REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

ELECTION PETITION CASE NO. 6 OF 2013

IN THE MATTER OF THE ELECTION ACT NO. 24 OF 2011 LAWS OF KENYA AND THE ELECTIONS (GENERAL) REGULATIONS 2012 AND ELECTIONS (PARLIAMENTARY AND COUNTY) PETITION RULES

AND

IN THE MATTER OF PARLIAMENTARY ELECTIONS FOR SENATE MAKUENI COUNTY HELD ON 4TH MARCH, 2013

BETWEEN

PARTY OF INDEPENDENT CANDIDATE OF KENYA….....……1ST PETITIONER

JOHN HARON MWAU …….2nd PETITIONER

VERSUS

HON. MUTULA KILONZO…….....1ST RESPONDENT

JOSEPH KAMANDI KITONYI……..2ND RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION……....3RD RESPONDENT

RULING

Background

1. General Elections in Kenya were held on the 4th march 2013.The Petitioners herein participated in the elections for the Senate in Makueni County. The 1stPetitioner, a political party nominated the 2nd Petitioner to vie for the Senatorial Elections. Elections were conducted by the 2nd Respondent an appointee of the 3rd Respondent, a body Corporate with the responsibility of conducting elections.
2. At the conclusion of the elections the 1st Respondent was declared the winner and Senator of Makueni County. The results were gazetted and a certificate thereof issued.
3. The Petitioners were dissatisfied by the results therefore petitioned this court praying for orders as follows:-

- The elections were void and invalid.
- The 1st Respondent was not validly elected as the Senator of Makueni County.
- The Respondents be condemned to pay costs of the elections.

4. The Respondents filed Answers opposing the Petition.
5. The 1st Respondent died on the 27th April 2013.A date for the by-elections has been set.

Application

6. The Petitioners have filed an application to withdraw the election petition dated 10th June 2013. The application is premised on the following grounds;-

i. ***The purpose of the Petition was for the court to hear and determine whether the 1st Respondent (deceased) was validly elected as amemberof the Senate for Makueni County, and as a result of the court's finding, whether theMakueni County Senate seat became vacant.***
ii. ***It is trite law that if after hearing the Petition the court finds that the person was not validly elected as a member of parliament; it follows therefore thatthe court must declare the seat vacant.***
iii. ***The grievances raised by the petitioners in the Petition were intended to persuade the court to determine whether, as a result of the malpractices pointed out, the seat became vacant in order to trigger a by-election.***
iv. ***A parliamentary seat can only become vacant by virtue of Articles103 (1) (a) and 105(1)(b) of the Constitution.***
v. ***The jurisdiction of the Petition Court is only to determine the two questions provided for under Article 105 of the Constitution.***
vi. ***If a seat becomes vacant under Article 103(1) (a) of the Constitution, it would be superfluous to continue with the petition in order to make a subsequent determination under Article 105 of the Constitution, whether the seat became vacant or not, after the vacancy has already occurred.***
vii. ***Once a seat has become vacant under Article 103(1) (a),the Court will have no jurisdiction to later determine whether the seat has become vacant or not, as such a decision will have been overtaken by events.***
viii. ***There is no dispute that the seat which is the subject of this Petition became vacant on the 27th April 2013,under Article 103(1)(a),when the 1st respondentPassed on.***
ix. ***By its ruling dated 29th may 2013,the court is seized with the fact that the Senate seat for Makueni County became vacant and the Speaker of the Senate has declared the same under Article 101(2) and (4) of the Constitution and in the circumstances, it will serve no practical purpose to proceed with the petition with a view of the court determining whether the said Senate seat has become vacant or not.***
x. ***The occurrence of a vacancy envisaged under Article 103(1) (a) and 105(1) (b) are the same and serve the same purpose:that of triggering a by-election.***
xi. ***It is a matter of judicial notice that the seat which is the subject of this petition has been declared vacant and the Independent Electoral and Boundaries Commission has also been declared a by-election and issued a timetable to the effect that the elections will be held on the 22nd July 2013.***
xii. ***In the event the petition proceeds, and the court determines that the Senate seat has become vacant under Article 105(1)(b) after the by-election has been held on the 22nd July 2013,there is a grey area whether such determination will affect the constitutional rights of the returned candidate of the said by-election.***
xiii. ***If,after the by-election on the 22nd of July,2013, another person is returned as the validly elected member of the Senate Makueni County and this Petition continues, and the court at a future date determines that the 1st respondent (now deceased) was not validly elected and that a seat has become vacant pursuant to Article 105 (1) (b) of the Constitution, what the Petitioners' remedy would be under the law is unclear.***
xiv. ***Rule 29 of the Elections(Parliamentary and the County) Petition Rules,2013,(Rules) does not***

