



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
ELECTION PETITION NO.5 OF 2013

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ELECTION ACT NO. 24 OF 2011

AND

IN THE MATTER OF: THE ELECTIONS (GENERAL) REGULATIONS 2012

AND

**IN THE MATTER OF: THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION ACT NO. 9 OF 2011**

AND

**IN THE MATTER OF: THE NATIONAL GENERAL ELECTIONS HELD ON THE 4TH
MARCH, 2013**

AND

IN THE MATTER OF: ELECTION FOR GOVERNORS IN THE COUNTY OF LAMU

BETWEEN

FAHIM YASIN TWAHAPETITIONER

AND

- 1. SILVANO BUKO BONAYA**
- 2. INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION**
- 3. TIMAMY ABDALLARESPONDENTS**

AND

ELECTION PETITION NO. 4 OF 2013

SWALEH SALIM SWALE IMUPETITIONER

VERSUS

1. THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION1ST RESPONDENT

2. BONAYA SILVANO2ND RESPONDENT

3. ISSA TIMAMY3RD RESPONDENT

CONSOLIDATED RULING

ELECTION PETITION NO 4 AND 5 OF 2013

1. Petition No. 4 and 5 though filed separately by different Petitioners, are both against the same respondents; and are in respect of elections held in the same county, namely, Lamu. After hearing the arguments separately, the court prepared a consolidated ruling regarding the two Notices of Motion.
2. The Notices of Motion filed on 25th March, 2013 contemporaneously with the Petitions of even date was presented before the court on 25th March, 2013. The court upon certifying the Notice of Motion urgent directed that the same be served upon all parties for hearing today the 26th March, 2013 at 3.30pm.
3. According to the affidavits of service filed on 26th March, 2013 and sworn by the process servers only the 1st and 2nd Respondents were served. The 3rd Respondent has not been served with the Notices of Motion or indeed the Petitions.
4. That notwithstanding, counsel for the Petitioners have urged the court to grant ex-parte, the prayer which effectively seeks to halt or stop the 3rd Respondent from taking the oath of office as the duly elected governor of the County of Lamu, which ceremony is scheduled for the 27th March, 2013. Counsel have urged the court to consider the wider interest of justice and the fact that the application stands to be defeated if the orders sought are denied. It has also been argued that the 3rd Respondent will not suffer any prejudice if the swearing in ceremony is halted, albeit temporarily.
5. As I did when these matters were first presented before me yesterday, I have once more perused the material contained in the respective Petitions and Notices of Motion. I have also given due consideration to the oral address made by counsel this afternoon. Evidently, each of the petitioners has mounted serious attacks on the validity of the election of the 3rd Respondent as the Governor of the county of Lamu. I am also keenly conscious of the fact that the swearing in ceremony is scheduled for 27th March, 2013, hence the Petitioners face a predicament of constrained time lines.

6. Be that as it may, I am of the firm opinion that beyond the effluxion of time, there is no new material placed before me today to persuade me that it is justifiable to issue an *ex parte* order adverse to the 3rd Respondent, without the benefit of hearing him, and/or indeed the other Respondents. It may well be true that any prejudice he might suffer may be temporary as he could eventually be vindicated upon the *inter partes* hearing of the application.
7. Equally though, it can also be said that the Petitioners' also suffering will also be temporary if the orders they seek are denied, because even if the 3rd Respondent is sworn in and their applications, at least the prayer for halting, defeated, the main Petition must be heard to completion within six (6) months as stipulated in the law. Besides the Notices of Motion do contain other prayers which are not liable to be defeated by delay.
8. Weighing all the foregoing considerations, I am constrained to decline the invitations to grant *ex parte* orders to halt the swearing in ceremony in respect of the 3rd Respondent. In so doing however, I am not without sympathy for the Petitioners who have seemingly spared no efforts in seeking to trace and serve Respondents within a very tight time frame.
9. I do therefore direct that the 3rd Respondent be served for the hearing of the Notices of Motion, which contain several other prayers, on the 10th April, 2013.

Costs will abide the outcome of the applications.

Delivered and signed at Malindi this 26th day of March, 2013 in the presence of Mr. Kilonzo for Petitioner in Election Petition No. 5 of 2013 and Mr. Adhoch for Petitioner in Election Petition No. 4 of 2013. Mr. Ole Kina for 1st and 2nd Respondents in Election Petition No. 4 of 2013.

Court clerk – Evans.

C. W. Meoli

JUDGE

MR. KILONZO

We now ask to effect service by substituted means in respect of the 3rd Respondent.

C. W. Meoli

JUDGE

COURT

Let the 3rd Respondent be served through substituted service.

C. W. Meoli

JUDGE