REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES COURT AT BUSIA

ELECTION PETITION NO. 8 OF 2017

YAITE PHILIP OKORONON ---------- PETITIONER

VERSUS

JAKAA GARDY ODARA----------1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC) ----------2ND RESPONDENT

RULING

At 10.00 Hours at PRE-TRIAL CONFERENCE on Monday 9th October 2017, this court observed that "The security for cash is not paid in full. Only Kshs. 60,000/- was paid on 20.9.17". the court recorded as follows; "Accordingly this matter is stood over generally". The matter rested at that.

Soon after the pretrial conference at about 14.30 Hours, on 9th October 2017, the Petitioner through his counsel M/S Okutta & CO Advocates jump-started the process and filed a Notice of motion dated 9th October 2017 for orders that:

1. That leave be and is hereby granted to the applicant to deposit a further Kshs. 40,000/- as security for costs.

2. That costs of this application be cost in the cause.

Which application was grounded on the broad facts that:-

a) That the Petitioner was unable to pay the entire amount of the Kshs. 100,000/- required all at once and only managed Kshs. 60,000/- and now the balance of Kshs 40,000/-

b) That the Petition filed is meritorious and should be hampered by none payment of Kshs. 40,000/- in good time

c) That the court has to determine the petition on its own merit

d) That the pre-trail conference is yet to be taken and the Respondents would not be prejudiced in any away.

It was supported by the affidavit of **YAITE PHILIP OKORONON** duly sworn and reiterating the same grounds.

That application was only filed but the same was not argued. Since two other application were filed in the meantime, this court made direction that all applications be heard on 16th October 2017

The petitioner's application was responded to by a Replying affidavit dated 10th October 2017 filed herein by Annet Mumalasi & Co. Advocates for the 1st Respondent herein and by a Replying affidavit and grounds of opposition both dated 12th October 2017 filed herein by Masire & Mogusu advocates for the 2nd Respondent herein.

SUBMISSIONS

When the application came up for hearing on 16/10/2017, Mr Okutta learned counsel for the petitioner submitted as follows;

Their application was seeking leave to pay the is premised in Article 159 (2) of the Constitution. Section 78 and 80 of the Elections act and Rule 5(1) (2) and (1) (2) of the Election Petition Rules (2017)

He submitted that the affidavit filed by the Petitioner/Applicant captures the furthered issues of our application. He explained that the petitioner filed the petition and paid 60,000/- as security for costs as the law demand. Due to inconsistencies he has explained, he was made to top up the 40,000/- required to make it to 100,000/- as required. He explained that he was unable to get the 40,000/- in good time and time elapsed. Having paid a partial amount in his view of the fact that direction on pre-trial have not been taken, he has come to court under the Constitution and Elections Act and Rules for this court to exercise its discretion and to extend time for payment of the balance of the security for costs amount. He submitted that the court should be guided by the purpose and interest of the Constitution. He submitted that Article 48 of the Constitution envisaged such situation whereby a Kenyan will not access justice by being incapacitated in terms of funds. He submitted that there should be no impediment to justice on accord of lack of funds. He submitted that Article 159 (2) of the same constitution guides court on how to proceed with this kind of matter.

He submitted that there is only a balance of 40,000/-. Article 159 (2) gives court immense powers not to be hampered by technicality but to look at the intended purpose of the law.

He posed the question whether Section of the law which requires deposit mandatory? He submitted that Section of the Elections Act says that if 100,000/- is not paid within 10 days the MCAs petition may be dismissed. He submitted that that is the meaning of Section 78 (1) of the Election Petitions. However, precautions in the High court have had similar solutions and urged the court to observe how they have handled this kind of situation. He submitted that even where Petitioner have not deposited even a single cent the High Court exercised its discretion and extended time. He submitted that each has to be looked at in its own facts so as to determine the merits.

He submitted that in this case 60,000/- which is 60% of the requisite security is paid. The petitioner has the balance but he cannot pay it without leave of this court. He submitted that this court should also exercise its discretion to extend time.

