



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELECTION PETITION NO. 20 OF 2017**

**OSCAR OMOKE OCHOLLA.....1<sup>ST</sup> PETITIONER**  
**KARIUKI KAVORE.....2<sup>ND</sup> PETITIONER**  
**ODERA DANIEL TRESVANT.....3<sup>RD</sup> PETITIONER**  
**HILLARY OKUMU MULIALIAH.....4<sup>TH</sup> PETITIONER**  
**KIRAGU MARGERY NDUTA.....5<sup>TH</sup> PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**  
**MARTIN SIMOTWO.....2<sup>ND</sup> RESPONDENT**  
**NIXON KIPROTICH GENERALI KORIR.....3<sup>RD</sup> RESPONDENT**

**AND**

**MERCY KHASIANI CHIYUMBA.....1<sup>ST</sup> OBJECTOR**  
**HENRY KING KIRAGU.....2<sup>ND</sup> OBJECTOR**  
**ESTHER WAIRIMU KIRAGU.....3<sup>RD</sup> OBJECTOR**

**RULING**

1. This ruling is in respect of three applications. Two of the applications are dated 13<sup>th</sup> July, 2020 and the third application is dated 12<sup>th</sup> October, 2020.
2. After the results of the general election held in 2017 were declared, the 1<sup>st</sup> Petitioner, Oscar Omoke Ocholla; the 2<sup>nd</sup> Petitioner, Kariuki Kavore; the 3<sup>rd</sup> Petitioner, Odera Daniel Tresvant; the 4<sup>th</sup> Petitioner, Hillary Okumu Mulialiah; and the 5<sup>th</sup> Petitioner, Kiragu Margery Nduta filed Nairobi High Court Election Petition No. 20 of 2017 challenging the election of the 3<sup>rd</sup> Respondent, Nixon Kiprotich Generali Korir, as the Member of the National Assembly for Langata Constituency. The petition was dismissed by the Election Court. Attempts by the petitioners to overturn the decision of the Election Court at the Court of Appeal failed.
3. The 1<sup>st</sup> Respondent, the Independent Electoral and Boundaries Commission, the 2<sup>nd</sup> Respondent, Martin Simotwo, and the 3<sup>rd</sup> Respondent, Nixon Kiprotich Generali Korir, were awarded costs against the respondents.
4. The three applications have arisen in connection with the 3<sup>rd</sup> Respondent's attempts to execute for the costs taxed by the Deputy Registrar on 23<sup>rd</sup> January, 2020. It is important to reproduce the applications in this ruling.
5. The first application dated 13<sup>th</sup> July, 2020 was filed by Mercy Khasiani Chiyumba (hereinafter simply referred to as Ms. Chiyumba).

Through the application she seeks orders as follows:

**a) Spent.**

**b) Spent.**

**c) Spent.**

**d) The Proclamation and Attachment of movable property dated 9<sup>th</sup> July 2020 issued pursuant to a Warrant of Attachment dated 25<sup>th</sup> June 2020 in execution of the Decree of the Court passed on 23<sup>rd</sup> January 2020 and all consequential actions/orders thereto be set aside.**

**e) The costs of this Application be provided for.**

The application is supported by the grounds on its face.

6. The second application which is also dated 13<sup>th</sup> July, 2020 was filed by the 1<sup>st</sup> Petitioner, Oscar Omoke Ocholla (hereinafter simply referred to as Mr. Omoke) and the 5<sup>th</sup> Petitioner, Kiragu Margery Nduta (hereinafter referred to as Margery). The following orders are sought in the application:

**a) Spent.**

**b) Spent.**

**c) Spent.**

**d) Spent.**

**e) Spent.**

**f) That the Honourable Court be pleased to direct that the security amount paid by the 1<sup>st</sup> Petitioner/Applicant and held by Court of KES. 500,000.00 be apportioned between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 3<sup>rd</sup> Respondent and the said amount of KES. 500,000.00 be deducted from the 1<sup>st</sup> Petitioner/Applicant liability on costs.**

