



REPUBLIC OF KENYA

High Court of Kisii

Election Petition 6 of 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ELECTIONS ACT, 2011 SECTIONS 75; 76; 77; 79; 80; 82; 86 AND 87

AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)

PETITION RULES 2013: RULES 3; 4; 5; 6(1)(A); 8; 9; 10; 11; 12; 13; 21; 32; 33 AND 38

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS, 2012

AND

IN THE MATTER OF THE ELECTION FOR MIGORI COUNTY

WOMEN REPRESENTATIVE HELD ON THE 4TH DAY OF MARCH 2013

FATUMA ZAINABU

MOHAMED.....PETITIONER

-VERSUS-

GHATI

DENNITAH.....1STRESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC).....2NDRESPONDENT**

**BENSON NJAU (KURIA EAST RETURNING
OFFICER).....3RDRESPONDENT**

**LILINA LILUMA (RETURNING OFFICER AWENDO
CONSTITUENCY).....4THRESPONDENT**

MOSES OMONDO DAULA

**(RETURNING OFFICER NYATIKE
CONSTITUENCY).....5THRESPONDENT**

**JACKTON NYONJE (RETURNING OFFICER ORIRI
CONSTITUENCY).....6THRESPONDENT**

**NOAH BOWEN (RONGO
CONSTITUENCY).....7THRESPONDENT**

**ALEX OYUGA (RETURNING OFFICER SUNA EAST
CONSTITUENCY).....8THRESPONDENT**

**MARTIN CHENGERE (RETURNING OFFICER SUNA WEST
CONSTITUENCY)....9THRESPONDENT**

**JAIRUS OBAGO (RETURNING OFFICER MIGORI
COUNTY).....10thRESPONDENT**

**ADAM MOHAMED (RETURNING OFFICER KURIA WEST
CONSTITUENCY)...11THRESPONDENT**

RULING

1. By a Notice of Motion dated the 24th April 2013, the Petitioner seeks an order for extension of time for deposit of security for costs in the election petition herein. The Notice of Motion is expressed to be brought under the provisions of Rule 20 of the Elections (Parliamentary and County Elections) Petition Rules 2013 and founded on the grounds that the Petitioner/applicant was for reasons beyond her control unable to deposit the money required for security for costs within the prescribed period; that she is now able and desires to deposit the said security upon such terms as the court may impose; and that the Respondents will not be prejudiced in any way if the order sought is granted.
2. The application is supported by the affidavit of the Petitioner in which she states that after filing the petition she managed to serve all the Respondents and was supposed to deposit security for costs in court within 10 days of lodging the petition. She explains that she sold her vehicle to raise the security money and was paid Kshs.680,000/= but was waylaid by unknown group of people who injured her and stole the money and she was consequently unable to deliver the money to her advocates for them to pay the deposit within time. She averred that the said delay was not intentional and that she has an arguable petition, and she produced a bundle of documents including an agreement for sale of his motor vehicle, log book and medical treatment note annexed to the affidavit in support of the application. She therefore urged the court to exercise its inherent jurisdiction in her favour of granting her leave to deposit the security for costs out of time.
3. The application is opposed. The 1st Respondent filed a replying affidavit on 2nd May 2013 and the 2nd – 11th Respondent also filed grounds of opposition dated 30th April 2013. The factual background of the application is not disputed.
4. Parties made oral arguments and cited case law and statutory authorities in support of their respective contentions. Mr. Kaburi who held brief for Mr. Murugu, counsel for the 2nd – 11th Respondent stated that he had instructions, despite earlier grounds of opposition to the application, not to oppose the application. The contest therefore remained between the Petitioner and the 2nd – 11th Respondents. Counsel for the 1st Respondent objected to the no-opposition stance of the 2nd – 11th Respondent and asked the court to consider their grounds of opposition to the application. I have looked at the grounds of opposition but since the same were not urged and elaborated in argument, I will consider the argument for and against only as presented by the Petitioner and the 1st Respondent. In addition, a party to a proceeding is at liberty to abandon a course of action that he may have adopted previously, if the same is done without prejudice to the other parties. As the 1st Respondent must be taken to have relied on the strength of her own case rather than the support of the 2nd – 11th Respondents, I do not see any prejudice to her.
5. Counsel for Petitioner, Mr. Nyangoro, reiterated the averments contained in the application and the supporting affidavit thereto and relied on Rule 20 of Legal Notice no. 54 of 15th March 2013 which he contended allows extension of time. The full argument in Counsel's submissions-in-chief and in reply to Counsel for the 1st Respondent are set out below:

“Mr. Nyangoro:-

[The] Application under Order [Rule] 20 of Rules on Election Petitions is supported by affidavit of the applicant of 24/4/13. The application is based on the ground that the applicant was unable to deposit the security by reasons beyond her control. The Respondents will not be prejudiced in any way by the grant of the said orders. The supporting affidavit depones that petition was filed on 8/4/13. The 2nd Respondent was served on 10/4/13 and the other Respondents on 16/4/13 by Newspaper advertisement. The security should have been lodged on 18/4/13. She entered into a sale agreement for a car on 15/4/13 for purposes of raising money for the deposit. On the way home she was waylaid by a gang of attackers and robbed her handbag which contained the money. She was therefore unable to

deposit the money with her advocate for purposes of lodging with the court. She requests that the court extends time for her to lodge the security. I refer to the exhibit to the affidavit.

I rely on the following authorities:

- 1. Legal Notice No. 54 of 15/3/13 rule 20 thereof. This is a new rule which allows extension of time. Previously the law did not allow for extension of time as happened in Esposito Franco –vs- Amason Kingi Joffa & Another, Court of Appeal, Civil Appeal No. 248 of 2008. The court found that there was no provision for extension of time. The same was the case in the Supreme Court Petition Nos 3, 4 and 5 of 2013 Raila Odinga &Ors -vs- IEBC (2013) eKLR, where the court dismissed an application because leave was not sought at pre-trial conference.**
- 2. In the Orissa High Court of India Raja Pal -vs- Election Officer –Cum- Block 96 (2003) CLT 663 held that the petition could not be locked out for not depositing costs.**
- 3. Egerton University -vs- Republic Court of Appeal Civil Application No. 65 of 2004 held that the discretion of the court to extend time is to be considered if appeal is not frivolous and delay is explained.**
- 4. Wasike -vs- Khisa & Another CACA No. NAI 248 of 2003 holding No. 2, 3 and 4 of the authority.**
- 5. Charan Lal Sahu –vs- Nandkishore Bhatt (1973) AIR 2464.**

The reply by Mr. Ondieki relies on section 78(3) of the Elections Act. The rules which were set thereafter by LN 54 of 2013 of 15/3/2013. The rule allows the extension of time without contravening the Constitution or the Act. The section 78(3) of the Elections Act, provides that the Respondent may apply to court. In dismissal of the petition, the applicant has come to court with clean hands, and the applicant prays that the court exercises discretion. I also rely on Article 159(2) (d) of the constitution of Kenya. The deposit of costs security is procedural technicality. I wish to bring to the court attention that the previous position to the law has changed: Rule 20 of Legal Notice No. 54 of 2013 and has discretion. The 1st Respondent has not served us with the documents except the replying affidavit and Notice of Motion to dismiss filed today. The law is changed to permit the extension of time. The Constitution gives the applicant an opportunity to seek substantial justice under Article 159. In the Raila case the rejection was because the applicant did not seek leave. The applicant herein seeks leave before doing the Act. The applicant came to court when she was able to pay the deposit. The 2nd – 11th Respondents do not object to the application. Section 78 of the Elections Act has to be read in accordance with Rules under Legal Notice 54 of 2013.”

