



**REPUBLIC OF KENYA**

**Magistrate Courts**

**Election Petition 1 of 2013**

**CHARLES ON'GONDO WERE.....PETITIONER**

**VERSUS.**

**JOSEPH OYUGI MAGWANGA.....1<sup>ST</sup> RESEPONDENT**

**RETURNING OFFICER KASIPUL CONST.....2<sup>ND</sup> RESPONDENT**

**I.E.B.C.....3<sup>RD</sup> RESPONDENT.**

**RULING.**

1. This is a ruling on a Preliminary Objection filed by the 1<sup>st</sup> Respondent on 16.5.2012 and a Notice of Motion filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on 20.5.2013.
2. It is also a ruling on the Petitioner's prayer for Scrutiny and Recount.
3. The Preliminary Objection is expressed to be made pursuant to Section 78(1), 2(b) and 3 of the Elections Act as read with rule 11 of the Elections (Parliamentary and County Elections) Petition Rules 2013. It raises objections to hearing of any further proceedings in the Petition and for its dismissal on the following grounds:-
  - a. ***The Petition was filed on 8.4.2013 and therefore the security for payment of costs was to be paid on or before the 18.4.2013.***

**b. The security was paid on diverse dates between 10.5.2013, 13.5.2013 and 14.5.2013.**

4. By the Notice of Motion dated 20.5.2013 the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents seek an order for dismissal of the petition herein with costs on the following grounds:-

**a. The Petitioner failed to deposit the security for costs within 10 days of filing the Petition as required by Section 78(1) of the Elections Act No. 24 of 2011.**

**b. The Petitioner herein paid for the security of costs in installments on diverse dates on 10.5.2013, 13.5.2013 and 14.5.2013**

**c. The Petitioner herein failed to apply to court to extend time to allow him pay the security after the ten days required by law had lapsed.**

The application is supported by the affidavit of Marcella Onyango, Advocate for the Applicants in which she deposes to the late payment of the deposit for security and hence the non compliance with S. 78 of the Elections Act and the omission by the Petitioner to seek leave to pay the security after the 10 days period required by the law. She deposes that the provisions of Section 78 are mandatory.

5. Both Advocates filed written submissions which they attended to highlight.

6. Mr. Nyauke the Advocate for the Petitioner filed Grounds of Opposition to both the Preliminary Objection and the Notice of Motion as follows:-

**1. The applications all put together are based on the technicality created by a statute but whose provisions do not override the provisions of Article 50(1) of the Constitution of the Republic of Kenya.**

**2. The fact that the deposit has been deposited in court shows the seriousness on the part of the petitioner to have this matter heard and determined on merit.**

**3. There is no prejudice so far suffered by the Respondents with regard to the deposit for security.**

**4. The court has discretion to balance its decision based on the rules of fairness and justice and not on technicalities.**

**5. Provisions of Rule 20 of the Elections (Parliamentary and County Elections) Petition Rules 2013 gives this court room to extend the time for doing anything under the Act. He too filed written submissions upon which he relied at the hearing.**

7. Since the Preliminary Objection and the Notice of Motion seek the same order which is dismissal of the petition herein for late payment of the security they were heard together. The court also heard the Advocates on the issue of Recount.

8. In canvassing the Preliminary Objection Mr. G.S. Okoth, for the 1<sup>st</sup> Respondent submitted that as the Petitioner had not complied with the rules no further proceedings should be taken in this petition. That the filing and presentation of petitions is governed by Section 76(1) of the Elections Act and is reiterated in Rule 8 of the Petition Rules. Those rules state that the petition shall be filed by presenting the petition to the Registrar in Form EP1 and the Registrar shall acknowledge receipt in Form

EP2. The Registrar determines the fee payable. Further that the filing and presentation of the Petition is one event and in the instant case that was properly done. However there was no compliance with the requirement for deposit for the security of costs, in this case Kshs.500,000/= within 10 days after presentation of the Petition. He submitted that the key word is “**presentation**”. That the date of presentation being 8.4.2013 the 10 days lapsed on 18.4.2013 which computation is in line with the General Provisions and Interpretations Act. He submitted that upon inspection of the record kept by the Deputy Registrar of this court, he found that in this Petition the deposit was paid in installments the last one being paid 36 days after the date of presentation of the petition.

