



**REPUBLIC OF KENYA**

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

**CIVIL MISCELLANEOUS CASE NO. 117 OF 2014**

IN THE OF AN APPLICATION BY FRANCIS MWANIKI NGUNGA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS IN THE NATURE OF MANDAMUS

**AND**

IN THE MATTER OF IEBC ACT, GOVERNMENT PROCEEDINGS ACT AND CIVIL PROCEDURE RULES

**AND**

IN THE MATTER OF MACHAKOS CHIEF MAGISTRATE'S ELECTION PETITION NO. 3 OF 2013

**FRANCIS MWANIKI NGUNGA.....PETITIONER/APPLICANT**

**VERSUS**

**OLIVER NZEKI MUNYAKA.....1<sup>ST</sup> RESPONDENT**

**RETURNING OFFICER, MACHAKOS CONSTITUENCY.....2<sup>ND</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application dated **18<sup>th</sup> July, 2014**, by way of chamber summons has been brought pursuant to **Order 53 Rule 1** of the **Civil Procedure Rules**.
2. The applicant seeks leave of this court to apply for orders of Judicial Review. Leave sought is intended to enable the applicant apply for an order of mandamus directing the Independent Electoral Boundaries Commission to pay the applicant **Kshs. 350,000/=** being the decretal sum awarded as costs in Machakos Chief Magistrate's Court **Election Petition No. 3** of **2013** plus interest thereon from the **19<sup>th</sup> May, 2014**, being the date of the decree until payment in full.
3. The application is premised on grounds that;-
  - i. The judgment was entered against the 3<sup>rd</sup> respondent herein on **16<sup>th</sup> September, 2013**.
  - ii. The respondent has neglected to satisfy the judgment and decree;
  - iii. The enforcement of the decree against the respondent falls within the auspices of the Government

Proceedings Act, any execution of the same ought to be done hereunder, unless the court grants the order sought, the applicant is at the risk of losing the decretal award in ***Machakos CM Election Petition No. 3 of 2013*** and in all the circumstances justice demands that the order sought herein be given.

- iv. In a supporting affidavit, **Francis Mwaniki Ngunga** stated that he won the petition and costs were to be borne by the 3<sup>rd</sup> respondent; an assessment of costs was done and the 3<sup>rd</sup> respondent was directed to pay him costs of **Kshs. 350,000/=**; the IEBC being a government agency falls within the auspices of the Government Proceedings Act, therefore to seek such costs he ought to seek a judicial review order in the nature of mandamus compelling the government to pay the sum owed.
  - v. The application herein being for leave to apply for a prerogative order of mandamus, it is mandatory for the application to be accompanied by a statement setting out particulars of the applicant, the relief sought, grounds it is premised upon and an affidavit verifying facts relied upon.
4. A perusal of documents on record, establish that what has been availed are a certificate of urgency, chamber summons, a supporting affidavit and decree made in the Election Petition.
  5. An order of mandamus would be issued in certain circumstances to compel the performance of a duty. The question to be posed would therefore be; whether the applicant has been barred from executing against the respondent in the Election Petition as provided by the Law?
  6. An order of mandamus would not be granted if adequate relief can be obtained by some other means that has been provided by the law. The law provides for a process of execution in election petitions. It has not been demonstrated that the applicant demanded for payment of costs as provided by the law and IEBC blatantly refused to pay. Without any proof of the applicant having been barred from executing against the respondent, I have no good reason to grant leave sought.
  7. In the premises, I decline to grant leave sought.
  8. It is so ordered.

**DATED and SIGNED at MACHAKOS this 17<sup>TH</sup> day of OCTOBER 2014.**

**L.N. MUTENDE**

**JUDGE**