



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

(CORAM: KANYI KIMONDO J)

ELECTION PETITION NO. 1 OF 2017

ROBERT KIBET KEMEI.....PETITIONER

VERSUS

ALFRED KIPTOO KETER.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

BERNARD KIBOR KITUR.....INTENDED PETITIONER

RULING

1. There are two *competing* applications before the court. They are at *cross-purposes*. On the one hand, the petitioner craves *leave* to *withdraw* the petition dated 5th September 2017. On the other hand, *Benard Kibor Kitur*, prays to be *substituted* as the petitioner.
2. I will first deal with the motion by the petitioner. His application is anchored upon Rule 21 of the Elections (Parliamentary and County Elections) Petition Rules 2017 (hereafter *the Rules*). It is dated 14th September 2017. It is executed by the petitioner's counsel of record *Mr. Joshua Martim*; and, predicated upon a deposition sworn by the petitioner on even date.
3. The application for leave is on a two-strand: Firstly, that the petitioner is no longer interested in the petition; and, secondly, that he has "*been prevailed upon by the electorate in Nandi Hills Constituency and his family*" to withdraw the action. In the supporting affidavit, he singles out his father as being instrumental in that decision.
4. At paragraph 8 of the affidavit, the petitioner deposes that "*no agreement or terms of any kind has been made, and that no undertaking has been entered into in relation to the withdrawal of the petition*". There is a similar undertaking by the 1st respondent at paragraph 3 of his supplementary affidavit sworn on 15th November 2017.
5. Quite obviously, the 1st respondent does *not* oppose the application to withdraw the petition. I would add that his learned counsel has filed skeleton submissions on 16th November 2016 supporting the withdrawal of the petition. While both respondents concede to the withdrawal, they pray for *costs*.

Learned counsel for the petitioner contended that costs are unwarranted because the notice to withdraw the petition was lodged *before* the *responses* to the petition. The riposte by the 2nd respondent is that the notice was not *published* until after the *response*; and, that it could not take any chances with filing of its reply to the petition.

6. I find that the application to withdraw the petition complies with Rule 21 and *Form 5* in the *First Schedule* of the Elections (Parliamentary and County Elections) Petition Rules 2017. Rule 22 decrees that the notice be served upon all the parties; and, that it be published in a newspaper with *national circulation*. The notice was *advertised* in the *Star* newspaper of 20th September 2017; and, it was served upon all the respondents.

7. Rule 21 provides that *no* petition shall be withdrawn without *leave* of the court. I explained the underlying rationale in *Ahmed Abullahi Amin & another v Abass Sheikh Mohamed & 2 others*, High Court at Garisa Election Petition 8 of 2013 [2013] eKLR as follows-

“The rationale is self-evident: the court may unwittingly become the anvil upon which political deals are hammered. Petitioners in election disputes at times act in bad faith. Those mala fides were recently brought to the fore in the High Court at Malindi in Election Petition Number 16 of 2013 Dobson Chiro Mwahunga v Independent Electoral & Boundaries Commission & others [2013] eKLR. In that petition, a disinterested petitioner acting through a brief-case lawyer filed a petition using the law firm of a third party. The scheme that unruffled in court was aimed at extracting costs and other benefits from the respondent. Meoli, J, struck out the petition on that ground among others”.

8. Rule 21 thus requires the parties to show by affidavit the true circumstances leading to the *compromise*. Specifically, the deponent must state that *no* agreement or terms of any kind have been made and that *no* undertaking has been entered into to scuttle the action. That notwithstanding, if a lawful agreement has been made, the deponent should say so. See *David K Ole Nkedianye & 2 others v Joseph Jama Ole Lenku & 4 others* Kajjado High Court Petition 2 of 2017 [2017] eKLR. See also *Sammy Waity v IEBC & 3 others*, Nanyuki High Court Petition 2 of 2017 [2017] eKLR.

9. I have not seen any evidence of *mala fides* or improprieties in withdrawing the petition. The petitioner has complied fully with Rules 21 and 22. I have stated that none of the respondents contests the notice to withdraw the petition. I am thus satisfied that this is a proper case to grant leave to the petitioner to withdraw from the petition.

10. Although the notice of withdrawal was *lodged* on 14th September 2017, it was not published until 20th September 2017. The response by the 2nd respondent was filed two days earlier on 18th September 2017. The 1st respondent filed his response on 25th September 2017. I thus find that *only* the 2nd respondent is entitled to costs at this stage. The costs shall however be in the cause.