Relying on the meaning assigned to the words technicality in the Oxford Advanced Learners Dictionary of current English, Forth Edition he submitted that a technicality is:-

**“a small detail of no real importance”.**

That the 7<sup>th</sup> Edition defines it as:

***“a small detail of Law/Rules especially one that does not seem fair”***

He submitted therefore that in enacting S.78 the Legislature did not intend it to be a mere technicality. He contended that it is a fundamental pre-condition to the validity of an election and cannot be taken that lightly. He stated that to take 36 days to deposit security is lack of seriousness. It is evidence of taking the petition lightly. He contended that even though courts are weary of dismissing cases without hearing them that is only where the parties complied with the rules and if good reason is given and an application is made. He noted that no application had been made under rule 20 of the Petition Rules so that even if the court wished to exercise its inherent jurisdiction under rule 20 its hands are tied. He urged the court to dismiss the petition.

**9.** These submissions were echoed by Mr. Omondi Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. He stated that S. 78(1) is explicit in terms and the operative words being **“the Petitioner shall”**

It leaves no room for the petitioner not to deposit the security for costs. That rule 11 also provides the same way as S.78. He submitted that the Legislature in providing the time within which security was to be deposited intended to discourage frivolous petitions. That although there was recourse to rule 20 the petitioner did not file an application for extension of time. He stated that the petitioner is not keen to have the petition heard expeditiously. He contended that the late payment of the deposit is irregular as it was done without leave and should not even be considered as part of the record and ought to be expunged.

He further submitted that whereas the petitioner has in his submissions asked to be given a fair hearing he himself is not being fair to the other parties, and the court. He submitted that S. 78 is a provision of the law and not a technicality. He urged this court to dismiss the petition.

**10.** On his part Mr. Nyauke, Counsel for the petitioner seemed to suggest that S. 78 of Elections Act is inconsistent with the constitution as it puts hurdles to Article 50(1) of the Constitution and is therefore null and void. That under S. 78(3) of the Elections Act the petitioner has room to seek for removal of the objection and only once the objection is not removed that further steps cannot be taken. That Article 50(1) gives this court a wide discretion to ensure that no injustice is meted during a trial of any nature. He stated that under Rule 20 of the Petition Rules the court has further powers to extend time for doing any condition set. On the issue of leave he submitted that the rule does not provide for leave. He contended that the provisions of Rule 38 seem to have escaped his colleagues mind and if this court in exercising its discretion under Rule 20 hopes to give effect to Rule 38 that will not in any way prejudice

the Respondents. He urged this court to take into consideration that no prejudice has been occasioned to the Respondents by the late payment of the deposit. He noted that the decision of **KIMARU J.** in **JOHN KIARIE WAWERU V. BETH WAMBUI MUGO & 2 OTHERS [2008]** eKLR which Mr. G.S. Okoth cited to support his submission that the deposit of security is a fundamental pre-condition to the validity of an election petition and cannot be taken lightly is merely persuasive. He urged me to disregard it. He also urged the court to look at Rules 4(1) & (2) which provide for the overriding objective.

**11.**In response Mr. G.S. Okoth submitted that the key word in Article 87(1) is “**timely**” which means that time is of the essence and ignoring the 10 days requirement is not just ignoring the Act but the Constitution. On rule 20 he submitted that by the rules of interpretation of statutes the court can only exercise its discretion if evidence is tabled before it. That the discretion must be exercised judiciously and the court must have the basis to do so hence it cannot do so suo moto. He contended that there is already prejudice to the parties as they are incurring a lot of expenses. That as justice is a two edged sword one can cut themselves with it if used carelessly. That the petitioner has wasted all his chances and cannot come back crying for mercy.

**12.**Mr. Omondi on his part submitted that there is a consistency in the Constitution, the Act and the Rules and that is that time is of the essence. He contended that as nothing else is moving due to the hearing of Election Petitions and the court must be careful not to miss the intention of Article 87(1) of the Constitution and S. 78 of the Elections Act. He noted that Mr. Nyauke did not point out the conflict between S. 78 and Act 50(1). He contended that the section has never been declared unconstitutional and a mere submission that it is cannot suffice. Regarding Rule 20 he submitted that the discretion thereat could either be exercised suo moto or upon an application and as either none of the above was done the deposit was irregular. He noted that the petitioner is not willing to see justice done and prayed that the petition be dismissed.