He submitted that election petitions are not private proceedings. In their own nature it is the electorate of North Bukhayo Ward //who have come to challenge the results of the elections through the petition. That makes it a public litigation in. itself.

He posed the question "Should we chase the voters of North Bukhayo Ward away because they did not have 40.000 /=?" He submitted that the answer to such a question would be that nothing of that sort should happen if we were to adhere to the practices set out in the 2010 Constitution. He submitted that substantial justice demands the court to allow 40,000 /- be paid so that the petition can proceed to be heard on merits.

He submitted that there were about 4 High Court authorities which talk of the same thing ie. The court

should exercise its discretion and allow the petitioner to deposit the balance of the security for costs funds.

He submitted that in considering whether to extend time, the court has to consider a purposeful approach to the interpretation of the law. Whether is the purpose of the requirement to deposit security? He submitted that it is to make costs payable to the respondents available should the petition fail but the money does not belong to the respondents.

He cited the following authorities;

1. In H.C. at Kisumu EP NO. 6 of 2013, an application to extend the time for paying the security for cost was allowed. The court went to a great length to interpret what S 8(1)(2) and (3) of the Election Act states. The Honourable Justice Edward Mureithi) tried to explain why rule 19 (1) gives the requisite jurisdiction the court is asking itself, what prejudice will the respondent lose if money is allowed to be paid outside the time limit. Counsel submitted that Rule 19 (1) of the rules stipulates that the moment the court finds that the costs are not paid, the court should stay the proceedings, until one of them does what the law makes it mandatory for them to do. The respondents ought to have filed an objection with the registrar of court telling the registrar not to accept any payment outside the time period. The court would then to have the obligation to have the objection removed and allow the petitioner either pay the remaining or entire amount.

2. As for Article 48 of the Constitution, counsel submitted that in C.A. No. 287 of 2013 and in Election Petition No. 9 of 2013 (Kitale) whereby an application similar to ours (where part payment of Security was paid) and the court allowed the balance to be paid.

3. Counsel submitted that in Busia HC EP No. 2/13 Justice Tuiyott said that a petition in itself separate and independent document from any other document filed including affidavits. All could be struck out but still the petition stands. A petition cannot be wished away.

Counsel submitted that Section 159 (4) and 3 purposes of the money is a procedural event. It is not substantive issue. The same cannot be a bar to the portioner's case being heard on merit.

FOR THE 1ST RESPONDENT

Miss Mumalasi learned counsel for the 1st respondent submitted that although this court has discretions to allow for extension of time but in this case, the Petitioner should not approach the court with an attitude of entitlement. She submitted that the discretion must be exercise judiciously looking at the conduct of the petitioner, the petitioner is taking this court for a ride and is holding the other parties at ransom. She submitted that the receipt for payment was done by the petitioner shows that the applicant paid on 20.9.17. She submitted that the petitioner filed the petition on 6.9.17 and he therefore ought to have paid this money by 15.9.17 (ie. Within 10 days form ten days of filing the petition). He paid the money 4 days late without seeking for leave to extend the time. She submitted that the portioner was claiming that he paid on time which was false and mischievous. She submitted that on 25.9.17 the petitioners counsel prepared a consent dated same date extending the time to pay 7 days (which lapsed on 2.10.17)

Counsel posed the question; "What does this say about the conduct of the petitioner?" her answer to it was that he is not serious. She submitted that when the matter came up on 2.10.17 counsel for the petitioner promised the court that he would deposit the money by the end of that day. That was a 2nd consent which he did not honour. She submitted that the conduct of the petitioner is unbecoming. She submitted that the petitioner breached a consent, he cannot get an extension unless it is done by consent and they have not consented to a new consent. She submitted that Section 78 (3) of the Elections Act is clear that in the event that security for cost has not been paid, a party/respondent. Counsel submitted that the petitioner is coming under Article 159 and 48 but Article 48 is not helpful the petitioner where he wants the access to justice. Counsel submitted that Section 78 has not yet been declared unconstitutional for having a requirement of Kshs. 100,000/- being deposit.

