



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Election Petition 14 of 2008

MOSES SOMOINE OLE SAKUDA PETITIONER

VERSUS

HON (PROF.) GEORGE SAITOTI 1ST RESPONDENT

ELECTORAL COMMISSION OF KENYA 2ND RESPONDENT

GEORGE MORARA OKENYE 3RD RESPONDENT

RULING

(1) On the 21st January 2008, Moses Somoine ole Sakuda (“the Petitioner”) filed a petition to challenge the validity of the election of the Hon. (Prof.) George Saitoti (“the first Respondent”) as the Member of Parliament for Kajiado North Constituency at the General Election held on the 27th December 2007.

(2) The first Respondent took out a Notice of Motion on the 20th March 2008 seeking orders to strike out the Petition on the ground that it was not served on George Morara Okenye, the Returning Officer, (“the third Respondent”), personally or in a mode prescribed by law.

(3) After hearing arguments for and against that application on diverse dates, this court dismissed the Motion on the 13th June 2008 and the first Respondent, being dissatisfied with the whole of the decision, lodged Civil Appeal No.118 of 2008 in the Court of Appeal on the 23rd June 2008 (“the Appeal”).

(4) A little later, on the 30th June 2008, the first Respondent filed the Notice of Motion now before me expressed to be brought pursuant to sections 44 and 60(1) of the Constitution of Kenya; section 23(2) of the National Assembly and Presidential Elections Act; the inherent jurisdiction of the court and other enabling laws.

(5) The first Respondent seeks the following orders:

“(1) This Hon. Court be pleased to stay and/or suspend any further proceedings in Election Petition No.14 of 2008 pending the hearing and determination of Civil Appeal No.118 of 2008 lodged in the Court of Appeal on 23rd June, 2008; or

(2) This Hon. Court be pleased to order the preservation of the *status quo* as at the time of delivery of the Ruling dated 13th June, 2008 with no further proceedings being taken, pending the hearing and determination of Civil Appeal No.118 of 2008 lodged in the Court of Appeal on 23rd June, 2008.”

The application is based on the grounds that the Appeal has overwhelming chances of success and its outcome should not be rendered nugatory; that the Appeal challenges the competency and validity of this Petition; and that if it turns out on appeal that this Petition is invalid and incompetent after taking the testimony and possibly verdict rendered, that would amount to palpable waste of scarce judicial time – among several other grounds – which are reiterated in the supporting affidavit of the Hon. (Prof.) George Saitoti, the first Respondent.

(6) Though the second and third Respondents did not respond to the application at all, the Petitioner filed his Grounds of Opposition on the 10th July 2008. He challenges the application on the basis that the Motion is misconceived, incurably defective and bad in law or is otherwise an abuse of the process of the court; and that the application lacks merit and is intended to delay the hearing and determination of his Petition expeditiously as envisaged by law. The Petitioner also filed his sworn affidavit dated the 10th July 2008 setting out further reasons for his opposition to the application.

(7) I have carefully read and considered the application and the affidavits filed as well as listened to the submissions of learned counsel in addition to studying the authorities cited in support of their respective contentions and submissions.

(8) The principal grounds on the basis of which the first Respondent seeks an order of stay of any further proceedings in this Petition are that the Appeal has overwhelming chances of success and its outcome should not be rendered nugatory. This court is not competent to assess whether or not the Appeal has overwhelming chances of success. That is a matter best left to the Court of Appeal and I have no desire to usurp the jurisdiction of that court by addressing the issue here.

(9) But I can and will deal with the issue as to whether the Appeal will be rendered nugatory if an order of stay is not granted. I think not, because if the first Respondent succeeds in his appeal, the effect will be to render any further proceedings which may have taken place in this court unnecessary, but an appropriate order for costs can be made to remedy that. For this reason also, I think that to allow the application on the ground that the Appeal will be rendered nugatory would in any event defeat the principle that Election Petitions should be disposed of expeditiously.

(10) In view of the foregoing, I am not persuaded that the application has merit and would have been inclined to dismiss it. However, and as I cannot assess if the Appeal has overwhelming or any chances of success, and as I do not in any event have any control on the dispatch of business in the Court of Appeal so as to be able to determine when the Appeal will be heard, I will allow the application for those reasons only and grant a very limited order to enable the first Respondent lodge an appropriate application in the Court of Appeal under rule 5(2) (b) of the Rules of that Court.

Accordingly, there will be an order of stay of further proceedings in terms of prayer No.1 in the Notice of Motion filed on the 30th June 2008 for a period of twenty-one (21) days from today. The costs of the application will be in the Petition. This Petition is fixed for mention before me on the 13th October 2008 at 9.00 a.m. for further directions.

So ordered.

Dated and delivered at Nairobi this Nineteenth day of September, 2008.

P. Kihara Kariuki

Judge.