**13.**On 16.5.2013 at the pretrial conference this court required that the petition lay a basis for his prayer for an order for recount of all “***the votes cast in the entire Kasipul Constituency for the general election with specific reference to the Parliamentary Elections for the year 2013.***”

In laying the basis Mr. Nyauke relied on his written submissions, the Pretrial Checklist and the petition. He submitted that the need for a scrutiny and recount arises first, from their contention that Forms 35 were not signed by the candidates or their Agents. Secondly from the Petitioner’s contention that dead persons voted and thirdly that there was manipulation of the elections by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in favour of the 1<sup>st</sup> Respondent. He cited the other reason as the omission to bring before this court the final tallying sheet which to him means the Respondents are hiding something. He contended that the only way the court can determine whether these proceedings are merited is by ordering a scrutiny and recount. He noted that no material was placed before this court to dismiss this petition from the outset. He contended that even the tallying given on the Form 35 do not add up. He contended that scrutiny would aid this court to arrive at a just conclusion.

**14.**Mr. G.S. Okoth for the 1<sup>st</sup> Respondent submitted that no basis had been laid. That the petition itself is one of the scantiest. That moreover only one Form 35 is attached to the petition and the same is signed. He noted that no other Forms 35 were attached and wondered how this court will know what transpired in the rest of the Constituency. He further submitted that in any case the failure by the agent to sign does not affect the result of an election and therefore that ground alone cannot be a ground for a recount.

On the issue of dead voters he submitted that it must first be proved that the dead persons were in the register and even were it proved that such people voted it must be shown that the irregularities affected

the result. He relied on the **JOHN KIARIE WAWERU** case cited earlier to fortify his submission. He wondered how the voting of 2 dead persons would prove there was irregularity of such magnitude as to affect the result.

**15.** Similar sentiments were expressed by Mr. Omondi for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. He begun by stating that the petitioner seems to be on a fishing expedition. He then wondered why no Certificates of Death have been exhibited to date. He noted that what are annexed are Burial Permits which are usually issued by chiefs and suggested that those could have been fabricated. He contended that even were the votes of the 10 alleged dead voters given to the petitioner that would not affect the result as the margin here was more than 4000 votes. He conceded that there may have been one or 2 errors as voting is a human exercise. He termed it misleading to allege that the tallying sheet was not exhibited and referred to it as the annexure marked MM1 to the affidavit of Mike Mose. He contended that a party who seeks to conceal the truth cannot benefit from court orders. He pointed out that in the entire petition there was no protest by any agent as having not been permitted to sign Form 35. As to the submission that even the agents who are purported to have signed some of the Forms 35 deny they did so he contended that we cannot delve into that issue as we are not handwriting experts.

**16.** In reply Mr. Nyauke submitted that annexure MM1 cannot pass the test for a final tallying sheet. That it is a document prepared in places not authorized by the 3<sup>rd</sup> Respondent as it has no serial number. He contended that interrogating the process through scrutiny would inform this court as to whether this is the form that was sent to Nairobi and it would be a miscarriage of justice to rely on it as the final tally. He submitted that scrutiny would also establish if dead people voted and if that was established it would lead to nullification of the election to allow for a free and fair election without manipulation. Further that it is to the one or two errors that Mr. Omondi concedes may have arisen that the petitioner is looking. He finally contended that the register is not a document ordinarily within the reach of the petitioner but of the Respondent and if they have nothing to hide they should allow for scrutiny.