Counsel submitted that if the petitioner feels it is unreasonable, he should go to the High court to have the order declared unconstitutional otherwise as it stood, it required a deposit of Kshs 100,000 /= which must be followed to the letter. Counsel submitted that the applicant is aware that the court said it cannot continue handling the matter. Counsel submitted that this court stayed the proceedings when it realized that there was a shortage of the security for costs at the pretrial conference of 9th October 2017.

The effect was that all were held up. Counsel submitted that the issue of payment of cash security is not a mere technicality. It goes to the roof of the case.

Counsel submitted that in the case of EP No. 10/2013 at Kisumu Justice Sitati said "payment for security for costs... goes to the root of the petition. It is not a mere procedural technicality". To demonstrate how important this issue is, Counsel submitted that the security for costs make the court stop proceedings. The court and the parties downed their tools because of the non-payment of the full amount.

Counsel submitted that this is NOT a public interest litigation but rather it is a matter filed by an election loser. Just because it involves people in a ward does not make it a public interest litigation since if he is elected it is him who is elected not the people in the entire ward.

On the merit of the application, counsel submitted that the applicant has showed that he is incapacitated to pay 100,000/-. He has not told us where he got 60000/- where he works and how he will get the balance of Kshs. 40,000/- Counsel submitted that it is an afterthought. Counsel submitted that it was not correct and in good faith, state that the 1st respondent does not want to be interrogated.

Counsel submitted that if this court put its feet down, the petitioner would not open his mouth. A party in contempt ordinarily does not get audience in court. If after about 36 days after filing the petition, and drafted two consents on extension of time what granted do we have to pay. The orders of 25.10.17 have not been set aside or appealed against.

This application is unmeritorious, is an abuse of the process. The authorities are not relevant.

> (1) Kitale decision 9 of 2013 the petitioner had paid 100,000/- on time but under the mistaken because that he was to pay 100,000/-. This is not the case here. Petitioner knew too well that he should have paid 100,000/-. He paid only 60,000/-
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> (2) The petitioner was guilty of laches. Application was made not in good time. The petitioners condition here is mischievous. They pay 60,000/- four days later, breaches a consent and tell the court before to take further proceedings. 34 days after filing the petition.

Finally, Counsel submitted that the court not lay down its tools, the petitioner would not have filed this application. The petitioner has put the 1st respondent to costs, 3 times (including today) without any reason. Counsel therefore submitted that should the application be allowed the 1st Respondent would be asking for costs of 50,000/-

FOR THE 2ND RESPONDENT,

Miss Nabulindo learned counsel for the 2nd respondent associated herself with the 1st respondent's sentiments but added as follows:

(1) Section 78 (1) calls for deposit of security for costs 10 days of filing the petition. This is not just a precondition. It is a fundamental requirement going to the root of the petitioner.

She submitted that the petition is independent. The court has no tools if no security for costs. If security for costs is not paid within the time stipulated by the rules or as ordered by the court, the petitioner is permitted to withdraw. If he does not withdraw, then the court can dismiss the suit. Counsel submitted that Section 78(3) of the EA provides that where the petition does not deposit as required by this section.

Counsel submitted that no further proceedings shall be heard and the respondent may apply for the petition to be dismissed. Counsel submitted that Rule 11(1) of the P & C E Rules is clear that the court shall not entertain any further proceedings where no petitioner has to paid.

Counsel submitted that the petitioner must be prepared to go to the full length of the petition with recovery. Counsel submitted that noncompliance attracts the consequences set out in the law. The 10 days allowed in the regulations and under the rules was to cushion the court against abuse. The petitioner was mischievous to deposit 60,000/- and be ready for pre-trial on 9.10.17 had he not been told that the court downed its tools.

The petitioner does not give any reasonable explanation

Counsel cited the cases of

(1) EP No. 6 of 2013 in that petition, the applicant gave sufficient reason to the court as to why she failed to pay security in court. She explained that she was waylaid and the money stolen. That was a sufficient reason there, the petitioner is merely staying he wants time extended. They are not giving reasons.