**d) That the Honourable Court be pleased to direct that costs of KES. 2,227,390.00 awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be apportioned among the Petitioners thus each Petitioner to pay KES. 445,478.00.**

**e) That the Honourable Court be pleased to direct that costs of KES. 2,117,566.67 awarded to the 3<sup>rd</sup> Respondent be apportioned among the Petitioners thus each Petitioner to pay KES. 445,478.00.**

**f) That the Honourable Court be pleased to direct that the costs of KES. 195,978.00 payable to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents upon deduction of KES. 250,000/- being the security for costs deposited in Court by the 1<sup>st</sup> Petitioner/Applicant be paid in instalments of KES. 25,000.00 each until payment in full.**

**g) That the Honourable Court be pleased to direct that the costs of KES. 173,513.00 payable to the 3<sup>rd</sup> Respondent upon deduction of KES. 250,000/- being the security for costs deposited in Court by the 1<sup>st</sup> Petitioner/Applicant be paid in instalments of KES. 25,000.00 each until payment in full.**

**h) That the Honourable Court be pleased to direct that the costs KES. 445,478.00 payable to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by the 5<sup>th</sup> Petitioner/Applicant be paid in instalments of KES.25,000.00 each until payment in full.**

**i) That the Honourable Court be pleased to direct that the costs of KES. 423,513.00 payable to the 3<sup>rd</sup> Respondent by the 5<sup>th</sup> Petitioner/Applicant be paid in instalments of KES. 25,000.00 each until payment in full.**

**j) That costs of this application be provided for.**

The application is supported by the grounds on its face and an affidavit sworn by Mr. Omoke on the date of the application.

7. The third and final application dated 12<sup>th</sup> October, 2020 was filed by two objectors namely Henry King Kiragu (hereinafter simply referred to as Mr. King) and Esther Wairimu Kiragu (hereinafter referred to as Ms. Wairimu). Through their application brought by way of a notice of motion they seek orders as follows:

**a) Spent.**

**b) Spent.**

**c) Spent.**

**d) The Proclamation of Attachment of Movable Property dated 9<sup>th</sup> July 2020 issued pursuant to a Warrant of Attachment dated 25<sup>th</sup> June 2020 in execution of the Decree of the Court passed on 23<sup>rd</sup> January 2020 and all consequential actions/orders thereto be set aside.**

**e) The costs of this application be provided for.**

The application is supported by the grounds on its face and the affidavits of the applicants.

8. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application of Mr. Omoke and Ms. Margery. The 3<sup>rd</sup> Respondent opposed all the three applications.

9. The facts relating to the applications are not disputed and I will proceed straight to the determination of the applications. In doing so, I will take into account the submissions filed by the advocates for the parties.

10. Before delving into the applications I will only observe that the objection proceedings commenced by Ms. Chiyumba, Mr. King and Ms. Wairimu did not follow the procedure for instituting such proceedings as established in rules 51 to 54 of the Civil Procedure Rules, 2010 ("CPR"). Nevertheless, in my view procedural missteps that are not prejudicial to any of the parties should not hinder this Court from addressing the substance of the two applications. I will therefore proceed to consider the two applications.

11. In respect of the application of Ms. Chiyumba who is the wife of Mr. Omoke one gets the impression that she is opposed to the attachment of all the items proclaimed by the 3<sup>rd</sup> Respondent's auctioneers. However, the evidence adduced, and which was not rebutted by the 3<sup>rd</sup> Respondent, established that the only item belonging to Ms. Chiyumba in the schedule of proclaimed property is motor vehicle registration number KBN 845M.

12. Under Rule 51(1) of the CPR it is only a person who claims to be entitled to or to have legal interest in the whole or part of any property attached in execution of a decree who may raise an objection to attachment. That means a person cannot file objection proceedings in respect of attached property belonging to somebody else. The fact that the other two vehicles do not belong to Mr. Omoke should not concern Ms. Chiyumba.