**17.** The 3 issues that call for determination by this court are:

- i. **Whether the late payment of the deposit by the Petitioner is fatal to the Petition;**
- ii. **Whether the Petition has laid a basis sufficient to warrant this court to order a Recount and scrutiny.**
- iii. **Who bears the costs of the applications"**

**18.** On the first issue section 78 of the Elections Act requires the Petitioner to deposit security not more than 10 days after the presentation of a petition. Rule 11 of the Election (Parliamentary and County) Petition Rules provides that the security for costs shall be deposited within 10 days of filing of the petition. This was not complied with in this petition. It is indeed true that the security for costs was deposited in 3 installments, the first installment being on 10.5.2013 and the third being on 14.5.2013. This clearly was well beyond the 10 days set by the Act and the Rules. Previously Election courts have taken a very grim view of this. In **Rotich Samuel Kimutai V. Ezekiel Lenyongopeta & 2 others, Civil Appeal No. 273 of 2003** the court had this to say:

**"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 subsection 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 of 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”.

This was also the decision of the same court in (**cite the Esposito Franco v. Amason Kingi Jeffah & two others [2010] eKLR**) where the court held that failure to deposit security within 3 days was not a mere technicality but that it went to the root of the matter – jurisdiction. As in our case in the Kimutai case, one of the arguments was that the deposit having been made there was no prejudice caused by the delay. Nevertheless the court went a head to strike out the Petition. It found that that failure was not a mere irregularity.

This is in keeping with the strict approach our courts have taken. They insist, as they should, that election legislation must be strictly complied with because the paramount public interest is that election petitions should be determined expeditiously. Indeed that is a requirement under Article 87(1) of the Constitution which is given effect by S. 75(2) of the Elections Act and the overriding objective – see Rules 4 and 5 of the Election Petition Rules.

**19.**The submission by Mr. Nyauke that this is a mere technicality does not hold and I do agree with Mr. G.S. Okoth that it is not a matter of small detail.

**20.**Be that as it may Article 159(2) (d) of the Constitution obliges courts to dispense justice without undue regard to technicalities and the fact that elections are special disputes governed by special rules does not exonerate the court from this duty to do substantive justice. In **Raila Odinga & others V. IEBC and 3 others NBI Petition No. 5 of 2013 (2013) eKLR** The Supreme court held as follows:

**“The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This principle of merit, however in our opinion bears no meaning cast in stone, and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course”**

The courts are also bound by the overriding objective which is to facilitate the just expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.

**21.**Having considered this matter carefully my finding is that whereas the payment of the deposit of the security for costs is not a technicality and goes to the root of the Petition the time limit for its payment is a procedural requirement which should not as observed by the Supreme Court, trump the primary object of dispensing substantive justice.

In Kisii Election Petition No. 6 of 2013 – **Fatuma Zainabu Mohamed V Ghati Dennitah & 10 others Muriithi J** found likewise when he stated

**“Accordingly, I find that the time prescribed for the deposit of security for costs is a matter of procedure rather than substance.....”**

In so stating I have taken into consideration that as provided in S.78(1) of the Elections Act and Rule 11(2) (b) & (c) of the Rules the reason for the deposit is security for payment of any costs that may become payable by the Petitioner. It is a measure of the seriousness of a Petitioner and is a deterrent to frivolous challenges to election results. That being the purpose for the deposit and the security herein having been deposited albeit late and taking into consideration Article 159(2) (d) of the constitution, and the overriding objective of the Election Petition Rules, I find that the Respondents costs are secured in the event that the petitioner was to lose this Petition.

**22.**It was argued that failure to apply for extension of time under Rule 20 was fatal – that it is a second wrong which does not make things right. I would have found favour with this position were it not for the provisions of S.78(3) of the Elections Act which presumes that the court may exercise discretion in favour of a petitioner who has not deposited the security and against who an objection has been raised. It is only once the objection is not removed that no further proceedings can be taken. Here even before the objection had been taken the deposit had been paid and so there will be no issue of removing the objection. For that reason this court shall on this occasion save the petition by not allowing the preliminary objection and the Notice of Motion which both sought its dismissal on the issue of the deposit. But before I leave the issue let me state that I see no conflict between S.78 of the Elections Act and Art 50(1) of the Constitution Mr. Nyauke did not himself point to any.

**23.**Turning on the issue of Scrutiny and Recount, this court did at the Pretrial Conference require the Petitioner to lay a basis for his prayer for **“an order that the votes cast in the entire Kasipul Constituency for the general elections with specific reference to the Parliamentary elections for the year 2013 be recounted”**.