Counsel submitted that the petitioner is thinking that the court is here for him thereby taking the court for granted. Elections and Electoral law and regulations must be followed to the letter.

COURTS RENDITION

I have carefully examined the rival arguments by both sides. I note that all three applications are in respect of deposit of security costs.

The current provisions of Section 78 on security for costs is almost a carryover of Section 21 of The Repealed National Assembly and Presidential Elections Act. The provisions of the old Act were:-

> "21.(1) Not more than three days after the presentation of a petition, the petitioner shall give security for the payment of all costs that may become payable by the petitioner.
>
> (2) The amount of security under this section shall be two hundred and fifty thousand shillings and shall be given by deposit of money.
>
> (3) If no security is given as required by this section, or proceedings shall be had on the petition, and the respondent may apply to the election court for an order directing the dismissal of the petition and for the payment of the respondent's costs; and the costs of hearing and deciding that application shall be paid as ordered by the election court, or if no order is made shall form part of the general costs of the petition.

"78. (1) 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.

> (2) A person who presents a petition to challenge an election shall deposit –
>
> a) One million shillings, in the case of a petition against a presidential candidate;
>
> b) Five hundred thousand shillings, in the case of a petition against a member of Parliament or a county governor; or
>
> c) Once hundred thousand shillings, in the case of a petition against a member of a county assembly.

I note that the determination of all the three applications is principally dependent on how the courts interpret Section 78 of the Elections Act.

In determine the first application for extension of time to pay the security of costs out of time, two ISSUES for determination present themselves for determination and they are 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 should enlarge the time for the deposit of security for costs in respect of this particular Petition.

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

I observe that there are two school of thought on whether or not courts have the discretion to enlarge time

One school of thought holds the view that the deposit of security for costs is a substantive issue that goes to the root of the proceedings as non-payment of the same deprives the court of the jurisdiction to deal with the matter further.

This school of thought is as epitomised in the case of Eposito Franco v. Amason Kingi and 2 Others. 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 costs.

The reasoning in that case and where judges felt they were bound by it was expressed as follows; "We are in agreement with the respondents that the requirement that an aggrieved party remits security for costs upon filing an Election petition is to restrict the would be vexatious litigants from coming to court and ensure that the party who comes to court is serious and will be able to pay the costs in the event he is required to do so."

The legislature therefore intended to cure the mischief of vexatious litigants as well as protecting the respondent's rights of costs in the event that the petition is not successful.

In the Patrick Ngeta Kimanzi case above, Majanja J. dealt with the rationale for the deposit of security for costs. Applying the principle in the Esposito case, the judge said that: -

"Security for costs ensures that the respondent is not left without a recompense for any costs or charges payable to him. The duty of the court is therefore to create a level playing ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access justice vis-à-vis the respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him. (see Harit Sheth Advocate –vs- Shamas Charania – Nairobi Court of Appeal, Civil Appeal No.68 of 2008 [2010] e KLR."

In Evans Nyambaso Zedekiah & another v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR, Honourable Lady Justice RUTH NEKOYE SITATI observed that " the requirement for deposit of security for costs keeps away from the court corridors some busy bodies who file cases in court while knowing that such cases have no chance of succeeding and also while knowing that they have no intention of paying the costs once they lose their cases. There is no argument that a court which has no jurisdiction cannot move one single step in a matter that is before it. See Owners of the Motor Vessel "Lillian S" –vs- Caltex Oil (Kenya) Ltd [1989] KLR 1".

In a nutshell, this school of thought holds the view that the court is stripped of jurisdiction as soon as the rules of depositing the security for costs are breached.

On the other hand, there is another school of thought that courts have discretion to enlarge the time for payment of the security for costs.

In NOAH MAKHALANGANGA WEKESA v ALBERT ADOME RETURNING OFFICER, IEBC

TRANS NZOIA & 2 others [2013] eKLR the petitioner sought an order that leave be granted and that there be an extension of time within which to deposit a sum of Ksh. 400,000/= being further security for costs. The main reason for the application is that when the petitioner filed the petition on 8th April 2013 he was ready and prepared to pay the sum of Ksh. 500,000/= as security for costs but the court registry assessed the amount payable as Ksh. 100,000/= and received the amount accordingly.