6. Counsel for the 1st Respondent, Mr. Ondieki, based his argument on international good practice citing several international human rights instruments; the directions on computation of time under Article 259 of the Constitution; and the provisions on deposit of security for costs under section 78 of the Elections Act, to submit that election disputes are supposed to be determined expeditiously and that the requirement for deposit of security is couched in mandatory terms and there was, therefore, no basis for extension of time; that the delay of 6 days outside the prescribed period of 10 days was inordinate delay; and that the provision of security for costs was a fundamental requirement going to the root of the Petition which could not be cured by the substantial justice without regard for technicalities of procedure under Article 159 of the Constitution. Counsel further submitted that despite the sympathy for the applicant’s plight, the application is prejudicial to the 1st Respondent as it is highly costly to manage a petition, and the court had no discretion in the matter. Counsel therefore urged the court to reject the Petitioner’s application and allow the application for the dismissal of the petition filed by the 1st Respondent to proceed to hearing. Counsel’s full argument is set out below:

“Mr. Ondieki:-

The application is opposed.

1. *Article 259 of the Constitution prescribes the time expressed in days, the Petitioner should have filed by the 19/4/13. The application should have been filed between 9-19 April 2013, or at least between 16-19 April 2013 after they were attacked. The delay of 6 days after 19/4/13 is inordinate delay.*
2. *Section 78(1) is couched in mandatory terms. The application should have been brought within the 10 days. The time has already lapsed and there is no basis for the extension sought.*
3. *Article 2(4) of the Constitution. Section 78(1) and (3) of the Elections Act requires that there be no further proceedings and the court has no jurisdiction to entertain the application before the court. The court has only jurisdiction to dismiss the petition. We have an application dated 2/5/13 and we have served on the Petitioner. The Notice of Motion seeks to dismiss the Petition on the ground for want of deposit of costs. The applicant has forfeited his chance to apply. The court cannot extend time that has lapsed.*
4. *Article 159(2) (d) cannot cure this mistake. Security for costs goes to the root of the petition. It is not a technicality. It is the social foundation of the petition. The court can allow minor technicality not substance.*
5. *Rule 11 of the LN 54 of 2013 recasts section 78 of the Election Act. The introduction of the law requires election petitions to be decided expeditiously hence the provision of the security to keep away non serious Petitioners. The applicant slept on her right for six days.*
6. *International good practices Article 12 of the UN Covenant on Civil and Political Rights requires election disputes to be resolved expeditiously.*
7. *The grounds of objection dated 30/4/13 contradict the position given by counsel for the 2nd – 11th Respondents before the court. It is dishonest to say that they do not object to the application after filing the grounds of objection. The grounds of objection should be given effect.*
8. *The application is prejudicial to the 1st Respondent. It is highly costly to manage the petition.*
9. *The supporting affidavit creates a sympathetic story. The court of law must be faithful to the law. The applicant had four days to come to court before the expiry of the 10 days. The medical report shows she only suffered tissue injury and she should have come to court earlier.*
10. *If the Rules purports to give the court discretion, they are ultra vires the Act. Section 78(1) and (3) are mandatory.*
11. *Authorities are distinguishable.*
 - (a) *Esposito decision is in favour of the Respondent, paragraph 43.*
 - (b) *Raila case before Supreme Court at page 5 thereof. Respondents should not shoulder the burden of applicant's omissions.*
 - (c) *(1973) AIR 2464 – Petition was dismissed for want of security of costs. The court cannot extend time. The court rejected the petition. The Constitution of Kenya Article 259 (5) (a) recognizes the value of time. I also refer to paragraph 6 of Article 259.*
 - (d) *Egerton case. The time frame under Rules 4 and 5 (2) (b) of the Court of Appeal Rules is different. The period of 6 months is provided by Article 105 (2) of the Constitution.*

The court has no discretion. The court should reject the application and allow the application by the Respondent to dismiss petition to proceed.”

Issues for determination

7. Two issues arise for determination in this application for enlargement of time as follows:
- a. Whether an election court has power to enlarge time for the deposit of security for costs in an election petition.
 - b. Whether the court will enlarge the time for the deposit of security for costs in respect of this Petition.

Whether an election court has power to enlarge time for the deposit of security for costs in an election petition.

