai)** who had 13,507 votes. For several reasons tabulated in an election petition filed on 29th January, 2003, Kimutai challenged the election of Kipkemoi and enjoined the returning officer and the Electoral Commission of Kenya (**ECK),** who are charged with the legal duty for organizing and conducting the elections, as the 1st and 2nd respondents respectively.

There is no dispute that the petition was presented within the prescribed period. There is no dispute about service of the petition either, the only attempt at denial of service having been made by **Kipkemoi** but was dismissed by the Election Court. ECK however filed a Notice of Motion on 1st April. 2005 seeking the following orders:

> **" 1 The Petition filed herein be struck off and/or dismissed for failure by the Petitioner to give security for costs within three(3) days and/or at all as provided by Section 21 of the National Assembly and Presidential Elections Act Cap 7 of the Laws of Kenya.**
>
> **2 That the costs of this application and this petition be borne by the Petitioner"**

Kipkemoi took up the same issue in another application filed on 23rd April, 2003. Both applicants swore that on perusal of the court file, there was no deposit of money made for security for costs until 20th March, 2003 which was way past the time limit set under **section 21.** Responding to both applications, however, Kimutai swore as follows:

> **"8 That my advocates on record have informed me which information I verily believe to be true that when the petition was filed in court on the 29th January, 2003 it was presented together with a cheque deposit as security being cheque number 108160 for Kshs. 250,000.00 but the same was returned on 3rd February, 2003 as the same was not a bankers cheque (Attached and marked "RSK 1" is a copy of the said cheque.**
>
> **9 That my advocates on record have informed me which information I verily believe to be true that thereafter their efforts to give security for costs was hampered by the fact that there was a movement of file from Nairobi to Eldoret and could not file security for costs immediately.**
>
> **10 That it was only on the 6th March, 2003 when my advocates on record learnt that the petition had been moved to the Eldoret High Court for determination. (Attached and marked "RSK – 2" is a copy of letter of notification received on 6th March 2003).**
>
> **11 That my advocates could not reach me with the information that the petition had been moved to the Eldoret High Court in time till 18th March, 2003 as I was in my rural home where I could not be reached easily to issue a bankers cheque for security of costs to my advocates.**
>
> **12 That upon getting this information, I issued a bankers cheque to my advocates on the 19th March, 2003 to be deposited on the 20th March, 2003 when the matter was coming up for mention at the Eldoret High Court.**
>
> **13 That my advocates on record inform me that security for costs was deposited on the 20th March, 2003. (Attached and marked "RSK 3" is a copy of the receipt dated 20th March, 2003)."**

The advocate did not swear any affidavit on the returned advocate's cheque and the cheque itself says nothing about being a "Clients Account" or " Office Account" cheque. Kimutai further contended that the respondents had submitted to the jurisdiction of the court since there was no immediate protest upon service of the petition. By their conduct they waived or acquiesced to the irregularity and cannot be heard to complain. Their belated objection was therefore a technicality which should not be allowed to defeat the serious allegations made in the petition.

The Election Court for the petition was constituted and gazetted in February, 2003. On 18th February, 2003 the following order was made in the Court file:

> **"This election petition to be heard at the High Court Eldoret by an Election Court presided over by Hon Mr Justice Omondi Tunya. Mention before the judge on Tuesday, 11th March, 2003 at 9.00am for fixing hearing date on priority basis. It is noted that the requisite deposit has not been paid and the issue relating thereto should be resolved by the election Court before the petition is set down for hearing."**

On the mention date, (11/3/03), learned counsel for Kimutai, Mr Amendi, attended Court and stated:

> **"We have not deposited the requisite shs. 250,000. Instead of taking a hearing date I pray for mention on 20/3(sic) in order to get further instructions from my client".**

The deposit as stated earlier was made by Banker's cheque on 20th March, 2003, but the respondents' advocates sought time to file applications to strike out the petition on account of the late payment. That matter was heard before the Election Court, Omondi Tunya J. in July, 2003. In the end the applications were granted and the petition was struck out on 23rd September 2003, thus provoking the appeal before us.