The court was determining whether the requirement to deposit security is a matter of law rather than procedural technicality. The learned judge said as flows;

"In that regard, the petitioner without reasonable cause breached the law by failing to deposit the required security. However, the fact that he deposited part of the security (i.e. Ksh. 100,000/=) and has by this application requested for time to deposit the outstanding balance of the amount is a strong indication of his seriousness in pursuing his Constitutional rights to access justice and fair-hearing of the petition as well as the right to free and fair elections. The Constitution is the Supreme Law of the land. It's provisions and in particular those relating to fundamental rights must, in disputes such as the present one, be interpreted in a broad and liberal manner if the circumstances so allow".

With regard to this application, this court is inclined to look at it more from a constitutional rather than a statutory perspective.

Although Section 78 (1) of the Act does not expressly provide for extension of time to deposit security, Section 78 (3) of the Act implies that there is a path created for extension of time. This is because the provision ((section 78 (3)) pre-supposes that the failure to deposit security could lead to an objection being raised by the respondent and in the event of such objection, the proceedings would be stayed or put to a halt unless the objection is removed. If the objection is not removed, the respondent would have the liberty to apply to the court for dismissal of the petition and for payment of the respondent's costs.

The wordings of Section 78 (4) of the Act clearly indicate that a petitioner may make an application to the court for the removal of any objection which exists. If there is no objection in place it may be forestalled by a petitioner by necessary application for extension of time to deposit security"

In FATUMA ZAINABU MOHAMED v GHATI DENNITAH & 10 others [2013] Eklr

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 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.

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.

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."

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.

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."

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.

This court's school of thought

I have considered the arguments and rationale in the two schools of thought. Both are correct but for some sociological and philosophical reasons, a judicial officer in my position who is bound by judicial authorities from above must take a stand in determining an application in a case like this. I belong to the second school of thought which holds the view that the court has a discretion to enlarge the time for the payment of the security for cost. My position is that the Constitution, Statutes and Rules should be interpreted liberally to reflect the real-time realities of the society to which the applies. To this end, I am persuaded that the school of thought which believes in **"the purposeful interpretation of the constitution**" is more responsive to the social economic and political needs of a democratic society like Kenya today.

In view of the above, and guided by the case, law cited hereinabove, I hold that this court has discretion to enlarge time for paying the security for costs. On the same principle, I find that this court can also validate payments which were made late without a consent or an order of the court

Exercise of discretion,

Having found that have the discretion, I now move to the question whether this court should exercise the said discretion in the circumstances of this case.

Discretion has to be exercised judiciously. "Judiciously" in the minds of an ordinary thinking reasonable man may mean fairly or equally or some other moral interpretation.

In Black's Law dictionary, the true meaning of the word judiciously is a term that means "to use sound judgement"

"Sound judgment" may in other words mean "reasonable judgement". I this case, I have to decide what is reasonable in the eyes of a right think man.

In the course of these proceedings and in consideration of the submissions of the parties herein, the court was able to observe as much as follows;

That there have been accusations and counter accusations with allegations that the conduct and attitude of the petitioner is such that he thinks that he can take these preceding for granted and hold the court and the parties at ransom

That the petitioner is a habitual defaulter in that;

1. He promised on the day of the pretrial that the balance of Kshs. 40,000 /=would be paid by the end of the day on 2nd October 2107 and why he defaulted.

2. That was a promise he gave the 2nd October 2107 court and yet he defaulted. In the mind of

counsel for the 1st respondent, that borders on contempt of court and the same has the following tow consequences;

i. The errant party may be punished for contempt of court

ii. the errant party no longer has audience of the court until he purges the contempt.