provision for the Petitioners' remedies if the courts were to find that the seat has become vacant after the by-election has been conducted and a third party has been declared as validly elected, hence the conflict of interest between Articles 101,103,105 of the Constitution and Rule 29 of the Rules, 2013, pointed out in the Petitioners Notice of motion Application dated the 14th May,2013.

xv. ***On the fact that the untimely demise of the 1st Respondent was an act of God, the seat has been declared vacant and the by-election for the seat which is subject for this Petition is on-going, and there being likelihoodthat Judgment will have no effect on the results of the by-election to be held on the 22nd July 2013, continuing with the Petition will not serve the interests of justice and will not be of any remedial purpose, save for consuming and occupying the honorable court's time.***

xvi. ***The 2nd and 3rd Respondents, despite being ordered by the court to provide the Petitioners with the documents necessary for this petition sought under Article 35 of the Constitution have failed to comply with the court order and have continued to neglect and to refuse to provide the said documents purposefully to disenfranchise the Petitioners from getting fair justice and there is no guarantee that if the petition continues, they will provide the said documents.***

xvii. ***The petition is at its earliest stage where the pre-trial proceedings have not even taken place.***

xviii. ***In the event that the Petitioners are successful against the remaining Respondents, there is no gainful remedial measure to the Petitioners.***

xix. ***In the event that the Petitioners are successful against the remaining Respondents, there is no gainful remedial measure to the Petitioners.***

xx. ***This application has been brought in a timely manner and isthe most efficacious way of resolving these peculiar and unprecedented circumstances affecting the petition.***

xxi. ***In the circumstances, it is only fair and just that each party to Petition bears its costs.***

7. The application is supported by affidavits sworn by **Julius Wambua** and **John HarunMwau** the 2nd Petitioner.
8. Counsel for the 2nd and 3rd Respondents filed the following grounds of opposition:-

a. ***The application is an abuse of the court process in that the grounds upon which the application is based are grounds that are res judicata.***

b. ***The grounds upon which the application is based are grounds that are untenable in law as they do misrepresent the provisions of the law.***

c. ***The grounds upon which the application is made are grounds that are a misrepresentation of facts.***

d. ***Costs follow the event. The 2nd and 3rd respondents having vigorously opposed the petition are entitled to costs of the Petition.***

Submissions

9. **Mr.Omwanza** for the Petitioners submitted that there are two instances when a seat becomes vacant but what is specific to this case is the fact that the court has to determine whether a member of Senate was validly elected and if the seat has become vacant.
10. He submitted further that the seat had indeed become vacant therefore the issue the court had to determine was whether the Senator was validly elected. He alluded to the timeline for Makueni Senate by-election issued by the 2nd Respondent to fill the vacant seat. The contention of the Petitioners was that there was no useful purpose to continue with the Petition.
11. Secondly, Counsel argued that if the Petition were to proceed and the court were to hear and grant prayers sought, there is a grey area whether such determination will affect the constitutional rights of the returned candidate.
12. Thirdly, Counsel stated that the application had been brought without undue delay since the pre-trial hearing had not commenced. The withdrawal would bring the matter to an end. According to Section 84 of the Elections Act, costs would follow the event. The successful party, would be indemnified. However, he argued that since the 1st Respondent had died there was no successful party the adjudication was not onmerit. He called upon the court to exercise its discretion by

ordering each party to bear their own costs. The interest of constituents was to participate in the by-election; costs would therefore not follow the event.

13. Counsel for the 2nd and 3rd respondents, **Mr.Murugara** in response thereof was not opposed to the withdrawal of the Petition in principle save to the costs of the case. He argued that the grounds filed in support of the application for withdrawal were misstatements of facts and law and matters of res judicata, hence not valid.

