



REPUBLIC OF KENYA
IN THE HIGH COURT O KENYA AT KAKAMEGA
ELECTION PETITION NO. 8 OF 2013

BENJAMIN OGUNYO ANDAMA.....PETITIONER

V E R S U S

1. BENJAMIN ANDOLA ANDAYI..... 1ST RESPONDENT

2. SALLY CHESANG,

(RETURNING OFFICER)..... 2ND RESPONDENT

3. INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION 3RD RESPONDENT

RULING

On 18th June 2013, counsel for the Petitioner Mr. Simiyu asked the court to issue witness summons for three of his client's witnesses, whose affidavit evidence had already been filed in court. Counsel informed the court that his client was finding it difficult to get the three witnesses to attend court. The said witnesses are HABERT SWAKA, PETER OKAMA SAMWEL and ARTHUR MULEMA.

The court gave an order that witness summons be issued for three to attend the hearing from the next day which was 19.6.2013. The said witnesses however did not attend court though witness summons were said to have been served by Senior Court Bailiff, one Otieno Orano on the respective wives on 18th June 2013. The said Senior Court Bailiff filed an affidavit of service.

On 19.6.2013 the counsel for the petitioner indicated that he wished to effect substituted service or bring the witnesses to court through warrants of arrest. The counsel requested the court to issue appropriate orders. The court directed that the request on those here witnesses be raised after the Petitioners five (5) witnesses present finalize tendering their evidence.

After the five witnesses present completed tendering their evidence on 20.6.2013, counsel for the Petitioner raised the same request. Counsel stated that this court had power under section 80(1)(a) and 9b) of the Elections act to issue warrants of arrest to compel the attendance of witnesses. Counsel stated that the contents of paragraph 308 of Halsbury's Laws of England Volume 17 were applicable only when the witnesses had already been compelled through arrest orders by the court. Counsel also relied on Rule 38 of the Election Petition Rules 2013 and the inherent powers of the court.

Counsel urged that the Respondents proceed and call their witnesses while efforts were made to trace and bring the three witnesses to court.

Counsel for the Respondents Mr. Omwanza and Mr. Ouma opposed the request. They argued that issuing warrant of arrest was an inappropriate and draconian action to be taken by the court against witnesses. They also stated that the request by the petitioner's counsel will mean adjourning the hearing which was started to continue till Friday 21.6.13.

I have considered the request by counsel to the petitioner and the responses thereto. I will not allow that the respondents call witnesses and then we go back to the petitioner. That will be like splitting the proceedings. In addition, it will mean that we will not know by the time of closing the respondents' case whether the petitioner has closed his case. The request is not a desirable option to be taken by the court. It will not be in the interest of justice. I decline the same.

Section 80 of the Election act No. 24 of 2011 confers on the election court power to compel witnesses to attend court and to examine them. Rule 38 of the Election Petition Rules allows the election petition court to issue administrative orders for written submissions and prescribing timeliness for certain actions. None of the two provisions above, relied upon by the counsel for the petitioner mention the issuance of arrest warrants to compel the attendance of witnesses.

This court has already issued witness summons, which I think is what is envisaged under section 80 of the Election Act. I will not issue arrest warrants.

Paragraph 308 of Halsbury's Laws of England Volume 17 states that affidavit evidence of a witness who has been ordered by court to attend court, but who has failed to attend "may not be used in evidence without the leave of the court." In the absence of any written law to which I have been referred to the contrary in Kenya, my view is that common law position is applicable.

The decision of the court is therefore as follows:-

1. I decline to issue warrant of arrest for the three petitioner's witnesses.
2. I decline to let the respondents call their witnesses now as the three witnesses of the petitioner are still being traced.

Dated this 20th day of June 2013

George Dulu

JUDGE