13. In that regard the application of Ms. Chiyumba is allowed only to the extent that the attachment of her motor vehicle KBN 845M is raised. All the other property proclaimed by the auctioneer will be dealt with by the auctioneer in the manner provided by the law.

14. On the application by Mr. King and Ms. Wairimu, I note that Mr. King claims that he bought motor vehicle registration number KCD 325H from Ms. Margery in February, 2020 and his attempts to transfer the vehicle to his name were frustrated by the failure of the National Transport and Safety Authority's TIMS portal. He eventually succeeded after the vehicle which was still in the name of Ms. Margery was attached by the 3<sup>rd</sup> Respondent's auctioneers. He supported his evidence with SMS messages and a letter dated 4<sup>th</sup> November, 2020 purported to be from the National Transport and Safety Authority.

15. Considering the kind of evidence presented to the Court by Mr. King, it is only just and fair to give him the benefit of doubt and find that he had indeed bought Ms. Margery's vehicle by the time it was proclaimed. I will therefore raise the attachment on motor vehicle registration number KCD 325H.

16. Ms. Wairimu on her part produced a title deed for her house in Langata. She also produced receipts showing that the household items belong to her. Her evidence is that she has been housing Ms. Margery who is her mother. She explained that she could not access the latest search certificate for the title of her house from the Lands Registry owing to challenges being experienced in the Registry. Based on this evidence, I have no option but to raise the attachment on the household items in Ms. Wairimu's house.

17. Finally, I turn to Mr. Omoke and Ms. Margery's application for apportionment of the decretal amount and permission to pay the decretal amount by instalments.

18. The application for apportionment of the taxed costs between the five judgment debtors has not been supported by any known law. The judgments of the Election Court and the Court of Appeal are clear that costs were awarded to the respondents against the petitioners. In such a case the costs have to be met by the petitioners jointly and severally. The respondents can execute for the entire costs against any of the petitioners.

19. In any event, Mr. Omoke and Ms. Margery did not serve the application on the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> petitioners and an order apportioning the decretal amount will be prejudicial to them yet they were not heard.

20. The other prayer in the application which seeks permission for the applicants to pay the decretal amount by instalments equally fails as it was premised on the believe that the decretal amount would be apportioned between the petitioners. Owing to the failure of the application for apportionment, the offered instalments become so insignificant that they become unacceptable.

21. It is also observed that Mr. Omoke and Ms. Margery have not deposed to their specific circumstances which would make it difficult for them to pay the decretal amount at once hence making it necessary for them to be allowed to pay the decretal amount in instalments. The

application is therefore found to be without merit in its entirety.

22. In summary the three applications are determined as follows:

a) The application of Mercy Khasiani Chiyumba dated 13<sup>th</sup> July, 2020 partially succeeds in that the attachment of motor vehicle registration number KBN 845M (referred to in the notice of proclamation and attachment as motor vehicle registration number KBN 845N) is raised. The auctioneer is at liberty to dispose of the other attached items in accordance with the law. Parties shall bear own costs in respect of this application.

b) The application of Oscar Omoke Ocholla and Kiragu Margery Nduta dated 13<sup>th</sup> July, 2020 is dismissed in its entirety with costs to the respondents; and

c) The application of Henry King Kiragu and Esther Wairimu Kiragu succeeds to the extent that the attachment of Henry King Kiragu's motor vehicle registration number KCD 325H is raised. Also raised is the attachment of Esther Wairimu Kiragu's household goods in her house on L.R. No. 18589/68, Nairobi. The parties will bear their own costs in respect of this application.

**Dated, signed and delivered virtually at Nairobi this 17<sup>th</sup> day of December, 2020.**

**W. Korir,**

**Judge of the High Court.**