



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT BUNGOMA**

**Election Petition 1 of 2008**

**IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT,  
CHAPTER 7 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE PRESIDENTIAL AND PARLIAMENTARY ELECTIONS  
REGULATION AND THE NATIONAL ASSEMBLY (ELECTION PETITION) RULES**

**AND**

**IN THE MATTER OF THE ELECTION FOR THE SIRISIA CONSTITUENCY**

**BETWEEN**

**JOHN KOYI WALUKE.....PETITIONER**

**~VRS~**

**MOSES MASIKA WETANGULA.....1<sup>ST</sup> RESPONDENT**

**ELECTORAL COMMISSION OF KENYA.....2<sup>ND</sup> RESPONDENT**

**JAMES KULUBI OMWANGWE.....3<sup>RD</sup> RESPONDENT**

**THE INTERIM INDEPENDENT ELECTORAL COMMISSION.....APPLICANT**

**RULING** This ruling is for two applications brought separately by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The first one is dated 28<sup>th</sup> August, 2009 and filed in court on 2<sup>nd</sup> September, 2009 brought under section 23(1) (d) and 2 of the National Assembly and Presidential Elections Act, Cap 7 of the Laws of Kenya, section 2 (41 (2) ) of the Constitution of Kenya (Amendment Act No. 10 of 2008), the Inherent Power and Jurisdiction of the Court and all other enabling provisions. The main prayer is that, the Interim Independent Electoral Commission be substituted in place of the disbanded Electoral Commission of Kenya. The same is brought by the Interim Independent Electoral Commission (herein after referred to as the “IIEC”) through their lawyer Odhiambo & Odhiambo Advocates.

The second application dated 31<sup>st</sup> August, 2009 and filed on the same day by the first Respondent Moses Masika Wetangula under section 23(1)(d) and 2 of the National Assembly and Presidential Elections Act, Cap 7 of the Laws of Kenya and section 3A and 63(e) of the Civil Procedure Act (CPA). It

seeks for striking out of the petition against the first Respondent for want of Electoral Commission of Kenya (ECK) and the Returning Officer. The second prayer is that, costs of the petition be awarded to the first Respondent.

After the Applicants in the two applications failed to agree on which application should be heard first, this court looked at the two applications and the grounds in support and came to a conclusion that the issues to be determined were similar. The bone of contention in the two applications is whether the IIEC has the capacity to be substituted to take over and conduct the defence of this petition in place of the ECK. It was therefore directed that the application seeking substitution dated 28<sup>th</sup> August, 2009 was to be treated as the application. The second application dated 31<sup>st</sup> August, 2009 its Supporting Affidavit and the 1<sup>st</sup> Respondent's Replying Affidavit sworn on the 29<sup>th</sup> August, 2009 were to be treated as the response to the application dated 28<sup>th</sup> August, 2009.

The grounds supporting the application dated 28<sup>th</sup> August, 2009 were presented and ably argued by Ms. Ateya of Odhiambo & Odhiambo Advocates. She submitted that the Constitutional Amendment Legal Notice No. 10 of 2008 repealed section 41 of the Constitution and replaced it with a new section 41 which made the IIEC the successor of the ECK for all intents and purposes. The IIEC was to take over all rights, duties, assets, obligations and liabilities of the ECK. The counsel explained that the IIEC is therefore the right party to succeed the ECK.

On the issue of the Returning Officer, Ms. Ateya submitted that the officer is appointed by statute to conduct elections and remains in office until elections are over. Where there is a dispute on how the elections were conducted, the Returning Officer must be joined as a Respondent to answer to any allegations of irregularities, rigging or any misconduct. It was her contention that even though the ECK which is created by the Constitution was disbanded, the Returning Officer is a creature of Statute and remains a Respondent to this petition.

Finally, it was argued that an election petition is not criminal proceedings and as such the IIEC and the 3<sup>rd</sup> Respondent James Kulubi Omwange will successfully play their respective roles as defendants. Ms. Ateya relied on the ruling of Justice Musinga in *KISII ELECTION PETITION NO.3 OF 2008 (unreported)* – where similar issues on substitution of IIEC in place of ECK arose. The Judge held that IIEC had capacity to take over the petition. The counsel urged this court to be guided by the said ruling.

Mr. Masika for the petitioner adopted the arguments of Ms. Ateya and emphasized the fact that the court is dealing with a constitutional provision on substitution of ECK with IIEC and not with statutory provisions. The new Electoral body (IIEC) was created by Parliament after recommendation by Krigler Committee Report which said that there was a dire need to establish a new body on dissolution of the ECK which was found to have lost credibility due to the manner in which it conducted elections. Any pending business of the ECK including election petitions were to be taken over by the IIEC. The intention of Parliament in creating the IIEC cannot have been to leave a vacuum as far as election petitions are concerned. Mr. Masika further submitted that the Returning Officer is part and parcel of an election petition and must remain a party.

