



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NUMBER 5 OF 2017

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 2017

AND

IN THE MATTER OF PARLIAMENTARY ELECTIONS FOR SOUTH MUGIRANGO CONSTITUENCY, NO.262 HELD ON 8<sup>TH</sup> AUGUST, 2017

BETWEEN

HON. DENIS MAGARE MAKORI.....1<sup>ST</sup> PETITIONER

HON. SAMSON BICHANGA.....2<sup>ND</sup> PETITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1<sup>ST</sup> RESPONDENT

WILSON KIMUTAI KIPCHUMBA.....2<sup>ND</sup> RESPONDENT

SILVANUS OSORO ONYIEGO.....3<sup>RD</sup> RESPONDENT

JACOB MBICHA MOGERE.....4<sup>TH</sup> RESPONDENT

#### RULING

1. By a Notice of Motion dated the 5<sup>th</sup> of September 2018 brought under Articles 22,23,48 and 50(1) of the Constitution, Sections 1A and 3A and 63(e) of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, 2010. The applicant seeking the following order; that the Order issued by this Honorable Court on 7<sup>th</sup> March, 2018 requiring release of the Security deposit be complied with and production of the original receipt be dispensed with. The application is supported by annexed affidavit of Michael Muchemi Ndegwa.

2. He deposes as follows; that the petitioners herein filed Kisii Election Petition Appeal No.5 of 2017 on 5<sup>th</sup> September, 2017 challenging the election of the 3<sup>rd</sup> Respondent as the elected member of National Assembly for South Mugirango Constituency. That his law firm was instructed in this matter on 15<sup>th</sup> September, 2017 to act for the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> Respondents. That all material times over the course of the suit he was the Counsel on record for the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> Respondents herein. That the matter was heard and determined with judgment by Hon. Justice A.K. Ndung'u dated and delivered on 2<sup>nd</sup> March, 2018 infavor of the Respondents. That subsequent to the delivery of the Judgment, an Order dated 7<sup>th</sup> March, 2018 was issued directing that "**The security for costs deposited of kshs.500, 000/= be released and shared equally between Counsels on record for the Respondents' fees**". That pursuant to the Order, he wrote to the Deputy Registrar, High Court of Kenya at Kisii providing our bank Account details for the release of our share of the said sum, being Kenya Shillings two Hundred and Fifty Thousand (Kshs.250,000/=). That they were informed that the release of the said sum was not possible in the absence of the original deposit slip issued after the deposit, which slip was in the custody of the Petitioners. That consequently, they have made numerous unsuccessful attempts to have the Petitioners release the said original deposit slip by way of written letters, telephone calls, and e-mail communication. However, the petitioners have to date failed, refused and/or neglected to release the original deposit slip and continue

to do so. That the continued failure, refusal and/or neglect by the petitioners to release the original deposit slip from their custody not only amounts to contempt of the orders dated 7<sup>th</sup> March, 2017 but also denies them as counsel on record for the Respondents their lawful and entitled costs. That he has attempted to engage the Petitioner's Advocates on the matters herein but to no success. That the Petitioner's Appeal was heard and determined with the Court of Appeal sitting at Kisumu dismissing the Appeal with costs to the Respondents vide an Order dated 26<sup>th</sup> July, 2018 hence the continued failure, refusal and neglect by the Petitioners is unreasonable and an illegality.

3. The application was not opposed. I have perused the court file an order was issued on the 7<sup>th</sup> March 2018 that the security for costs deposited of the sum of Kshs.500, 000/- be released and shared equally between the Counsels on record for the respondents' fees. This order has not been set aside. From the copy of KCB bank credit advice of cash deposit filed in court on the 15/9/2017 there is indication that a sum of Kshs.500, 000/- was paid into account no. 1184278571. The said sum was paid in by **George Nyaora Nchogu Omanza and Nyamisi Advocates**. The court issued an official receipt on the 20<sup>th</sup> September 2017. The applicant avers that they have made attempts to have the money released to them but the petitioners have refused or failed to submit the original receipt as required by the court. The court accounting process requires that an original receipt must be tendered to effect the refund or payout of any sum deposited in court after the conclusion of a case, in this case the petition. In compliance with the order dated the 7<sup>th</sup> March 2018, the petitioners Advocate shall deposit the original receipt used to deposit the security within 14 days from the date of this ruling. Upon its release the Deputy Registrar shall effect the release of the sums deposited as the court order dated the 7<sup>th</sup> March 2018. Respondent to be served with this order forthwith. This matter shall be mentioned before the Deputy Registrar on the 7<sup>th</sup> of November 2018 to confirm compliance. No order as to costs.

**Dated signed and delivered this 19th day of October 2018.**

**R.E. OUGO**

**JUDGE**

**In the Presence of;**

**Petitioners Absent**

**Mr. Nyagwencha h/b for Mr. Muchemi for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents**

**Ms. Rael Court Clerk**