In the circumstances of this case, I find myself trapped between the in a decision between the devil and the deep sea. In the following so to say tricky situation

1. In view of the fact that Kshs. 60,000 / has already been deposited in court by the petitioner, is it **judicially prudent and wiser** to order that the Kshs. 60,000 /= be forfeited to the respondents (as this is the most likely eventuality of this petition is dismissed) or is it more **judicially prudent and wiser** to order for a top-up of the Kshs. 40,000 /= to validate compliance?

2. Should this court order that the respondents enrich themselves (justifiably or unjustifiably) with the cash of Kshs. 60,000 / already deposited and deny the petitioner to deposit any further monies?

3. Does the justice of the case call for a continuation or a discontinuation of this case on the basis of none-payment of the sum of Kshs. 40, 000/

4. If I find that the petitioner has been guilty (as alleged) of an attitude that he is entitled to disregard his own terms of the consent and disregard court order, should I let him go scot free?

5. If I find that the portioner has given satisfactory reason as to why he failed;

i. to deposit the money in time or why

ii. to seek leave to deposit the money out of time.

iii. to honour his promise to pay the money as par his own consent, on 2nd October 2017

iv. Why he took a clean 37 days to apply for extension of time

v. Why he has not explained how and when he will pay the balance of the Kshs 40,000 /=

Should I nonetheless let him get away with it Scott free or should the respondents also be compensated for the efforts they made to defend his application and to file application for striking out his suit which should not have occurred in the first palace had he done the right thing with tin the right time?

I think that in the circumstances of this case, exercising my discretion, the most judicial manner justice calls for the petitioner to be allowed to pay the balance of the security for costs so that this case can proceed to its final conclusion.

I am guided by the cases herein above cited which interpreted Section 78 (3) liberally and enlarged tine and enabled the applicants therein pay the security for cost.

In addition to the above, I also find that 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"

I go by that principle.

Moreover Rule 4 of the Rules, which sets out the objective of the Rules provides as follows: -

> "(1) The overriding objective of these Rules is to facilitate the just, expeditious proportionate and affordable resolution of election petitions under the Constitution and the Act.
>
> (2) The court shall, in the exercise of its powers under the Constitution and the Act or in the interpretation of any of the provisions in the Rules, seek to give effect to the overriding objective specified in sub-rule (1).
>
> (3) A party to an election petition or an advocate for the party shall have an obligation to assist the court to further the overriding objective and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court."

I find that Rule 20 of the current rules allow me to enlarge time for the petitioner herein.

It is this court's opinion that the petitioner may suffer injustice if he is not allowed to deposit the outstanding balance of the security and have his petition heard on the merits.

The respondents will not suffer prejudice if the petitioner is indulged accordingly.

Accordingly, I allow the petitioner's application.

1ST AND 2ND RESPONDENT'S MOTIONS TO STRIKE OUT / DISMISS THE PETITION

On 10th October 2017, the 2nd respondent through its counsel Masire & Mogusu Advocates filed a Notice of motion dated 10th October 2017 for orders that:

> 1. That the petitioner's petition filed against the 2nd respondent on 6th September 2017 be **struck out** with costs to the 2nd Respondent/Applicant for want of compliance.
>
> 2. That the costs of this application be provided.

The said application was founded on the grounds that the petitioner is yet to comply with the provisions of Rule 11 of the Elections (Parliamentary and County Elections) Petitions Rules which require the petitioner to deposit security for costs to the Registrar within 10 days of filing the petitioner.

It was supported by the affidavit of Abuga S. Mogusu duly sworn and reiterating the same grounds

On 11th October 2017, the 2nd respondent through its counsel Annet Mumalasi & CO Advocates filed a Notice of motion dated 10th October 2017 for orders that:

> 1. The petition herein be **struck out** and same be **dismissed**
>
> 2. The 1st respondent be paid the costs of the petition
>
> 3. The costs of this application be provided.

The said application was founded on the grounds that;

1. The petitioner has failed to, refused and or neglected to comply with the mandatory provisions of section 78 (1), (2)(c) of the Elections Act 2011

2. The petitioner has failed to, refused and or neglected to comply with the consent order of 02/10/2017 requiring him to deposit the entire security for cost before the close of business on the same day

3. It is imperative and interest of justice that the orders sought be granted

4. It was supported by the affidavit of Gardy Obara Jakaa duly sworn and reiterating the same grounds

Many things are common about the two applications. They both seek to have the Petition herein dismissed. They are both based on the grounds that the petitioner has not paid the requisite security amount of money for costs.

