



No. 30

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 44 OF 2013

**IN THE MATTER OF ARTICLES 1, 2, 3, 19, 101, 21, 22, 23, 47, 88, 120 AND 258 OF THE
CONSTITUTION AND THIRD SCHEDULE OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS SECURED AND GUARANTEED UNDER ARTICLES 27, 28, 38, 47 AND 50 OF
THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE PURPORTED NOMINATION AND ELECTION OF HASSAN ALI
JOHO AS THE GOVERNOR OF MOMBASA COUNTY COMMENCING MARCH, 2013**

AND

**IN THE MATTER OF THE QUALIFICATIONS AND REQUIREMENTS FOR NOMINATION
OF CANDIDATES FOR ELECTION TO THE POSITIONS OF GOVERNOR AND DEPUTY
GOVERNOR**

AND

**IN THE MATTER OF THE IMPLEMENTATION AND OF ADHERENCE WITH THE
ELECTIONS ACT, 2011 (ACT NO. 24 OF 2011)**

BETWEEN

SILAS MAKE OTUKE.....PETITIONER

AND

HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

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

AND

HON. HASSAN ALI JOHO.....1ST INTERESTED PARTY

HAZEL EZABEL NYAMOKI OGUDE.....2ND INTERESTED PARTY

RULING

1. This a ruling on the request by counsel for the 2nd Respondent and 2nd Interested Party, respectively Mr. Khagram and Mr. Buti, for the transfer to Nairobi for hearing and disposal by the Constitutional and Human Rights Division Court which is considering a review of a ruling in Constitutional Petition No. 116 of 1013. The application is based primarily on two principal arguments that the said Constitutional Petition No. 116 of 2013 was filed earlier in time and that judicial policy is against the possible outcome of two conflicting decisions over the same dispute by courts of concurrent jurisdiction.

2. The application is opposed by the Petitioner's counsel who emphasises the Petitioner's right to be heard in his petition pointing out that the Petition No. 116 of 2013 has already been heard and ruling delivered thereon with only a review application pending, and that there is therefore no means of introducing in that petition evidence in the present file, which he claims is determinant in the matter of the 2nd Respondent's qualification to be elected as Governor.

3. In reply, Counsel for the 1st Respondent and the 2nd Interested Party pointed to the review application as a point of entry for the petitioner to introduce the evidence in this petition into the Petition No. 116 of 2013. They emphasized, however, that their request was not for consolidation of the two matters but rather for the hearing of the dispute in two petitions by the *same* court to avoid conflicting decisions on the matter by different courts of equal jurisdiction.

4. Counsel for the 1st Respondent, Ms. Namahia, though present did not take a position on the matter, and Counsel for the 1st Interested Party was absent, although the mention date was taken in his presence.

5. The constitutional right to a fair hearing under Article 50 (1) of the Constitution requires that the Petitioner in this case has the opportunity to present the evidence in support of his claim for adjudication by the court. Therefore, the issue before the court in this request for transfer of the suit to Nairobi Constitutional and Human Rights Division is whether the transfer will facilitate or hamper the enjoyment of that right by the petitioner.

6. In considering the application for the transfer of the matter to Nairobi High Court, this court has taken into account the circumstances of the matter as follows:

1. The Petitioner in this matter is not a party to Constitutional Petition No. 116 of 2013, and he would have to apply to be joined in the Nairobi petition.

2. A question must arise whether a party who is joined at the stage of review of a judgment or ruling may on application under the Order 45 of the Civil Procedure Rles apply for review of judgment and orders introduce new evidence or materials which were not before the court when it considered that matter before the person became a party to the suit. Although Order 45 rule 1 of the Civil Procedure Rules appears to entitle '**any person considering himself aggrieved**' to seek review, the reference in the rule to '*the discovery of new and important matter or evidence which, after, the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed...*' suggests that the '**any person considering himself aggrieved**' must have been a party to the suit at the time of making the decree or order.

3. An application for consolidation of the two petitions would also have to be made to allow for the consideration of the evidence raised in this petition in the petition filed at Nairobi.

4. If the petitions were to be heard without consolidation, consecutively or simultaneously, if that is possible, the benefit of expedition sought to be realised by the transfer would not be achieved; only the consideration of the two similar petitions by the same court;

5. In view of the pending preliminary objection on *res judicata* by virtue of the decision in Nairobi petition, which objection may or may not succeed, the perceived danger of two conflicting decisions by courts of equal jurisdiction is unwarranted. If the court accepts that the matter is *res judicata*, then no conflicting decision will be made by the court; if the court holds that the matter is not *res judicata*, and it proceeds to hear and determine the issues in this suit, there shall be no two decisions on the same point as the court would have held that the issues in the two suits are different.

7. There are clear procedural difficulties with which the Petitioner may have to contend in seeking to participate in Nairobi Petition No. 116 of 2013 and/or in having the two petitions consolidated for hearing and disposal. In addition, no clear overwhelming benefit will be achieved by hearing the two petitions at Nairobi consecutively, or even simultaneously, and the danger of conflicting concurrent court decisions will be addressed by the preliminary objections on *res judicata*.

8. Accordingly, in protecting the petitioner's right to fair hearing and in the interests of the expeditious disposal of the petition herein, the court declines the application for the transfer of the suit to the Constitutional and Human Rights Division of the High Court at Nairobi and directs that the petition shall proceed to hearing before the High court at Mombasa on a date to be fixed in consultation with the parties.

Dated, signed and delivered on the 16th April 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

No appearance for the Petitioner

Mr. Eredi for the 1st Respondent

No appearance for the 2nd Respondent

No appearance for the 1st Interested Party

Mr. Buti for the 2nd Interested Party

Miss Linda - Court Assistant