8. The determination of this issue depends on findings on related sub-issues or questions, namely: the underpinning philosophy of election law; whether the security for costs in an election petition is a matter of procedure or a substantive requirement going to the jurisdictional root of the petition; whether the time within which to deposit security for costs is a matter of procedure or substantive requirement; and the true construction of the juridical provisions on the security for costs in election petitions. The Constitution of Kenya under Article 159 (2) (d) requires the court to render substantial justice without regard to technicalities of procedure, and therefore those aspects of the issue in dispute that are properly the province of procedure are malleable to the dictates of Article 159, but not those of substantive import.

9. Starting at the beginning, the right to vote has been accepted nationally and internationally as a fundamental human right and its enforcement and jealous guarding must be the duty of every constitutional or election court. Every election petition is an opportunity for the court to give effect to the voting rights of the parties, with outcome depending on the facts of the case. The two leading human rights instruments, the Universal Declaration of Human Rights 1948 and the United Nations Covenant on Civil and Political Rights, 1966 emphasize the right of citizens of the world states to participate in “genuine periodic elections” guaranteeing free expression of the will of the electors for purposes of conferring authority of government on the duly elected leaders. See Article 21 (3) of the Universal Declaration of Human Rights 1948 and Article 25 (2) of the United Nations Covenant on Civil and Political Rights, 1966. These instruments are part of the Kenya law by virtue of Article 2 (6) of the Constitution.

10. Our own Constitution of Kenya, 2010 has entrenched this primary right under Article 38 (2) and (3) which are in the following terms:

“38.(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the elections for:-

- (a) **Any elective public body or office established under this constitution; or**
- (b) **Any office of any political party of which the citizen is a member”.**

(3) Every citizen has the right without unreasonable restrictions:-

- (a) **To be registered as a voter.**
- (b) **To vote by secret ballot in any election or referendum; and**
- (c) ***To be a candidate for public office or office within a political party of which the citizen is a member and if elected to hold office”.* (Emphasis added).**

Having offered themselves as candidates for the position of Women Representative in Parliament created under the Constitution, the Petitioner and the Respondent are entitled to the Article 38 rights significantly ***“to be a candidate for public office or office within a political party of which the citizen is a member***

and if elected to hold office.” The right to hold office if elected necessarily encompasses a right to a determination in accordance with the law by a court or other lawful authority that one is the duly elected candidate to the office. Following the declaration of the Respondent as the duly elected Women Representative for the County of Migori and the Petitioner being aggrieved by that declaration, the Petitioner was under the Constitution entitled to file an election petition for the determination of the election dispute. The Petitioner herein exercised her right to petition the court in accordance with Article 87 of the Constitution for the determination of the dispute, which under Article 105 (2) must be heard and determined within six months after lodging the petition.

11. Article 87 (1) of the Constitution of Kenya provides that:

“Parliament shall enact legislation to establish mechanism for timely settling of electoral disputes”

and Parliament has enacted the Elections Act 2011, which makes provision under section 78 (1) for the deposit of security for costs within 10 days of the filing of the petition.

12. From the above exposition of the relevant provisions of international instruments and the Constitution of Kenya, the following principles may be discerned for guidance in determination of electoral disputes:

- a. Every citizen is entitled to genuine periodic elections or *‘free, fair and regular elections based on universal suffrage and the free expression of the will of the electors’* as put in the Bill of Rights of the Constitution of Kenya.
- b. Every adult citizen is entitled, **without unreasonable restrictions**, to be a candidate for public office and to hold office if elected and, for purposes of establishing such election, to seek a right to a determination by a court or other lawful authority that one is the duly elected to the office. This coincides with the constitutional right to access to justice under section 48 of the Constitution.
- c. In proceedings for election petitions, timely settlement of the dispute will take primacy in accordance with the constitutional prescription.

The court must keep in mind these election dispute resolution principles while considering any election matter.

Whether the provision for deposit of security for costs in an election petition is a matter of procedure or a substantive requirement

13. Whether the provision for deposit of security for costs in an election petition is a matter of procedure or a substantive requirement going to the jurisdictional root of the petition depends upon a determination of the true object of the provision for security for costs or the purpose of the requirement for security for costs. It is not an end of itself, for its own sake. It serves a purpose whose discovery is the key to the determination as to whether it is a procedural or substantive requirement. First principles on the provision of security for costs disclose an intention in the creators of this judicial device to protect the defendant from financial ruin which may be occasioned by having to defend litigation proceedings filed against him in circumstances where it is difficult or impossible to recover his costs upon successful defence of the suit.