In submissions, each of the respondents indicate that they supported the other. Their arguments were in tandem. Indeed, when the matter came up for hearing of the applications on 16th October 2017, the court directed that all the applications be heard together.

In view of the above, I feel that it is prudent to consolidate the two applications and deal with them as one. Indeed, counsel for the Petitioner replied to them as one. I see no prejudice in that

SUBMISSIONS

FOR THE 1ST RESPONDENT

Miss Mumalasi learned counsel for the 1st respondent submitted that as par their request in their application dated 10.1017, the petition should be dismissed. She submitted that the respondent can make the application orally or formally once the money is not paid under (section 78 the Respondent) may apply. She submitted that in this case, the 1st respondent has made a formal application. She quoted section 78(3) of the EA should and submitted that by failing to pay the money, the petitioner is keeping the 1st respondent in court longer and unnecessarily and making him unable to discharge his duties as MCA for Bukhayo North Ward.

She submitted that this application is made in good time. She submitted that the 1st respondent was deserving the orders sought. She submitted that that the court should exercises is discretion in favour of the 1st respondent. She submitted that this is a court of law not of emotions. She submitted that the petitioner never even indicated in their application how and when they wanted to pay the further sum of Kshs 40,000 /=. She submitted that a party cannot pay any time they want just because the court said so in another court. Each case has to be examined on merits. She reiterated her submission in reply to the application for extension of time and urged the court to strike out the entire petition.

FOR THE 2ND RESPONDENT,

Miss Nabulindo learned counsel for the 2nd respondent In my application dated 10.10.17 I pray that the petition be struck out with costs for want of compliance.

There is a difference between dismissing and striking. Dismissal is where a suit can never be instituted after it has been ended. Striking out means that the case may be re-visited.

Counsel submitted that the provisions of security for costs is a sacred foundation of the petition. It is not a mere technicality. The jurisdiction of the court is tied to payment of these cash. Non-payment stripes the court of the jurisdiction and that is why the court refused to take further proceedings. Election Petition should be decided expeditiously.

Counsel submitted that the provisions for security for cash to keep away non- serious petitioners like the petitioner herein.

Counsel submitted that it is not reasonable under Act 159 of the Constitution. It goes to the root of the petitioner. The petition is lifeless and incurable. Counsel submitted that failure to pay the security has removed the grounds from under the petition. The petition cannot stand and must fall or being struck out.

In reply to the two applications to strike out / dismiss the application, Counsel for the petitioner submitted that the notice of motion by IEBC seeking to strike out should itself be dismissed. Counsel submitted that that application was filed two soon without merit or regard to procedure. In the authority referred earlier, the CA categorically defines what should be done. Counsel submitted that the procedure should be as follows;

Start by filing an objection. The law envisages a situation where they ought to have filed an objection but even in the same is not absolute. All it means is that proceedings in this matter are stayed. Either the objection is removed by calling in the petitioner to show cause why the petition should not be dismissed for want of payment of deposit if not reviewed, then they should come up with a notice of motion for dismissal. Both notices of motions were made in a fishy way. Both are technicalities. They are by the 1st respondent it is under S 78(1)(3) of the E.A 2011. That is the parent section which demands powers to Rule 19(3) of 2017. Procedurally one has to come under both the Act and the Rules.

Counsel submitted that there is no provision for striking out. Counsel submitted that Article 159(2)(b) should be construed in the petitioner's favour.

Counsel submitted that the courts hands should not be tied by procedural technicality such as depositing money. Counsel submitted that the applications were defective since they were asking for striking out and dismiss. He Posed the question; Is it possible to do both? His own answer to it was that it was not possible. He submitted that the framing of the prayers was the conjunctive and which specific. He submitted that the court cannot do a multipolicy of things which is impossible.