Analysis

Ground1 and 2

14. It is true, this court was to hear the Petition and determine whether the 1st Respondent was validly elected as a member of Senate MakueniCounty. Arguing that the Court had jurisdiction to declare the seat vacant is a misstatement of the law because the court only nullifies an election and communicates to the Speaker. (*See Article 105(1) (a) (b) of the Constitution.)* Article 105(1) (b) gives the High Court power to declare a seat vacant if there is a dispute after the Speaker has declared it vacant. Article 105 (1) (a) on the other hand gives the High Court power to determine whether a person has been validly elected. That would not be contemplated to be a ground for withdrawal of the Petition under Rule 23 of the Rules. High Court can only declare a seat vacant after the Speaker declares it vacant party aggrieved moves to Court to have the question regarding the vacancy determined.

Ground 3

15. This is a matter that had not proceeded to pre-trial hearing. Having not heard the case, this court cannot establish whether the Senatorial Election was marred with malpractices.The petitioner can therefore not purport to rely on that ground for withdrawal of the Petition.

Ground 4

16. This is a misstatement of law. It is not true to state that a parliamentary seat can only become vacant by virtue of Article 103(1) (a) of the Constitution. Those are not the only circumstances that make the seat vacant as correctly submitted by Counsel for the 2nd and 3rd Respondents. There are other circumstances like a member resigning; removal from office; and being absent from the house for eight consecutive sittings without a satisfactory explanation. It is however, important to note that one of the circumstances that would lead to the seat being vacant is what is stipulated in Article 103 (1) (a) of the Constitution, namely when death occurs. That is a good ground for withdrawal of the Petition.

Ground 5

17. This would be applicable when the Court has to determine a dispute arising out a declaration by the Speaker that a seat has become vacant. That limb of the ground would not be applicable in the instant case.

Ground 6

18. Relief sought by the Petitioner included a declaration that the 1st Respondent had not been validly elected. Following the demise of the 1st Respondent, Article 103 (1) (a) became applicable. Although the Court would still make a declaration if the Petitioner continued with the suit as required by the Rules.It is a valid ground to base upon the withdrawal of the Petition.

Ground 7

19. It is incorrect to state that the Court will have no discretion to deal with the matter. The court is

seized of jurisdiction to continue with the matter as there are other respondents who are alive and the continuance of the Election Petition would therefore not be in vain as far as prayer (a) is concerned.

Ground 8

20. This is a good ground to be cited in the application for the withdrawal of the Petition. The demise of the 1st Respondent is not in dispute.

Ground 9

21. The Court did affirm that it was seized of jurisdiction to determine the matter as provided by the law. The Petitioner has not questioned that jurisdiction.

Ground10-12

22. The occurrence of the vacancy will trigger a by-election, the seat has already been declared vacant by the 3rd Respondent.

Ground 13

23. This would depend on when the petition would be concluded. The statement may not be correct.

Ground 14

24. It is a misstatement. The matter introduced is res judicata as was definitively dealt with in the Ruling dated 29th May 2013. The ground was rejected*(See Paragraph 34)* .

Ground 15-16

25. The matter is res judicata. It was addressed in the Ruling dated 29thMay 2013.

Ground 17-21

26. It is stated that each party should bear their costs because the Petition is still in the earliest stage where pre-trial proceedings have not taken place; If the Petitioners are successful they will not recover costs from the 1st Respondent who is deceased; and they will not get any remedial measure from the 2nd and 3rd Respondents; the application had been filed in a timely manner.

27. The 2nd and 3rd Respondents on the other hand argued that though there was death of the 1st Respondent it does not mean that they are not entitled to costs.The Respondents Counsel stated further that they answered to the allegations contained in the affidavits of the 1st and 2nd Petitioners filed on 3rd May 2013. They filed detailed and voluminous responses. He argued further that averments should not have been made in the 1st place they were therefore entitled to costs.