Although 13 grounds were set out in the memorandum of appeal, learned counsel for the appellant, Mr Majanja condensed them into a two- pronged attack. Firstly, that the learned Judge misconstrued the nature of "deposit" alluded to under Section 21, and secondly, that the time within which the deposit ought to be paid had no bearing on the remedy intended under the Act. The basic submission on the first ground was that there was no definition of money in the Act and it was sufficient therefore for personal cheques, as the advocate's cheque handed in with the petition on 29th January, 2003, to be made and accepted as a valid deposit. There is no reference to " Banker's cheques" or "Cash" in the Act and the court ought not to have rejected the cheque on the basis that the deposit was not made by way of a Banker's cheque. Mr Majanja further sought to persuade us that the provision in the section requiring "deposit of money" was an ambiguous one. In that event, he submitted, the construction to be placed on that provision must be one that harmonises the ambiguity with the intention of Parliament. For that proposition he cited "Maxwell on The Interpretation of Statutes" 11th edition, where the learned authors state:

> **"It is an elementary rule that a thing which is within the letter of a statute will, generally, be construed as not within the statute unless it be also within the real intention of the legislature, and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that intention."**

It was also necessary, he submitted, in order to arrive at the real meaning, to get an exact conception of the aim, scope and aspect of the whole Act as was suggested by Lord Coke more than half a century ago (1528) in Heydon's Case, thus:

> **"to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief."**

In adopting those principles, in his view, it will be discovered that the only intention of Parliament was that there should be security for costs in form of money provided in an election petition without defining

the nature of such money.

For his part, learned counsel for ECK, Mr Mukele had no doubt in his mind that in providing in mandatory terms that the security shall be given by "deposit of money," the legislature clearly meant "Cash". Not even a Banker's cheque. On this submission he was supported by learned counsel for Kipkemoi, Mr Wena.

We think on our part that the provision we are called upon to interpret causes little, if any, difficulty. Whether the provision should have been enacted by Parliament at all, is of course, another matter which may fall for consideration on another occasion. That is because Mr Majanja informed us that the appellant had filed a reference before a Constitutional Court seeking various declarations, among them.

> **" 3 A declaration that section 21 of the National Assembly and Presidential Elections Act offends the principle of separation of powers between the three arms of government, the democratic principles of universal suffrage and equality and protection of the law upon which our Republic was founded and is an unlawful intrusion by the legislature into judicial function to wit: the determination of what is reasonable time to deposit security for costs in pending litigation.**
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> **4 A declaration that Section 21 of the National Assembly and Presidential Elections Act is arbitrary and contrary to public policy and is not in the public interest and offends the delineation of functions of government as set out in Chapters, II III and IV of the Constitution of Kenya.**
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> **5 A declaration that the provisions of Section 21 of the National Assembly and Presidential Elections Act, Cap 7 of the Laws of Kenya requiring the giving of security for costs in the sum of Kshs. 250,000.00 within three days of the filing of petition and/or at all are inconsistent with the constitution and are therefore all null and void to the extent of the said inconsistency in that:**
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> **(a) The said provision offend the provision of Section60(1) of the Constitution of Kenya in that they place an obstacle to the applicant's right of access to the High Court for redress by requiring the deposit of Kshs. 250,000.00 within three days as a condition precedent for such redress.**
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> **(b) Alternatively, A declaration that he said provisions offend the Applicant's right to challenge a Parliamentary Election under the "other' or special jurisdiction conferred by the High Court under Section 44 of the Constitution.**
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> **(c) Further, A declaration that the said provisions are not provisions made pursuant to section 44(4) with respect to the circumstances, manner, time within which, and the conditions upon which an application may be made to the High Court for the determination of a question under section 44 in that the said provisions:**
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> **(i) Amount to an unreasonable restriction on the applicant's right to stand for parliamentary election guaranteed by the right to freely associate with others and in particular, to belong to or form a political party under sections 1A and 80(1) of the Constitution of Kenya.**
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> **(ii) The huge deposit of Kshs. 250,000.00 and within three days of filing the petition is inconsistent with the national objectives set out in sections 1A and 70(a) and (b) of the constitution, namely that the government should be based on democratic principles of universal suffrage, together with the need to uphold the principles of equality and social justice and the participation of all Kenyans within government."**

We express no view on such reference lest we prejudice the hearing of it by the Constitutional Court.

Section 21 as stated on the outset caters for security for costs. It is clear in subsection 2 that the security is not in form of land, guarantee, bond, moveable property, or such like traditional forms. It is specified that it ought to be in form of money. But there is no definition of money in the Act. Nor is it in the **Interpretation and General Provisions** Act, Cap 6 Laws of Kenya. Its dictionary meaning is simply:

"a Current medium of exchange in the form of coins and banknotes"

-see Concise Oxford Dictionary.