14. In discussing the power of the courts to order security of costs, the learned authors of the *Halsburys’ Laws of England*, 4th ed. at p. 225 Paragraph 298 observe that:

“In the following cases the plaintiff may be ordered to give such security for the defendant’s costs of the action or other proceeding as the court thinks just, namely where it appears to the court:

- 1. That the plaintiff is ordinarily resident out of the jurisdiction;***
- 2. That the plaintiff, not being a plaintiff who is suing in a representative capacity, is a nominal***

plaintiff who is suing for the benefit of some other person and there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so;

3. That the address of the plaintiff is not stated in the writ or other originating process or is incorrectly stated there unless the court is satisfied that the failure to state the address or the misstatement was made innocently and without intention to deceive;

4. That the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation.

In addition, the court has statutory power to order a plaintiff limited liability company to give security for costs; and similar power is conferred by other statutory provisions.”

Clearly, the object of the provision for security of costs is to protect a likely successful defendant from loss by way of the costs of litigation incurred in his defence of the plaintiff’s claim. As Khamoni. J. in ***Re Estate of Karanja***, (2002) 2 KLR 34, 43 observed “it is the defendant in whose favour an order for security is made against the plaintiff or a person who is a position of plaintiff, substantially.”

15. Is Security for Costs substantive or procedural requirement? As I understand it, the law on security for costs provides that no proceeding should be had before security for costs is given for the protection of the defendant, where it ordered in exercise of discretion by the court or by statutory requirement. In order to protect a defendant or a person who occupies the position of a defendant, such as a Respondent in an election petition, from unrecoverable costs, further proceedings in the matter are prohibited before provision of security for costs. In the case of election petitions, section 78(3) of the Elections Act, provides that in default of deposit of security for costs “*no further proceedings shall be heard on the petition and the Respondent may apply to the election court for and order to dismiss the petition*”. However, for reasons set out below, I do not find that an application for extension of time to make the deposit of security for costs is barred by this provision. The section would bar the hearing of the petition but not an interlocutory application for extension of time to make the deposit of security for costs.

16. The provision for security for costs enables the court to proceed with the hearing of petition or other proceedings and the lack of it halts the court’s right to take further proceedings in the matter. Accordingly, security for costs, whether it is required by statutory provision or order of the court, must be taken as going to the root of the jurisdiction of the court to entertain the dispute. If no security for costs is deposited then the petition or other proceeding though validly lodged before the court in accordance with the applicable procedure rules cannot proceed to hearing and determination as further proceedings are prohibited. As such, the provision for security for costs is, in my view, a substantive requirement underpinning the jurisdiction of the court to deal with the dispute in the proceedings in which the security for costs is required, and is based on the sound principle for the protection of the defendant from unrecoverable costs.

Is the time for provision of security for costs a matter of substantive requirement or procedure amenable to remedy under Article 159 of the Constitution and other enabling law.

17. That an application for extension of time may be made even when “no further proceedings shall be heard” is obvious from the following provisions of procedure. Order 26 Rule 5 of the Civil Procedure Rules also provides an insight as to the operation of the security for costs by giving its effect as follows:

“5(1) if security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall upon application, dismiss the suit.

(2)If a suit is dismissed under subrule (1) and the plaintiff proves that he was prevented by sufficient cause from giving the required security for costs, the court may set aside the order dismissing the suit and extend the time for giving the required security”.

Moreover, Order 50 Rule (6) provides for extension of time in these terms:

“Where limited time has been fixed for doing any act or taking any proceedings under the these Rules or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of time appointed or allowed:” (Emphasis added).

It is clear therefore that in civil proceedings, extension of time to deposit security for costs is not only possible before and after the lapse of the time allowed for such deposit, but also after the dismissal of the suit in default of the security. Because of this flexibility with regard to the time-lines for furnishing security for costs through extension of time by the court, the time prescribed for the deposit of security for costs in civil proceedings is obviously a matter of procedure which is not cast in stone. Is this the position with regard to election petitions?

