



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWERA & MWILU, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 287 OF 2013

BETWEEN

LYDIA MATHIA.....APPELLANT

VERSUS

NAISULA LESUUDA1ST RESPONDENT/APPLICANT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION2ND RESPONDENT

(An Application for orders that the appellant does deposit security for costs in an appeal from the Judgment & Decree of the High Court of Kenya at Nairobi (R. E. Ougo, J.) delivered 27th September, 2013

in

ELECTION PETITION NO. 13 OF 2013)

RULING OF THE COURT

1. This application for provision of further security for costs is brought under **Rules 42, 47, 107(3)** of the **Court of Appeal Rules 2010**. It seeks orders that the appellant do provide further security for costs of the appeal in the aggregate sum of shs. 6,000,000/- or such other sum to be approved within 30 days; that the appeal be stayed pending the deposit of security and alternatively, in default of provision of further security, the petition be struck out with costs.
2. The application was filed three days before the scheduled date for the hearing of the appeal on 25th November, 2013. The applicant is the 1st respondent in the appeal.

On the hearing date of the appeal, **Mr. Kanjama** learned counsel for the applicant applied that the application be heard before the appeal. The respective counsel for the appellant and the 2nd respondent in the appeal having no objection, it was ordered by consent that the application be heard before the appeal although it was not listed for hearing. The result is that the appeal was adjourned.

3. The appellant and the 1st respondent, **Naisula Lesuuda**, are party members of the **National**

Alliance Party (TNA) which sponsored candidates for election for presidential, parliamentary and other elective offices in the General Elections held on 4th March, 2013. The TNA party in its party list nominated 16 candidates for election as senators and submitted the list to the body mandated to manage the elections, The **Independent Electoral and Boundaries Commission** (IEBC), in accordance with the Constitution and the Elections Act. The TNA party list ranking included:

- (1) Beth Mugo
- (2) Emma Bura Gertrude
- (3) Lydia Mathia (Petitioner)
- (4) Joy Adhiambo Gwendu
- (5) Naisula Lesuuda (1st respondent)
- (6)16...

Thus the petitioner and the 1st respondent were ranked 3rd and 5th in priority respectively in the party list. After the results of the elections, IEBC allocated four senate women representative seats to TNA on the basis of proportional representation. Subsequently by Gazette Notice 3578 of 20th March 2013, IEBC designated the four validly nominated senate women representatives from TNA as Beth Wambui Mugo, Emma Bura Gertrude, Naisula Lesuuda (1st respondent) and Joy Adhiambo Gwendu among others from other political parties. The name of the appellant was omitted from the list.

4. The petitioner was aggrieved by the exclusion of her name in favour of the 1st respondent and filed High Court Constitutional Petition No. 175 of 2013 on or about 25th March, 2013 to challenge the substitution of her name for that of the 1st respondent. We are informed from the bar that the Constitutional Petition is still pending and is due for mention on 22nd January, 2014. Meanwhile, the petitioner filed High Court Election Petition No. 13 of 2013 on or about 12th April 2013 in which she, among other things, avers that IEBC had no power under the Constitution or the Elections Act to alter a party's list or vary the order of priority in the list and in essence seeks the quashing of the Gazette notice and revocation of the 1st respondent's name and a declaration that she was instead validly nominated as a senator. The election petition was dismissed by the High Court (**R.E. Ougo, J.**) on 27th September, 2013 with an order that each party bears their own costs, which decision precipitated the present appeal.
5. From that brief examination of the nature of the appeal, we now turn to the application. It is supported by the short affidavit of the 1st respondent. She deposes in the affidavit, *inter alia*, that:
 - i. The appellant seeks costs of shs. 6 million in the memorandum of appeal.
 - ii. She has filed a notice of cross-appeal for the costs in the High Court.
 - iii. She verily believes that appellant has no significant assets to meet the costs that may be awarded and that appellant has filed a constitutional petition on the same matter and the appeal is a stratagem to engage in continuous litigation despite the merits of the case and in abuse of the process of the court.
 - iv. The appeal is substantial, dealing with numerous matters and touching on numerous matters of law and the overall costs to complete the case including costs of the appeal are large.
 - v. Power to order security for costs is a balancing process requiring doing justice to both parties.
6. **Mr. Kanjama** submitted, among other things, that, it is part of the law under section 78 of the Elections Act (ACT) that a petitioner should deposit shs.500,000/- as security for costs; that section 78 was not intended to last only when proceedings were pending in the High Court and that it was the intention of the Parliament that no person should be allowed to prosecute an

election petition or appeal unless he provides sufficient security. He further submitted that the appellant should first deposit security of shs. 500,000/- for costs of appeal and that in addition the Court should require the appellant to provide further security for up to shs. 6 million.

7. On his part **Mr. Arwa** for the appellant submitted, *inter alia*, that the entire law regarding provision of security for costs is contained in the Elections Act which supersedes the Civil Procedure Act and any other procedural law; that there is no provision for depositing security of shs. 500,000/- in the Court of Appeal; that extension of security of shs. 500,000/- to appeals would require amendment of the Act and that under Article 48 of the Constitution the appellant has a right to go to Court of Appeal.

Mr. Gatonye learned counsel for IEBC did not make submissions and left the issue to the discretion of the Court.

8. As regards the law, section 78(1) of the Act provides:

“A petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition under this part.”

Section 78(2) (b) provides among other things, that, a person who presents a petition against a Member of Parliament shall deposit shs. 500,000/-. Rule 11 of the Elections (Parliamentary and County Election) Petition Rules 2013, L.N. No. 54 of 2013 (Election Petition Rules) stipulates the manner of providing the security for costs.