The first observation I make is that this is a prayer in the alternative which makes it a not a very serious prayer. Secondly the prayer is very poorly drafted. It seeks a recount in reference to the Parliamentary elections. Unlike previously where we had only one House in Parliament we now have two – The Senate and the National Assembly so which House is the order sought in respect. The prayer is ambiguous and indeed a similar prayer was struck out in **Nairobi Election Petition No. 2 of 2013. Steven Kariuki V. George Mike Wanjohi & 2 others (unreported)** where Kimondo J. ably expressed himself thus:-

**“When a Petitioner comes to our court to challenge an election, it is important to specify the election that is contested. The voters in Mathare Constituency cast their votes in relation to 6 electoral seats. The court takes Judicial Notice that Mathare Constituency is in Nairobi County. In that county, and in Mathare, there were elections conducted simultaneously for member of the National Assembly, Senate and Governor for example. The prayers should thus be specific that the orders sought relate to the National Assembly seat for Mathare Constituency..... The prayers in view of the ambiguity of the contested office are couched in such generality that the recount or re-tallying or inspection of documents may extend or apply to any of the elections that took place on 4<sup>th</sup> March, 2013 in Mathare or what the Petitioner calls “Mathare Parliamentary election.....”**

I fully associate myself with his findings.

24. Even had the prayer been clear and unambiguous would it have been allowed"

The powers of the court to order Scrutiny and Recount are provided under S.82 (1) & (2) of the Elections Act and Rule 32 and 33 of the Elections (Parliamentary and County) Petition Rules 2013. However it is not in all cases that the prayers shall be granted. In **Hassan Ali Joho V Hothan Nyange & another (2006) eKLR**, for instance the court ordered that a basis had to be laid before the order for scrutiny could be granted. It is also clear from that decision that the margin of victory or loss may influence the decision for the order so that if the margin is narrow the court is more likely to order a recount. This in effect is what Mr. Omondi the Advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents was saying. That in this case the margin was quite wide and a scrutiny ought not to be ordered. Indeed the court in the **Hassan Joho** case found that the margin of 1061 votes was too wide for a scrutiny and recount without laying a basis. Here the margin is about 3000 votes. The question then is whether in this case a basis has been laid.

My finding is that it has not. In **Nairobi Election Petition No. 5 of 2008 William Maina Kamanda V. Margret Wanjiru & others** where the court found that a basis had been laid one of the reasons given was that the Electoral Commission had not only not accounted for what was approximately 37% of the Form 16As but had also maintained "a deafening tomb-like silence on the tampering of the ballot boxes during and after the electoral process. Kihara Kariuki J as he then was, also noted that the difference in votes was only 895 votes so that the missing Forms 16As might have made a difference. In the present case the margin is wide and the issues raised by Mr. Nyauke are issues which the petitioner who asserts them must of necessity prove. Scrutiny and Recount is not intended to aid a Petitioner to look for evidence. The onus is upon him to prove the Petition. I agree with Mr. Omondi's submission that the petitioner seems to be on a fishing expedition. It is noteworthy that he requires a scrutiny and recount of all votes cast so that it can be established that dead people did not vote and that there were no irregularities. He seems to be saying that it is only if a scrutiny and recount is ordered that he shall be satisfied that the Respondents are not hiding something. He has not pointed out to any specific polling stations yet Rule 33(4) is to the effect that scrutiny shall be confined to the polling stations in which the results are disputed.

25. In the premises I make orders as follows:-

1. ***That the Preliminary Objection dated 16.5.2013 and the Notice of Motion dated 20.5.2013 be and are hereby dismissed but with an order that the costs thereof shall be borne by the Petitioner.***
2. ***That the prayer for Recount and Scrutiny is hereby rejected but costs thereat shall be in the cause.***

Dated, signed and delivered in Homa Bay this 30<sup>th</sup> day of May, 2013.

**E.N. MAINA**

**JUDGE.**

**In presence of:**

Mr. Nyauke Advocate for the Petitioner.

Mr. G.S. Okoth Advocate for the 1<sup>st</sup> Respondent

Mrs. Onyango Advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondentss

Eudice Okombo Court Interpreter.



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