Juridical provisions on security for costs in election petitions

18. Section 78 of the Elections Act is the statutory basis for the requirement of the deposit, not later than 10 days after the presentation of an election petition, of security for costs in varied amounts depending on the level of the elective post the subject of the petition. Under section 78 (3) “where a Petitioner does not deposit security as required, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the Respondent may apply to the election court for and order to dismiss the petition and for the payment of the Respondent’s cost.” Rule 11 of the Election (Parliamentary and County Elections) Petition Rules, L.N. No. 54 of 2013 of 15th March 2013 (hereinafter referred to as the Election Petition Rules) is restatement of the requirement for the deposit of security for costs within 10 days of the election petition. Under Rule 20 of the Election Petition Rules, the court is granted power of extension of time in these terms:

“20. Where any matter is to be done within one time provided for in these rules or granted by the court, the court may, for purposes of ensuring that no injustice is done to any party, extend the time within which the thing shall be done on such terms or conditions as it may consider fit even though the period initially provided or granted may have expired.”

Although it was submitted for the Petitioner that this rule authorized the extension of time to make the deposit of security of costs under Rule 11 of the Election Petition Rules, I take the view that the rules cannot legislate a power for extension of time which is not expressly authorized under the relevant section of the Statute by the authority of which the Rules are made. There is no express provision under the Elections Act 2011 for the enlargement of time to deposit the security for costs. Accordingly, the power to extend time cannot be authorized by the general power under Rule 20 of the Election Petition Rules to extend time for the doing of any act under the Rules.

19. Counsel for the Petitioner cited the case of *Eposito Franco v. Amason Kingi and 2 Ors.* Court of Appeal Civil Appeal No. 248 of 2008 stating that the holding of the court that there was no power to extend the time for deposit of security for casts was consistent with the position of the law before the change introduced by the Rule 20 of the Election Petition Rules to allow extension. Counsel also cited, as showing the same old position, the Indian decisions of the Supreme Court in *Charan Lal Sahu v. Nandikishore Bhatt & Ors.* (1973) AIR 2464 and of the Orissa High Court in *Raja Pal v. Election Officer-Cum-Block* 96 (2003) CLT 663. The court was unable to take full benefit of the Indian decisions as the same referred to statutory provisions of Indian Acts which were not sufficiently set out in the decisions. I noted however that the position regarding the effect of security for costs was not uniform all over India as the Court in the *Raja Pal* decision observed:

“We have perused the decision of the Supreme Court in *K. Kamaraja Nadar v. Kunju Thevar and Ors.* (supra) cited by Mr. Ray and we find that the said decision of the Supreme Court has been rendered in a case covered by the Representation of the People Act, 1951 and there is a clear provision in section 86 of the said act that where the election petition does not comply with the clear provisions of section 117 requiring security deposit along with the election petition, the High Court shall dismiss the election petition. But in the Orissa Panchayat Samiti Act there is no provision

similar to section 86 of the Representation of People act 1951 providing that where the election petition is not accompanied by security deposit of Rs. 200, the same shall be dismissed by the Election tribunal.”

20. I have also noted that unlike the Kenya case where the deposit for security may be filed within 10 days of filing of the election petition, the Indian position was that the election petition was to be accompanied by a security deposit. Section 117 of the Representation of the People Act, which is set out in the *Charan Lal Sahu* decision is in the following terms:

“117. Security for costs. – At the time of presenting an election petition, the Petitioner shall deposit in the High Court in accordance with the rules of the High Court a sum of two thousand rupees as security for the costs of the petition.”