The application was vehemently opposed by Mr. Makokha for the 1<sup>st</sup> Respondent whose submissions were guided by the 1<sup>st</sup> Respondent's Replying Affidavit and his application dated 31<sup>st</sup> August, 2009. He contended that the application for substitution should not be allowed and that the petition should be struck out for reasons that there is no Electoral Commission and there is no Returning Officer. The ECK is established by the Constitution whereas the Returning Officer is appointed by a gazette notice. On disbandment of the ECK, all its staff including the Returning Officer went home. For the time being, there is no Returning Officer for Sirisia Constituency whose election is the subject of this petition. There is no prayer made by the IIEC or the Petitioner to substitute the Returning Officer against whom several allegations of misconduct are made in the petition. In the absence of the Returning Officer, the said allegations cannot be proved.

Mr. Makokha submitted that section 41A spells out the duties of the IIEC but the duties do not include

taking over election petitions. If Parliament intended that IIEC takes over all the pending election petitions, then it would have stated so. The commission's life is limited to only two years. Petitions may not end during that period and this leaves an unanswered question as to what would happen on expiry of the said term.

It is not possible for any person or body to take over Criminal liability of another since the principle of *mens rea* must be established. As such Mr. Makokha was of the view that, IIEC cannot inherit the criminal liability of ECK whose particulars are set out in the petition.

The ballot boxes were kept in the office of the District Coordinator which is now non-existent. "Who then is in charge of the boxes," the 1<sup>st</sup> Respondent poses the question.

Mr. Makokha took issue with the notice of appointment filed for IIEC by Odhiambo & Odhiambo Advocates. He argued that leave ought to have been sought before filing the notice as required by the law. According to him, the ruling by Justice Musinga is irrelevant to this application in that, the matters in issue therein were brought in by way of a preliminary objection. Further, the counsel argued that the authority is not binding to this court but only of persuasive authority.

Having summarized the arguments of the parties, I now look at the issues raised.

Regarding the affidavit sworn by Ahmed Isaack Hassan, the chairman of the IIEC, he states on oath in the first paragraph that he is the chairman and has the authority to swear the affidavit. This is sufficient in itself and there is no requirement that another document in that regard be annexed. That notwithstanding, this court has power under Order XVIII, Rule 7 to admit any affidavit despite some defect or irregularity. The affidavit in support of the application is therefore in order.

On the Notice of Appointment, it was argued that leave ought to have been sought before it was filed. The IIEC is seeking to be substituted in place of ECK. This petition is an existing suit to which the IIEC has been mandated to succeed. The issue of seeking the leave of the court before filing the notice of appointment does not arise.

In regard to the succession issue of ECK by IIEC, I refer to the provisions of section 41 (2):

*"The Interim Independent Electoral Commission shall be the successor to the Electoral Commission of Kenya established by section 41 (now repealed) and subject to this Constitution, all rights, duties, obligations, assets and liabilities of the Electoral Commission of Kenya existing immediately before the commencement of this section shall be automatically and fully transferred to the Interim Independent Electoral Commission and any reference to the Electoral Commission of Kenya shall, for all purposes, be deemed to be a reference to the Interim Independent Electoral Commission established under this section."*

The section in particular stipulates that the IIEC will be the successor of the ECK to take over all rights, duties, obligations, assets and liabilities existing immediately before the date of commencement of the Act being 29<sup>th</sup> December, 2008. The question that arises is whether the provision includes election petitions. Would election petitions be regarded as rights, duties, obligations or liabilities? The duties of the IIEC are spelt out in section 41 A and numbered (a) to (j). Some of the duties are stipulated as follows:

- a) *reform of electoral process and the management of elections:*
- b) *promotion of free and fair elections:*
- c) *fresh registration of voters and the creation of a new voter register;*
- d) *efficient conduct and supervision of elections and referenda;*

- e) *development of modern system for collection, transmission of electoral data;*
- f) *settlement of minor electoral disputes...;*

The above duties all relate to elections which is the main duty of any electoral commission. The repealed section 42 of the Constitution mandated the ECK to carry out duties similar to the ones in section 41 A. Section 41 (2) provides that IIEC is the successor of the ECK to take over all the matters pending before the ECK as at 29<sup>th</sup> December, 2008. The intention of Parliament must be interpreted with regard to the duties of ECK under the repealed section 42 and those conferred on the IIEC by section 41A. The duties range from conduct and management of elections to settlement of minor election disputes and promotion of voter education and culture of democracy.

