

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 1 OF 2005

HASSAN ALI JOHOPETITIONER

- VERSUS -

1. HOTHAM NYANGE1ST RESPONDENT

2. ANANIA MWASAMBU MWABOZA.....2ND RESPONDENT

RULING

Before this Petition is fixed for trial, there are three applications that have been filed by the parties that need to be first disposed of. The first one is that of the Petitioner dated and filed on the 11th April 2005. It is brought under Section 3A of the Civil Procedure Act, Order L Rule I of the Civil Procedure Rules and sections 23(1)(d) and 26 of the National Assembly and Presidential Elections Act Cap 7 of the Laws of Kenya and seeks mainly an order for a recount, scrutiny and reconciliation of all ballot papers, counterfoils and register of all votes cast in the By-Election in Kisauni Constituency on the 16th December 2004.

The second application is the first Respondent's Notice of Motion dated and filed on 4th May 2005. It is brought under sections 20(1) and 21(1), (2) and (3) of the National Assembly and Presidential Elections Act, Rule 9 of the Election Petition Rules as well as under the inherent jurisdiction of the court and seeks the striking out of the Petitions dated 24th December 2004 and 17th January 2005. The third application is also by the first Respondent. It is dated 26th July 2005 and filed on 27th July 2005. It is brought under section 3A of the Civil Procedure Act Order L Rule 1 of the Civil Procedure Rules and section 23(2) of the National Assembly and Presidential Elections Act as well as Rule 5 of the Election Petition Rules and seeks an order for particulars.

Ms. Keli, Counsel for the first Respondent, informed me that in view of the Hon. Justice Ojwang's Ruling delivered herein on 8th July 2005 the first Respondent wishes to abandon his application dated 4th May 2005. As that is not opposed I order that first Respondent's Notice of Motion dated 4th May 2005 is hereby abandoned with no order as to costs.

That leaves us with the Petitioners application for a recount and scrutiny and the first Respondent's Application for an order for particulars. The issue at the moment is: Which one should be heard first?

Mr. Nyaberi, Counsel for the Petitioner urges me to hear the Petitioners application first.

His argument is premised on two grounds. First, that the Petitioner's application was filed earlier than the first Respondent's. Secondly, that if granted it will dispose of the whole Petition.

Miss Keli on the other hand contends that the first Respondent's application for an order for particulars should be heard first to enable the first Respondent prepare for the hearing.

I have perused both the Applications and considered these rival submissions. Having not heard it I cannot say whether or not the Petitioner's application, if granted, will dispose of this Petition. The first Respondents application, as it were seeks to complete the pleadings in this matter. Although filed later than the Petitioner's I hold that it should be heard first so that, if granted, pleadings may be closed and the

issues crystallized to avoid wandering all over. Costs in cause. **DATED and delivered this 7th day of September 2005.**

D. K. MARAGA

JUDGE