It would appear to me that under the Indian situation of section 117 there would be no competent petition before the court without the accompaniment of the security deposit at the time of filing. The finding is reinforced by the fact that the right to petition on an election in India is expressly limited by the Constitution of India making it not a constitutional right but a statutory one whose exercise must strictly accord to the governing statute. In discussing this position, the Supreme Court of India in the *Charan Lal Sahu* case at p. 296 held:

“The right to challenge an election is a right provided by Article 329 (b) of the Constitution of India, which provides that no election to either House of Parliament or either House of Legislature of a State shall be called in question except by petition presented to such authority and in such a manner as may be provided for by or under any law made by the appropriate Legislature. The right conferred being a statutory right, the terms of that statute had to be complied with. There is no question of any common law right to challenge an election. Any discretion to condone the delay in presentation of the petition or to absolve the Petitioner from payment of security for costs can only be provided under the statute governing election disputes. If no discretion is conferred in respect of any of these matters, none can be exercised under any general law or any principle of equity. This Court has held that the right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it. In *N. P. Ponnuswami v. Returning Officer, Namekkal Constituency and Others* (1952) S.C.R. 218 it was pointed out that strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the Legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it.” (Emphasis added).

21. The Kenyan *Eposito* decision was based on the provisions of the former Constitution of Kenya and the former elections Act, the Presidential and National Assembly Elections Act cap .7, both now repealed respectively by the Constitution of Kenya 2010 and the Elections Act 2011. On the question of extension of time to deposit security for costs, the Court took a position similar to the Indian position holding at para. 39 as follows:

“Unlike the case before us, the *Kimutai* case was one where the Petitioner conceded that there was no deposit offered or made. It is also evident from the decision that the issue as to whether extension of time was permissible was left undecided but it the issue now before us. In our view, the tenor of the Constitution (now repealed), statutory provisions, and rules relating to petitions, coupled with the absence of any express provision for extension of time, are pointers to the intention of Parliament that time would not be extended. Another pointer to the intention to limit the discretion of court was the deletion of in 1979 (by Act No. 19/79) of a useful provision in section 21(4) which donated power to the court to accommodate poor who were unable to raise the security deposit of Sh.5000/- at the time. The upshot is that the terms set for the filing of an election petition are conditions precedent, non-compliance of which attracts the irreversible consequence of nullifying the petition.”

22. The position in Kenya today is clearly different from the Indian situation and the old Kenya election dispute resolution regime. It has been changed not by the provisions of Rule 20 of the Election Petition Rules as contended by the Counsel for the Petitioner but by the Constitution of Kenya 2010. Under the Constitution, there is now a constitutional right to vote including the right to approach the Court on an election petition, which is a hybrid constitutional right being both a fundamental human right or civil right under Article 38 (3) (c) of the Bill of Rights and a political right under Articles 87 and 105 of the Constitution of Kenya 2010. The Elections Act of Kenya does not create or give the right to challenge an election as is the case for India. The object of the Act in accordance with Articles 87 (1) and 105 (3) of the Constitution is to give effect to the constitutional right to vote. Therein lies the difference between the Indian situation and the current constitutional dispensation of Kenya. Accordingly, where the Elections Act restricts the enjoyment of the constitutional right, the Constitution, in terms of Article 2 (4) thereof must prevail. I consider that if section 78 (3) of the Elections Act were construed as not allowing for any good cause an extension of time to deposit security for costs, it would unreasonably restrict the right to approach the court for a determination whether one has been elected to hold office, inconsistently with the constitutional right under Article 38 (3) (c) of the Constitution for *“every adult citizen has the right without unreasonable restrictions to be a candidate for public office or office within a political party of which the citizen is a member and if elected to hold office”*. Accordingly, I find that the time prescribed for deposit of security for costs is a matter of procedure rather than substance of the right to petition the court on election dispute, which is granted by the Constitution itself.

23. In addition, the provision under sub-section 3 of section 78 of the Elections Act for the Respondent to apply for an order to dismiss the petition indicates that the dismissal of the petition is not automatic upon the default of the Petitioner to deposit the security for costs within the prescribed time. In my view, the procedure for application to court for an order to dismiss the petition provides an avenue for the Petitioner to show cause why the petition should not be dismissed on the ground of default of security by seeking leave of court to lodge the security out of time. The discretion to grant such leave must, of course, be exercised judicially for good cause shown.