11. I will now turn to the application for *substitution* of the petitioner. Rule 22 requires that *notice* to be substituted be served upon the *Deputy Registrar*. The intended petitioner filed a notice addressed to the Registrar on 22nd September 2017. The applicant states in the notice that he was a candidate in the elections for Nandi Hills Constituency; and, that *“he came second with 13,872 votes”*. He claims he is a key witness in the petition; that he was not consulted about the withdrawal of the petition; and, that he is in fact the one who paid the security deposit of Kshs 500,000. The petitioner did not contest the latter fact.

12. The application for substitution is contested by both respondents. The 1st respondent has filed a replying affidavit sworn on 5th October 2017. He deposes that the notice is vague; that the intended

petitioner is pursuing a vendetta; that the applicant is not a key witness in the petition but “was instrumental in the selective identification of witnesses who did not support [his] re-election bid to swear [false] affidavits”. Lastly, the 1st respondent contends that there is no requirement for the petitioner to consult the intended petitioner about withdrawal of the petition.

13. The 1st respondent has also filed skeleton submissions; and, a list of authorities dated 15th November 2017. Learned counsel for the 1st respondent, *Mr. Lang’at*, submitted that the application is defective. He was of the view that it should have been accompanied by an affidavit. He also opined that there was no notice of appointment of counsel for the intended petitioner which raised doubt about the instructions of counsel. A close analysis of Rule 24 shows that the submissions by the 1st respondent’s counsel are prosaic.

14. Rule 24 (1) and (2) provide as follows-

“(1) At the hearing of the application for withdrawal of a petition, a person who is qualified to be a petitioner in respect of the election to which the petition relates may apply to the election court to be substituted as the petitioner in place of the petitioner who has applied to withdraw the petition.

(2) The election court may grant the application to substitute the applicant under sub-rule (1) as the petitioner”.

15. There is no specific procedure under Rule 24 that an intending petitioner must follow. All that is required is for the applicant to be qualified to be a petitioner; that he serves a notice of his intention on the Deputy Registrar under Rule 22; and, lastly, that he makes an application at the hearing of the application for withdrawal of a petition. The intended petitioner has done exactly that. In short, there is no express provision about the format of the application. It can even be an oral application so long as it is preceded by the steps which I have highlighted.

16. The next key question is whether the intended petitioner is qualified to be a petitioner. Like I observed earlier, the applicant states in the notice that he was a candidate in the elections for Nandi Hills Constituency; and, that “he came second with 13,872 votes”. Those facts have not been controverted. I deprecate the conduct of the intended petitioner of hiding behind the petitioner; and, bankrolling this litigation. It amounts to abuse of court process. But I remain alive that election petitions are actions *in rem*. In the end, I find that the intended petitioner is entitled to be substituted as the new petitioner.

17. The petitioner did not contest the fact that the security deposit was paid by the incoming petitioner. Under Rule 24 (3) I direct that the security deposited on behalf of the original petitioner shall remain as security for any costs that may be incurred by the substituted petitioner; and, that to the extent of the sum deposited as security, the original petitioner may be liable to pay costs of the substituted petitioner.

18. Lastly, the substituted petitioner shall inherit the petition as it now stands. Rule 24 (5) provides as follows-

“Subject to sub-rules (3) and (4), a substituted petitioner shall stand in the same position, to the extent possible, and shall be subject to the same liabilities as the original petitioner”.

19. The final orders shall be as follows:

a) That leave is hereby granted to the petitioner to withdraw from the petition dated 5th September 2017.

- b) That *Benard Kibor Kitur* is hereby substituted as the petitioner.
- c) That the substituted petitioner shall stand in the same position, to the extent possible, and shall be subject to the same liabilities as the original petitioner.
- d) I direct that the security deposited on behalf of the original petitioner shall remain as security for any costs that may be incurred by the substituted petitioner; and, that to the extent of the sum deposited as security, the original petitioner may be liable to pay costs of the substituted petitioner.
- e) For the reasons expounded in paragraph 10 of this ruling, I grant the 2nd respondent costs of the withdrawn petition. Those costs shall be in the cause.
- f) The Election Court will now grant a suitable date to the parties for a final trial conference; and, for directions on the hearing of the petition.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 23rd day of November 2017.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance by counsel for the Petitioner.

Mr. Lang'at and Mr. Kibii for the 1st Respondent instructed by Mburu Maina & Company Advocates.

Mr. Lang'at holding brief for Mr. Melly for the 2nd Respondent instructed by Iseme, Kamau & Maema Advocates.

Mr. Magut for the substituted petitioner instructed by Magut & Company Advocates.

Mr. J. Kemboi, Court Clerk.



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