28. Petitions are withdrawn pursuant to Rule 23 of the Rules

which provide as follows:-

> ***"(1) An election petition shall not be withdrawn without leave of the court.***
>
> ***(2) The court shall grant leave on such terms as to the payment of costs or as the court may consider fit and just.***

(3) An application for leave to withdraw an election petition shall-

a. ***Be in the form EP 5 set out in the Schedule;***
b. ***Be signed by the Petitioner and his advocate;***
c. ***State the grounds on which the application is supported, and***
d. ***Be filed at the office of the Registrar***

> ***(4) The parties to the election petition and their advocates shall before leave for withdrawal of an election petition is granted, produce affidavits stating the ground on which the petition is intended to be withdrawn.***
>
> ***(5) Despite sub-rule (4), a court may, on cause being shown, dispense with the affidavit of a person if it seems to the court on special grounds to be fit and just.***
>
> ***(6) Each affidavit shall state "to the best of the deponent's knowledge and belief, 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 election petition."***
>
> **7. *Despite sub-rule (6), where a lawful agreement has been made with respect to the withdrawal of the election petition, the affidavit shall set out the terms of the agreement".***

29. The Court has the discretion to grant leave for withdrawal of the Petition as long as the Petitioner complies with Rule 23 of the Rules.

30. I have analyzed grounds relied on. I find ground 4, 6 and 8 to be valid grounds for withdrawal of the Petition.

31. It is a requirement that each affidavit stipulates that;-

> ***"To the best of the deponent's knowledge and belief, 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 election petition."(****See Rule 23(6) of the Rules).*

32. The Petitioners failed to comply with the provision. Failure to include the statement would be envisaged to render the application invalid. However, it is important to note that the overriding objective of the Rules is to ensure justice is done. (*See Rule 4*).Now that the 1st Respondent is deceased it is only reasonable to have the election Petition withdrawn.

33. Rule 24 (2) requires the Petitioner to Publish in the Gazette a notice of withdrawal of the election petition in form EP 6 set out on the1st schedule at the Petitioners own expense. In the case of ***Martin SarakweWechuliVs IEBC Election Petition No.7 of 2013,*** **Omondi, J**Stated thus:-

> ***"…an election petition is not just for the interest of an individual, but affects interest of the entire public; this is why the notice of withdrawal must be published in the Kenya Gazette****…"*

34. The Petitioners chose to flout the rule which is couched in mandatory terms. But with the reason aforestated, the application for withdrawal cannot fail on that ground.

Conclusion

35. From the foregoing it is apparent that in the interest of justice it is fair that I allow the application. I therefore grant the petitioners leave to withdraw the Election Petition.

The issue to be considered is payment of costs.

36. In Election Petitions costs follow the event as stated in Section 84 of the Elections Act. Rule 23 provides that the Court shall grant leave on such terms as to the payment of costs or as the Court may consider fit and just.

37. The main reason why this Petition should be withdrawn is due to the demise of the 1st Respondent .This would call upon the Court considering ordering each party to bear their own costs. In the case of ***Nedbank Swaziland Ltd verses SandileDlaminiNO.(144/2010) [2013] SZHC30*** (***2013)*****Maphalala J**. referred to the holding of ***Murray C J*** *in the case of****Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR)*** *at* ***227***, who stated as follows:

> ***"It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (FrippvsGibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at….In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."***

What then would be reasonable in the circumstances*?*

38. In this case the 1st Respondent died on the 27th April 2013. When the matter came up on the 13th May 2013, the Petitioners insisted on proceeding with the Petition. Thecourt directed them to submit on the issue of continuation of the Petition. On the 15th May 2013 the Petitioners contrary to the requirement of the law filed an application asking the court to terminate proceedings. The 2nd and 3rd Respondents had to file responses to the application. It was subsequently argued and Ruling thereto delivered on the 29th may 2013.

39. Looking at the affidavit deposed by the 1st Petitioner in support of the application for withdrawal, thedeponent, **JuliusWambua**inparagraph 3 states that the seat had been declared vacant hence the best cause was to withdraw the petition. In the 4th paragraph he states that the 2nd and 3rd Respondents had willfullyand with impunity refused to comply with the court order to supply them with documents in order to frustrate them. They therefore did not anticipate getting justice.

40. The conduct of parties must be considered. This is a matter where the Petitioners having sued the Respondents made them instruct advocates to represent them.They paid their legal fees. The advocates drew responses to the petition and the applications. It will be unfair and unreasonable to make them shoulder their own costs after they kept appearing in court as required. Consequently the Petitioners are condemned to pay costs of the 2nd and 3rd Respondents.

41. Parties shall file the Bill of costs to be taxed by the Deputy Registrar.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **24TH**day **JUNE, 2013**

L.N. MUTENDE

JUDGE