ISSUE

In determining whether to strike out or dismiss the entire petition, I have to examine the following issue;

1. Whether the late payment of the deposit by the Petitioner is fatal to the Petition;

As earlier stated, I hold the view that he law should be given a liberal interpretation.

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. In this case, no notice had been issued to the petitioner to show cause why the petition should not be dismissed for want of payment of the full amount of the security for cost. The two respondents rushed to court first and made the applications to dismiss.

In HENRY OKELLO NADIMO v THE INDEPENDENT ELECTORAL AND BOUNDERIES COMMISSION& 2 others[2013]eKLR, the homnuarble Judge stated as flows;

> "Given the wording of Section 78 of The Election Act a person who presents a Petition to challenge an election of a Member of Parliament must deposit the security of ksh. 500,000/= not more than ten days after the presentation of the Petition. And although the High Court has recently (see the decision in Kitale High Court Petition No.5 of 2013 – John Lokitare Lodinyo –v-s Mark Lomunokol & 2 others) allowed for deposit to be made after the lapse of ten (10) days, it is unlikely that any Court will allow a Petition to go to main hearing before the entire security is deposited.

In view of this statement, I find that this court can refuse to proceed to the hearing of the petition unless

and until the money has been paid in full.

Conclusion

I think that the most judicious route to take is to allow the petitioner's application for enlargement of time only if the petitioner does not comply with the orders of the court.

In the circumstances, I make the following orders

1. The deposit of Kshs. 60,000 /= paid by the petitioner is hereby validated.

2. The petitioner do pay the balance of Ksh 40,000 /= within the next two hours

3. That failure to pay the said Kshs 40,000 /= as ordered, the petition shall stand dismissed.

Costs

One cardinal principle of law involving the awarding of cost is that costs always follow the event. In this case, I realize that all the three applications would not have been necessary had the petitioner did the right thing at the right time. I.e. had he paid the sum of Kshs. 100,000 /= in good time. Because he did not do the right thing, he had to make an application, at a cost, which was opposed, at a cost, to have time enlarged for him. Because he did not do the right thing, the 1st and 2nd respondents, each made an application, at a cost, which was opposed, at a cost, to have the petition struck out. In the circumstances of this case, I find that the petitioner was the sole cause of the efforts and expenses involved in all the three applications. I therefore condemn the **petitioner to pay the cost of all the three applications**.

Decorum and integrity

Rule 5 places a duty on the court and the parties to conduct the proceeding for the purposes of the efficient and expeditious disposal of election petitions in the interpretation of the overriding objective as provided in Rule 4.

Rule 5 of the Rules reads as follows: - "For the purpose of furthering the overriding objective provided in rule 4, the court and all the parties before it shall conduct the proceedings for the purpose of attaining the following aims –

a. the just determination of the election petition; and

b. the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act."

In this case, there have been accusation and counter-accusation of delaying tactics. The petitioner accused the respondents of refusal to be investigated on alleged malpractices.

The respondents on the other hand accuses the petitioner of an attitude and mischief in taking the court for granted.

This court has flipped over the petition and response herein and it deciphers that the journey ahead of it is quite long. it is therefore absolutely necessary that time and emotions be managed properly so that this court may be able beat the deadline of having resolved this case within 6 months as par the law provided.

This court is raising a red flag and sounding a warning that this court expects decorum and a sober, non-temperamental approach to all issue in this matter. The court also expects the highest level of integrity in these proceedings.

The court however appreciates the indefatigable efforts made by all the counsel involved in this matter.

The level of efforts and energy in articulating and putting across in the best interest of their clients is admirable. The level of research done is quite commendable. The court can only hope that counsels shall continue with the same vigour and confidence throughout the proceedings until the petition is determined.

Those are the orders and observations of the court

This ruling is printed in duplicate and a soft copy stored in an electronically protected data bank. A copy of this ruling can be obtained upon payment of court fee amounting to Kshs. 60 / per page.

Dated, signed and delivered at Busia this 18th day of October 2017.

G. N. WAKAHIU,

CM. BUSIA.