24. The contention by counsel for the 1st Respondent that the application for extension of time should have been brought within and not later than the 10 days prescribed for the deposit of the security is, with respect, not well founded. Such a proposition would require that the misfortune or other cause that warrants the seeking of enlargement of time must happen well before the expiry of the 10 day period to enable the affected party to seek court’s extension of time within the period. It would shut out from any hope of extension of time all those Petitioners who would be unfortunate enough to have their misfortune strike on the 10th day of the stipulated period because they would never have an opportunity to come to court for extension within the prescribed period. This school of thought is contrary to provisions on enlargement of time under the Constitution, the Interpretations and General Provisions Act and the Civil Procedure Rules, which clearly provide for enlargement of time even where the application for enlargement is made after the expiry of the stipulated period. Article 259 (9) of the Constitution, provides that:

“if any person or state organ has authority under the constitution to extend a period of time prescribed under this constitution, the authority may be exercised either before or after the end of the period, unless a contrary intention is expressly mentioned in the provision conferring the authority.”

In terms similar to Article 259 (9), section 59 of the Interpretation and General Provisions Act, Cap 2 provides as follows:

“59. Where in a written law a time is prescribed for doing an act or taking proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiry of the time prescribed.”

See also Order 50 Rule 6 of the Civil Procedure Rules and Rule 20 of the Election Petition Rules set out above.

Accordingly, I find that the Court has power to enlarge time for the deposit of security for costs in an election petition and that this power to enlarge time may be exercised on application either before or after the expiry of the prescribed period of 10 days. I also find that being a matter of procedure, the provision for the time within which to deposit the security for costs may be extended in the interests of justice.

Whether the court will enlarge the time for the deposit of security for costs in this Petition.

25. Having determined that power to enlarge time for deposit of the security exists under the proper construction of section 78 of the Elections Act being a provision to give effect to the constitutional right to vote and access court for determination of election disputes under Articles 38, 87 and 105 of the Constitution, and further weighing the constitutional rights of the Petitioner and the Respondent, respectively, the Petitioner’s voting right to a determination of the election dispute as to whether she was elected to the office and the Respondent’s entitlement to a timely settlement of the dispute within the 6-month period of which four (4) months still remain, I think that the Respondent’s interest in the protection offered by security for costs and in expedited disposal of the dispute will still be met even if a short extension of the time for the deposit of the security for costs is ordered. I have also noted the circumstances, in which the Petitioner’s default in making the deposit in time occurred and I do not consider the delay of 6 days after the expiry of the prescribed 10 day period to be inordinate delay in the circumstances. The Petitioner is ready to deposit the security for costs so the Respondent’s interest in the protection against unrecoverable costs in that regard is well covered.

26. In accordance with the analogy of the Proviso to Rule 6 of Order 50 of the Civil Procedure Rules, that ***“provided that the costs of any application to extend such time and any order made thereon shall be borne by the parties making such application, unless the court orders otherwise,”*** the Petitioner herein must pay the Respondents costs.

27. The court is grateful to the Counsel for the parties for the industry that must have gone into researching and prosecuting their respective briefs and their resourcefulness in presenting the relevant case-law and materials, although some, which related to the exercise of jurisdiction to enlarge time in the Court of Appeal and the Supreme Court, were not directly relevant.

28. For the reasons set out above, I grant the Petitioner’s application for leave to deposit the security for costs out of time on condition that the same is deposited into court within the next one day from the date of this ruling. For avoidance of doubt, the Petitioner must deposit the sum of Ksh.500,000/- security of costs by or before the close of court business on Thursday, the 23rd May 2013. The matter will be mentioned on Friday, the 24th May 2013 for further orders as appropriate.

29. The Petitioner will pay to the Respondent the Costs of the application to be agreed between the parties or taxed by the taxing officer of the court in default of agreement.

Dated, Signed and Delivered in Open Court at Kisii this 21st day of May 2013.

.....

EDWARD M. MURIITHI

JUDGE

In the presence of: -

.....**for the Petitioner**

.....**for the 1st Respondent**

.....for the 2nd – 11th Respondents

.....Court Clerk

.....

EDWARD M. MURIITHI

JUDGE