The grammatical meaning of words alone, however, which both the respondents' counsel appear to favour, is a strict construction which no longer finds favour with true construction of statutes. As Lord Denning puts it in the **" Discipline of Law"** at page 16:

> **"The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach"**
>
> **…..In all cases now in the interpretation of statutes we adopt such a construction as will "promote the general legislative purpose" underlying the provision. It is no longer necessary for the judges to wring their hands and say:**
>
> **" There is nothing we can do about it'. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind."**

We think in this matter that Parliament could not have intended that all election petitioners must carry into the court registry bank coins or banknotes to the value of Kshs.250,000/= with all the attendant security risks. It would otherwise have provided for "ready money" which is the definition of "cash". **In Re Collings** [1933] Ch. 920, it was held that ***"money"* in its strict legal sense included money on deposit or current account at a bank".** And one of the ways such money may be withdrawn and paid out to another person is by way of a cheque, which by definition is a written order to a bank to pay the stated sum from the drawer's account. If the cheque is not honoured, then there would obviously be no payment. In our view a deposit made upon the filing of an election petition towards security for costs in the form of cash, banker's cheque or personal cheque is sufficient compliance with the provisions of the section, unless in the case of a personal cheque it be shown that the practice of the Court is not to accept personal cheques, in which case payment has to be made in cash or by Banker's cheque. The section must also be read together with the Rules thereunder, and Rule 12 provides:

> **"12 (1) The deposit of money by way of security for payment of costs, charges and expenses payable by the petitioner shall be made by payment to the Registrar, and such deposit shall be vested in and drawn upon from time to time by the Chief Justice for the purposes for which security is required by these Rules.**
>
> **(2) The Registrar shall give a receipt for any such deposit and shall file the duplicate of the receipt, and shall keep a book, open to the inspection of all parties concerned, in which shall be entered from time to time the amount and the petition to which it is applicable."**

The issue here is whether any deposit was made on 29th January, 2003 as alleged by the appellant. Certainly there was no receipt issued by the registrar and no entry was made in the book under **Rule 12.** If it was the case that the petitioner's personal cheque was rejected on 29th January, 2003, the cheque could have been encashed or converted into a Banker's cheque within time to comply with the deadline set in the Act. The deposit was still payable until 1st February, 2003.But nothing happened until 20th March, 2003 when it was paid. The circumstances surrounding the allegation of payment on 29th January, 2003 were examined by the learned Judge and he found as a fact that there was no payment made. He may well have been right since the appellant's counsel said nothing about having made the deposit when he first

appeared before the election court. On the contrary he stated that the deposit had not been paid. Indeed, learned counsel for Kipkemoi, Mr. Wena referred us to the appellant's affidavit which is on record, sworn on 25th July, 2003 and states;

> **" 10 That on the day of filing the petition, the petition was allowed and registered and (sic) explained to the registry clerk that the security deposit was not available as I could not raise it immediately and that he gives me time to look for the security deposit of Kshs. 250,000.00.**
>
> **……..**
>
> **13 That I could not raise the Kshs. 250,000.00 being security deposit due to the fact that I am a Kenyan of humble means and not rich enough to raise the money immediately being such a colossal amount of money."**

That is a clear confession that there was no deposit made on 29th January, 2003 and we therefore reject the appellant's submissions on the first ground of appeal.

Was the delay in paying the deposit fatal to the petition? Mr Majanja submits not, and relies again on the purposive construction of the statute. The purpose, in his view, was to ensure that the remedy provided by Parliament, that is, the deposit of money, was in place by the time the petition was heard. The mischief that the respondent may incur costs and expenses which cannot be recovered is thus suppressed. There was no prejudice caused by the delay, and the delay has no bearing on the remedy. On the other hand, Mr Mukele was of the view that the time limit was a necessary precondition for exclusion of busy bodies from that vital and expensive process. That is why sub- section 3 has clear wording on the consequences for non- compliance.

Once again we think the intention of Parliament was clear in enacting the time limit in such peremptory language. " **Not more than three days….. shall give"** does not admit of ambiguity or further search for the intention of Parliament. Whether or not Parliament should have enacted a further provision for seeking extension of time in appropriate cases, would of course be academic for purposes of this appeal and in any event there was no attempt to apply for extension of time at all. Section 21(3) provides for the consequences of non-compliance which is what in the end transpired in this case. Failure to deposit the money within time was not a mere irregularity which could be waived by the parties.

We are grateful to all counsel for their assistance in this appeal. We have considered all the grounds of appeal laid out and the authorities cited even though we have not set them out in extenso. We find no merit in the appeal and we dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 14th day of October, 2005

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR