



**OKIYA OMTATAH
OKOITI.....PETITIONER**

**AND
THE ATTORNEY**

**GENERAL.....1ST RESPONDENT
THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION.....2ND RESPONDENT**

RULING NO. 2

1. Mr Okoiti Omtata is a citizen driven by public interest to do ensure that the government lives up to the Constitution. He comes before this court for a second time to seek this court's intervention to stop the procurement by Biometric Voter registration (BVR) kits intended for the registration of voters by the Independent Electoral and Boundaries Commission (IEBC).

2. By the Notice of Motion dated 24th September 2012 the petitioner now seeks the following reliefs.

(1) *That the application be certified as urgent and service thereof be dispensed with in the first instance.*

(2) *That an interim conservatory order be issued to restrain the 2nd respondent, whether by themselves or their servants or agents or the Government organ or department, concerned from contracting over the Biometric voter Registration kits with SAFRAN MORPPHO or its affiliates or subsidiaries in Canada or elsewhere pending the hearing and determination of this application interparties.*

(3) *That an interim conservatory order be issued to restrain the 2nd respondent, whether by themselves or their servants or agents or the Government organ or department, concerned from contracting over the Biometric Voter Registration kits with SAFRAN MORPPHO or its affiliates or subsidiaries in Canada or elsewhere pending the hearing and determination of the petition herein.*

(4) *That an interim conservatory order be issued to restrain the 2nd respondent, whether by themselves or their servants or agents or the Government organ concerned from contracting over the Biometric Voter Registration kits with SAFRAN MORPPHO or its affiliates in Canada or elsewhere until they comply with the express condition of the law in public procurement and constitutional provisions on integrity.*

(5) *That this Honourable Court gives a declaration as to whether a Government to Government contract outs the application of and adherence to procurement laws and constitutional provisions on integrity.*

(6) *That this Honourable Court gives a declaration as to whether integrity is a mandatory virtue to any person or corporation which intends or qualifies to contract with the Government of Kenya or its agencies and Commissions.*

(7) That an order be issued under Article 35 on the right to access information, compelling the 2nd respondent and the Minister of Finance to provide the Honourable Court with FULL information on the ongoing procurement of Biometric Voter Registration Kits including:

(a) The competence and the previous experience of the Canadian Commercial Cooperation (hereinafter, the CCC) which is the procurement agency of the Government of Canada appointed to procure the BVR kits on behalf of the Government of Kenya.

(b) The process the CCC used to identify the bidders for the BVR kits.

(c) The number and identity of the bidders who were invited to bid and or expressed an interest to participate in the procurement process or submitted unsolicited proposals to CCC for the supply of the BVR kits.

(d) Evaluation reports on all the entities that submitted bids/offers to CCC.

(e) The full disclosures of the approximately Kshs.7.3 billion loan which the Government of Kenya has reportedly negotiated with the government of Canada for the purchase of BVR kits.

(f) The whereabouts of the approximately Kshs.4 billion that was initially allocated by Parliament to the IEBC to procure the BVR kits, and whether the same can be reallocated without the approval of Parliament.

(g) That this Honourable Court be pleased to join other parties relevant to this petition as and when it deems fit.

(h) That this Honourable Court be pleased to allow the petitioner to amend his petition as the new set of facts dictates.

(i) That the Court do give any other or further orders that will favour the cause of justice.

(j) That costs be in the cause.

3. The application is supported by the petitioner's own affidavit. According to press reports attached to the deposition, a French company known as Sagem SA was convicted in a Paris criminal court in France for bribing Nigerian officials to secure a contract worth USD 214 to produce National Identity Cards. He depones that Safran Morpho, the Canadian subsidiary of the French company that has been selected by the Government of Canada through the Canadian Commercial Corporation to supply the BVR Kits for the IEBC, suffers from credibility and integrity crisis as a result of this connection. The petitioner also buttressed his position by referring to press accounts noted that the Attorney General has raised concerns about the manner in which the procurement was conducted.

4. The petitioner's case as submitted by Mr Nguring'a, counsel for the petitioner, is that Chapter six of the Constitution and other provisions of the Constitution and the law impose an integrity regime which this court is required to enforce to underpin the integrity of the March 2013 elections.

5. The petitioner's case is that unless the conservatory orders are issued, the process of election will lack public confidence and the public will be left with a huge bill arising out of a failed electoral process.

6. The petitioner's case is supported by Shailesh K Patel, an interested party. He submitted that the agreement entered into between the Government of Kenya and the Canadian Commercial Corporation, which is the Canadian government corporation, would expose the people of Kenya to a large bill through the single sourcing procedures. In his view, the procurement conducted by the Canadian Corporation was opaque and the Safram Morpho, a subsidiary of a company convicted of criminal offences in France will taint the process through its association with IEBC.

