



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

Election Petition 1 of 2003

IN THE MATTER OF THE CONSTITUTION OF KENYA

A N D

**IN THE MATTER OF THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT
[CAP. 7]**

A N D

**IN THE MATTER OF THE PARLIAMENTARY AND PRESIDENTIAL REGULATIONS AND
THE RULES MADE THEREUNDER**

A N D

THE ELECTION OFFENCES ACT [CAP.66]

A N D

IN THE MATTER OF THE ELECTION FOR THE

BUDALANGI CONSTITUENCY

THE HUMBLE PETITION OF

**PETER LEO AGWELI ONALO
.....PETITIONER**

VERSUS

**ELIAKIM LUDEKI1ST
RESPONDENT**

**BITA SAUTI RAPHAEL WANJALA2ND
RESPONDENT**

**ELECTORAL COMMISSION OF KENYA3RD
RESPONDENT**

RULING

(1) By his Amended Notice of Motion dated and filed on the 28th June 2006, Peter Onalo, the Petitioner, is asking the court to issue witness summonses to the following persons:

1. Mr. G.K. Mukele, the Vice-Chairman of the Electoral Commission of Kenya.
2. Inspector of Police John Ndangwa.
3. The Officer Commanding Police Division and the Officer Commanding Station at Port Victoria Police Station.
4. The Officer Commanding Station at Busia Police Station.
5. Ms. Doris Makhulo, the Presiding Officer at Sifugwe Primary School Polling Station.
6. Mr. Joseph Ogao, the Presiding Officer at Musoma Polling Station.
7. The Executive Officer of the High Court of Kenya, Central Registry, Nairobi.

(2) In the supporting affidavits sworn by Mr. Kennedy Kenaz Bw'omote on the 6th May 2003, and by Mr. Ogesa Antony on the 28th June 2006 respectively, it is stated that it is important that these officers do attend court when the Petition comes up for hearing. It is common ground that the court has power to issue witness summons to compel any person to attend court and give evidence or produce documents.

(3) Eliakim Ludeki, the First Respondent, was the Returning Officer for Budalangi Constituency during the December 2002 General Elections. Raphael Wanjala, the Second Respondent, was the person elected as Member of Parliament for Budalangi Constituency. The Electoral Commission of Kenya, the Third Respondent, is the body charged with the organization and conduct of Presidential, Parliamentary and Local Government Elections in Kenya.

(4) The allegation against the First Respondent is that he cancelled the Petitioner's nomination as the person validly nominated by NARC to be the candidate for the election. The Second Respondent and his supporters are alleged to have used violence against the Petitioner and his supporters and to have forcefully taken the Petitioner's nomination papers from the First Respondent's office. The First and Third Respondents are accused of cancelling the Petitioner's nomination without giving him an opportunity to be heard.

(5) The Petitioner wants Inspector John Ndangwa to be summoned because he is alleged to have been present when the First Respondent (the Returning Officer) is alleged to have been attacked during the nomination exercise. It is not unreasonable to presume that there must have been many other persons present during the alleged incident and the Petitioner admits this in his Answer to the Request for Particulars.

Inspector John Ndangwa must have been working under the direction of the Returning Officer against whom the allegation of failure to provide adequate security has been made. In defence of that allegation or other allegations, the First Respondent would be entitled to summon the officers who worked under him, including Inspector John Ndangwa, to contest those allegations. He is therefore a potential witness for the First Respondent. Accordingly, the Petitioner has no right to have him summoned to give evidence on his behalf.

(6) The Petitioner alleges that reports of violence were made at Port Victoria Police Station on the 9th and 26th December 2002 and entered in the Occurrence Book from the 25th November 2002 until the 28th December 2002. The Petitioner is entitled to have that evidence placed before the court. Accordingly, a witness summons will issue for the attendance of the Officer Commanding Police Division or, as the case

may be, the Officer Commanding Station at Port Victoria Police Station to produce the Occurance Book entries for these dates — namely, from the 25th November 2002 until the 28th December 2002.

(7) The Officer Commanding Station of Busia Police Station will also be summoned to produce the Occurance Book for the period from the 20th November 2002 to the 28th December 2002.

(8) The Petitioner is not entitled to summon the Presiding Officers at Sifugwe Primary School Polling Station and Musoma Polling Station respectively because these were officials employed by, and working under the direction of, and answerable to, the Electoral Commission of Kenya, the Third Respondent. The decision as to whether or not to call them as witnesses must be left to the Electoral Commission of Kenya. Summoning them as witness for the Petitioner would undermine the Third Respondent's legal rights as a party in this Petition. The request by the Petitioner to call these two Presiding Officers to give evidence on his behalf is accordingly denied.

(9) With regard to the Executive Officer of the High Court of Kenya, Central Registry, Nairobi, I consider the request to be well-founded. He is required to attend court and produce a court file. He is the proper person to do so and I accordingly hereby order that summons be issued for him to attend court and produce the proceedings and ruling/judgment in Nairobi H.C.C.C. No.1774 of 2002 (OS) — Peter Leo Agweli Onalo -v- Electoral Commission of Kenya and Another.

(10) That brings me to Mr. G.K. Mukele, the Vice-Chairman of the Electoral Commission of Kenya. There are a number of allegations which have been made by the Petitioner against the Third Respondent and its officers. His attendance is required because the Petitioner wants him to produce a certain statement allegedly submitted by the First Respondent on a complaint involving the Second Respondent. Since the First Respondent is a party in these proceedings and the Returning Officer for the Constituency at that, he will almost certainly give evidence on his own behalf and also on behalf of the Third Respondent, the Electoral Commission of Kenya. Evidence relating to the alleged statement can be obtained from him at his cross-examination. The Petitioner has not laid a basis for his request to summon Mr. G.K. Mukele. The Electoral Commission of Kenya as a Respondent must be given the freedom to choose which witnesses to call to contest the allegations made against it and its offices by the Petitioner.

(11) The Petitioner has made several allegations against the Respondents in his Petition. It is his duty and burden to adduce evidence to substantiate them if he is to succeed in getting the Second Respondent's election as the Member of Parliament for Budalangi Constituency nullified. In seeking to discharge that burden, the court cannot allow him to go on a fishing expedition by calling as witnesses persons who are likely to be called to give evidence by the Respondents.

(12) So, except for the Officer Commanding Police Division or, as the case may be, the Officer Commanding Station for Port Victoria Police Station and the Officer Commanding Station for Busia Police Station respectively and the Executive Officer of the High Court of Kenya, Central Registry, Nairobi, for whom witness summonses will be issued, the Petitioner's request to summon Mr. G.K. Mukele, Presiding Officers Doris Makhulo and Joseph Ogao and Inspector of Police John Ndongwa respectively, is denied. The Amended Notice of Motion filed on the 28th June 2006 succeeds to that limited extent only and fails in all other respects. The costs of the Motion will be in the Petition.

Orders accordingly.

Dated and delivered at Nairobi this Seventh day of August 2006.

P. Kihara Kariuki

Judge