The Constitutional Amendment which created the IIEC was based on the Krigler Report which called for replacement of ECK. The ECK had by that time lost public confidence due to the manner in which it conducted the 2007 general elections as the Krigler Report put it.

The intention of Parliament when it passed the amendment was to replace the ECK with a new body. The duties of the new body were to manage elections which was the mandate of the disbanded ECK. Managing elections includes handling or defending election petitions. The two duties are related and cannot be separated. It could not have been the intention of Parliament to have the IIEC succeed ECK in all matters pending as at 29<sup>th</sup> December, 2008 and leave a vacuum as far as election petitions are concerned. In my view, election petitions are included in the rights, duties and obligations of the disbanded body and, therefore became the business of the IIEC when it was created. Parliament had no intention of creating another body after IIEC which would be mandated to take over election petitions pending in courts. In my view section 41 A does not create a vacuum on duties relating to pending election petitions. Section 41 read together with section 41A is clear that IIEC has fully succeeded the ECK in respect of the rights, duties, obligations, assets and liabilities for the two year period that it will be in office. Section 41 uses the words “*automatically*” and “*fully transferred*”. There is no doubt that Parliament was aware at the time of enacting the Constitutional amendment that there were election petitions pending in court. The legislature had no intention to block the IIEC from defending the said petitions.

It is not for this court to speculate as to what will happen in the event that some election petitions are still pending in court at the expiry of the two years. In the event that Parliament will not have created a permanent electoral commission, then the existing law will be applied in the relevant situations. Courts should only deal with existing situations by applying the law and not give room to speculation.

The Constitution is the supreme law of this country and a lot of weight ought to be attached to its provisions. The Constitution does not deal with details which may be catered for in statutes and subsidiary legislation. Its provisions ought to be interpreted broadly and liberally to give values and aspirations to the people. It was held in the case of CRISPUS KARANJA NJOGU -VS- ATTORNEY GENERAL CRIMINAL APPEAL NO.39 OF 2000 - (unreported) that the Constitution has principles and values embodied in, which make it a living document. I agree with my brother Justice Musinga in his ruling when he said that there was no need for any transitional provision stating that IIEC shall take over all election petitions pending in court. The wording of section 41 and section 41 A is clear and leaves no doubt that IIEC was fully mandated to take over all duties and obligations of the disbanded body.

On the issue of taking over criminal culpability, the allegations in the petition are directed to the first and third Respondent and not the ECK now being replaced by the IIEC. For this reason, no prejudice will be caused by the substitution of ECK.

It was argued that the Returning Officer went home on disbandment of the ECK and that he also requires to be substituted. I am not convinced by this argument. In my view, any returning officer who is a party to a pending election petition, will continue in that capacity until the petition is fully heard and determined. The gazette notice appointing him is still valid and does not become invalid on disbandment of ECK. The IIEC does not require to appoint new returning officers for purposes of the pending

petitions. The allegations in the petition of rigging or misconduct are against the 3<sup>rd</sup> Respondent who ought to defend himself in this petition.

Section 41 (2) states in part:

*“..... any reference to the Electoral Commission of Kenya shall, for all purposes, be deemed to be a reference to the Interim Independent Electoral Commission established under this section.”*

It follows therefore that the Returning Officer appointed by gazette notice by ECK will be deemed to be an officer of the IIEC for purposes of succession. It is therefore, not necessary to substitute the Returning Officer in this petition.

The ruling of Justice Musinga in the Kisii Electoral Petition No.3 of 2008 is relevant to the matter before me. The issues raised and addressed therein include substitution of ECK with IIEC which is the main issue herein. I am persuaded by the said ruling on the relevant matter.

I am convinced and I so rule that IIEC has capacity to take over pending election petitions and that the application before me is well advised. There is therefore, no vacuum as far as the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are concerned. I find no merit in the 1<sup>st</sup> Respondent's prayer to strike out the petition. The application of the IIEC dated 28<sup>th</sup> August, 2009 is merited and I allow the same as prayed. Costs in the cause.

**F. N. MUCHEMI**

*JUDGE This ruling is dated and delivered in open court on the 24th day of September, 2009 in the presence of Mr Masika for petitioner, Ateya for Odhiambo for applicant ( IIEC AND Mr. Makokha for 1<sup>st</sup> Respondent).*

**F. N. MUCHEMI**

**JUDGE**