



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**ELECTION PETITION NO. 12 OF 2017**

COSMAS FOLENI KENGA .....PETITIONER

VERSUS

THE INDEPENDENT ELECTION AND

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

GULIYA HUSSEIN ABIDWAHID .....2RD RESPONDENT

OWEN YAA BYA .....3RDRESPONDENT

**RULING**

On 30.10.2017, this case came up for a ruling in respect of two applications brought separately by the Petitioner and the Substituting party, ESTHER KACHE ZIRO.

The first application was brought by the petitioner whereby he was seeking leave to withdraw the petition under Rule 23 of the Elections (Parliamentary and County) Petitions Rules, 2017.

The 2nd application was sought by the substituting party, ESTHER KACHE ZIRO on 12th October, 2017 under Article 87 (a) of the constitution, sections 109 (1) (f) and (2) of the Elections Act and rule 24 of the Elections (Parliamentary and county) Petition Rules, 2017, in which she was seeking to be substituted as a new petitioner in the place of petitioner, COSMAS FOLENI KENGA. She also sought that the court directs that the security deposited on behalf of the petitioner remains as security for purposes of the petitioner.

Upon listening to both applications and the response by the 4th respondent's counsel, the court allowed the two applications vide a ruling delivered on 30th October, 2017, with orders as follows;

(a) the petitioner be and is hereby ordered to pay costs of the petition to the respondents who have filed their responses herein. The said costs to be paid from the deposited security as follows;

(i) the 4th respondent to be paid Ksh 250,000/=

(ii) the 2nd and 3rd respondents to share the balance equally, that is, Ksh 125,000/= each.

(b) the substituted petitioner to deposit ksh 500,000/= as security within (3) days from the date of the

order.

The court went on to direct that the case would be mentioned on 9.11.2017 for pre-trial -conference with regard to the substituted petitioner.

And on 9.11.2017, when the matter came up for mention, counsel for the substituted petitioner parties indicated to court that they were not aware of the said mention date and so they were not ready. Mr. Aboubakar, counsel for the substituted petitioner asked the court to give him another date to enable them put in their applications.

Mr. Owuor, counsel for the 4th petitioner, on the other hand asked the court to enforce the order regarding the payment of security, given the strict timelines, the election court is obliged to follow and dismiss the petition. He also asked the court to give directions with regard to the preliminary objection they had filed.

In response to this, Mr Aboubakar, counsel for the substituted petitioner, indicated that going by their sentiments, both of them were not aware of the mention date; He then indicated to court that he had an application to make in regard to the issue of payment of the deposit for security.

I have carefully gone through the submissions by both counsels.

I wish to point out that the court record clearly indicates that this case was fixed for mention for pre-trial directions with respect to the substituted petitioner's coming on board for 9th November, 2017. The same was read out in open court and coram shows that Mr. Aboubakar, counsel for the substituted petitioner was in court. The respondents were not present and neither did they sent any representation despite the date for ruling having been fixed in their presence on 19.10.2017.

With regard to the issue of compliance with the court's orders of 30th October, 2017 and the interlocutory applications by both counsel (for the substituted petitioner and 4th respondent), in the spirit of fair hearing, (as provided for under article 50 (1) of the constitution), I direct ;

(1) That the respondents do serve the substituted petitioner with the Notice of Motion application dated 28th September, 2017 and the Notice of Preliminary objection dated 9th November, 2017 before the close of today.

(2) That the substituted petitioner to file and serve;

(a) That the responses to the notice of motion dated 28th September, 2017 and notice of preliminary objection dated 9th November, 2017; and

(b) The intended interlocutory application in relation to payment of security, all within three(3) days from today, but not later than 16th November, 2017.

(3) That the respondents to file and serve their further affidavits to the responses to the notices of motion and preliminary objection and a response to the intended application in relation to the payment of security by the substituted petitioner within three (3) days of being served but not later than 21st November, 2017;

(4) That the substituted petitioner to file and serve her further affidavits, if any, to the responses to their intended application by the respondent within 2 days of being served but not later than 23rd

November, 2017;

(5) That such interlocutory applications to be heard on 4.12.2017 at 9.00am;

(6) That subject to the outcome of the interlocutory application that may attack the petition, the petition shall be heard on 11th ,13th and 14th and 15th of December, 2017.

**Ruling delivered signed and dated this 13<sup>th</sup> day of November 2017.**

**D. O. CHEPKWONY**

**JUDGE**



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