Section 84 of the Act requires the Election Court to award the costs of and incidental to the petition and stipulates that such costs shall follow the cause. Rule 36 deals with costs and deposits after the conclusion of the election petition and requires the Election Court among other things to specify the total amount of costs payable.

Lastly, section 85A of the Act gives a right of appeal to the Court of Appeal on matters of law only and Rule 35 of Election Petition Rules provides:

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

9. It is indisputable from the wording of section 78 of the Act as a whole and from the definition of a “petition” and “Election Court” in section 2 of the Act as well as from the provisions of the relevant election petitions rules, that the deposit for security for costs is solely confined to election petitions filed in an Election Court. By Article 93(1) of the Constitution, Parliament consists of the National Assembly and the Senate. From the nature of the petition filed by the appellant in the Election Court, it was a petition against the 1st respondent as a member of Parliament and was by s.78 (2)(b) of the Act required to deposit shs. 500,000/- as security for costs. The purpose for which the deposit was made was served by the conclusion of the petition. The submission by Mr. Kanjama that Parliament did not intend that the requirement for deposit should solely apply to election petitions and further that Parliament did not intend a person to prosecute an appeal from the decision of an Election Court without providing sufficient security for costs is not supported by the Act or by any other law. If such was the intention of the Parliament it could have made express provisions in the Act and in the Election Petition Rules and could not have specifically excluded appeals from the operation of the Election Petition Rules.
10. Moreover, the present application was not made under s.78 of the Elections Act. To import the provisions of section 78 as a general rule regarding provisions of security for costs in election disputes including appeals to Court of Appeal is tantamount to legislating which is not the function of the Court. It may well be that Parliament deliberately avoided legislating on deposit for security for costs in the appeals in the Court of Appeal as an election petition is quite distinct from an appeal. An appeal is confined to matters of law while an election petition involves, in many cases, a mass of factual evidence. By providing for a relatively large and a mandatory deposit for security of costs the Parliament intended, among other things, to filter out frivolous

petitions.

It follows that the law to be applied in this application is not section 78 of the Act but rather, Rule 107(3) of the Court of Appeal Rules. However, that does not preclude the Court in exercising its discretion under Rule 107(3) to take cognizance of the fact that the appeal arises from an election petition and to give due consideration and weight to that fact.

11. By Rule 107(1) of the Court of Appeal Rules 2010 it is a mandatory procedural requirement that an appellant should on the institution of a civil appeal, deposit shs. 2,000/- as security for costs of the appeal unless the security has been waived under Rule 115(1). By Rule 107(3) 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.”

Although the respective counsel did not rely on any authorities, Rule 107(3) is in *pari materia* with former Rule 104(3) which has been considered in previous decisions and the principles applicable clearly enunciated (see Lalji Ganji v Nathoo Vassanjee [1960] EA 315, Noor Mohamed Abdulla v Patel [1962] EA, Marco Tool and Explosives Ltd. v Mamujee Brothers Ltd. [1988] KLR 730, Messina & Another v Stallion Insurance Co. Ltd. [2005] 1 KLR 431).

It is not necessary to restate the applicable principles. However it is to be remembered that the Court has unfettered discretion which should be exercised judicially. As was held in **Marco Tool Explosives Limited** (supra), much will depend on the circumstances of each case though the final result must be reasonable and modest.

12. However, it should be noted that these principles relate to ordinary civil appeals. Further the mandatory deposit for security of costs limited to shs. 2000/- is not even realistic in the present times because the cost of litigation even in simplest appeals far exceeds that limit. The electoral law falls within the sphere of public law with vast public interest. As already stated, the Court is not precluded from taking into account the nature of the appeal in exercising its discretion under Rule 107(3). However in exercising its direction, the Court has to take into consideration that an appellant from the decision of an Election Court has a constitutional right under Article 38(2) (a) of the Constitution to seek elective office. The principle of access to justice in Article 48 of the Constitution has also to be considered.

By that principle if further security is to be provided:

“It shall be reasonable and shall not impede access to justice.”

A requirement for the appellant to provide exceedingly high further security such as is required by the applicant, which may not be affordable or which may be obtained after great strain including obtaining a bank loan, would not only amount to a denial of the statutory right of appeal in election disputes but would also impede access to electoral justice.

13. In the present application it has been admitted by the applicant in paragraph 7 of the supporting affidavit that the appeal is substantial and touches on numerous matters of law. It has not been alleged that in lodging the appeal the appellant is acting in bad faith. There are no past costs to be secured because the Election Court did not make an order for costs. If the pending Constitutional Petition No. 175 of 2013 is an abuse of process of the court, the trial court will find so and compensate the applicant with costs. In the circumstances, although we are satisfied that the mandatory security of shs. 2,000/- already provided is hardly reasonable considering the nature of the appeal, it would be anomalous to require an appellant to provide further security far in excess of the statutory maximum of shs. 500,000/- required for election petitions in an Election Court. That statutory maximum should be the guiding principle when the Court is exercising its discretion under Rule 107(3) in relation to appeal from Election Court. However, the quantum of the further security will depend on the circumstances of each appeal.

14. For the foregoing reasons we allow the application to the extent, and we order, that the appellant (1st respondent) do provide further security for costs of the appeal in the sum of shs. 500,000/- to be deposited in a joint bank account within 30 days from the date hereof. Pending the provision of further security the appeal is stayed. In default of provision of additional security, the 1st respondent be at liberty to apply for the dismissal of the appeal.

Costs of this application be costs in the appeal

DATED and Delivered at Nairobi this 20th day of December, 2013.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/hg.