7. Mr Kilonzo, counsel for the IEBC, and Ms Munyi, counsel for the Attorney General, opposed the application. Mr Kilonzo, emphasised that the court must take into account the fact that the electoral process governed by the *Elections Act, 2011* has a strict timetable and the issuance of conservatory orders would interfere with this programme leading up to the elections in March 2013. Counsel further stated that the procurement, being a government to government procurement, was regular and in conformity with law and must be allowed to go forward.

8. Ms Munyi supported Mr Kilonzo's submission. She produced correspondence from the Attorney General's office being the letter dated 18th September 2012 and one dated 24th September 2012. In the former letter the Attorney General raised certain concerns with the proposed contract and in the latter one he did confirm that those concerns had been dealt with and the agreement could be executed. In the circumstances, counsel urged the court to dismiss the application for conservatory orders.

9. I have considered the pleadings and submissions of the parties and I take the following view of the matter. In my earlier ruling delivered on 27th July 2012, I delivered myself in the following terms, "(3) *In granting a conservatory order, the court is supposed to balance the interests of the two opposing parties. On one hand is the petitioner, acting in public interest to stop what he considers a flawed procurement process by the IEBC to procure electronic voter registration equipment. On the other side, is a constitutional body with a mandate to carry out voter registration and in so doing taking steps to procure the necessary equipment.*"

10. I have not changed my view on this matter nor am I persuaded otherwise. Allegations of corruption are indeed serious, the Constitution puts integrity and other values at its heart in **Article 10** and **Chapter six** of the Constitution and the rejection of the application must not be seen as negating these values but rather that the court is called upon from time to time to balance competing interests and values in every application before it based on the facts and evidence available.

11. Allegations of corruption have been levelled against a company, SAFRAN MORPHO. No authentic court record has been provided for the court to satisfy itself of the nature of the actual allegations. As I stated in my earlier ruling, "*For purposes of court proceedings, these [newspaper] reports are of little probative value and cannot form any evidential basis for impugning the work of a constitutional body.*" Further, not one person either in the IEBC, Ministry of Finance or the Canadian Commercial Corporation has been implicated in any corrupt dealings in relation to the BVR kits. Our own values demand and oblige this court to give every person a hearing before condemning them. This is one value that forms the cornerstone of our justice system.

12. There is now a contract between the Government of Kenya and the Canadian commercial Corporation and the IEBC which gives rise to rights and obligations between the parties. This Court cannot give orders that would interpose these relationships without hearing all the parties thereto much less on the basis of some allegations of fraud gleaned from newspaper articles. If any authorities were required for this proposition they can be found in several cases of our courts (see ***Provincial Insurance Co., of East Africa v Mordecai Nandwa Kisumu Civil Appeal No. 179 of 1995 (Unreported)*** and ***Omega Enterprises (K) Limited vs KTDA and Others Nairobi Civil Appeal No. 59 of 1993 (Unreported)***).

13. I therefore reject prayers 2, 3 and 4 of the motion seeking conservatory orders

14. Prayers 5 and 6 of the application seek declarations. The court cannot grant interim declarations through an interlocutory application. The declarations must await full hearing of the case.

15. Prayer 7 seeks information from the 2nd respondent and the Minister of Finance. **Article 35** entitles the petitioner to information from the state. Such information was requested by the petitioners in the letter dated 14th August 2012 addressed to the Minister for Finance. There is no indication that the letter has been dealt with and it would be proper for the Minister to address himself to the information requested

before the court exercises its coercive powers. In the circumstances, I direct the 1st respondent to ensure that an appropriate response is given to the petitioner within the next 21 days.

16. As regards prayers 8 and 9, I hereby direct the petitioner to file and serve the amended petition within the next 30 days. The petitioners are at liberty to join any necessary parties they deem fit.

17. In view of what I have stated I now make the following orders;

(a) Prayers 2, 3, 4, 5 and 6 of the Notice of Motion dated 24th September 2012 are dismissed.

(b) The 1st respondent shall ensure that an appropriate response is given to the petitioner letter dated 17th August 2012 from the Kejude Trust to the Minister of Finance within the next 21 days from the date hereof.

(c) The petitioner be and is hereby granted leave to file and serve an amended petition within the next 30 days and the petitioner is also at liberty to join any necessary parties it deems fit.

(d) There shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 26th September 2012

D.S. MAJANJA
JUDGE

Mr Nguring'a instructed by P. M. Kahiga and Company Advocates for the Petitioner.

Mr Kilonzo with him Ms Thanji instructed by Sisule Munyi Kilonzo and Associates Advocates for the 1st respondent.

Ms Stella Munyi, instructed by the State Law Office for the Attorney General.