



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Petition 311 of 2012**

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

**AND**

**THE ATTORNEY GENERAL .....**

**1<sup>ST</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....**

**2<sup>ND</sup> RESPONDENT**

**RULING NO. 3**

1. This is the third application that the indefatigable Okiya Omtatah Okoiti has filed to stop the consummation and implementation of the agreement between the Government of Canada through the Canadian Commercial Corporation and Kenya Government for the supply of Biometric Voter Registration (BVR) kits for use by the Independent Electoral Commission of Kenya for purposes of registration of voters for the general elections scheduled in March, 2013.

2. The Notice of Motion dated 3<sup>rd</sup> October 2012 seeks the following orders;

(1) *That an interim conservatory order be issued suspending the contract signed between the Government of Kenya and the Government of Canada (through the Canadian Commercial Corporation) on or about September 24, 2012, for the supply of BVR kits pending the hearing and determination of this application herein interpartes.*

(2) *That an interim conservatory order be issued to restrain the 1<sup>st</sup> and 2<sup>nd</sup> respondents, whether by themselves or their servants or agents or the Government organ or department concerned from contracting over the Biometric Voter Registration kits as provided for in the contract they entered into with the Government of Canada through Canadian Commercial Corporation and moreover the contract dated on or about September 24, 2012, does not become effective until Kenya makes a payment of Euros 22,483,675.87, representing about 40% of the contract value pending the hearing and determination of this application and the petition herein interpartes.*

(3) *That an interim conservatory order be issued directing the 1<sup>st</sup> and 2<sup>nd</sup> respondents whether by themselves or their servants or agents or the Government organ concerned to consider any other offers, including the offer made by SIC-BIOMETRICS of Canada to supply, within the stipulated time high quality BVR kits and the complete AFIS solution and other services, required as described in the contract of CCC/IEBC/MIN. OF FINANCE at a much lower price of US\$57,398,000.00 which amount will save the Kenyan taxpayer a colossal amount equivalent to a minimum US\$16 million, or say Kshs1.3 billion.*

- (4) That this Honourable Court do declare that the Constitution of Kenya, 2010 is an absolute bar to any process or action that seeks to violate or contravene the constitution.
- (5) That this Honourable Court do declare that the timetable set by the IEBC for holding elections on March 2, 2012 does not meet the constitutional threshold of an emergency with the legal capacity to oust or suspend constitutional provisions as spelt in Article 58 as read with Article 132(4)(d) of the Constitution of Kenya, 2010, and, therefore cannot be invoked to allow the unconstitutional, illegal, null and void contract to be executed.
- (6) That a copy of the contract signed between the respondents and the CCC should be availed to the petitioner and the Interested Party.
- (7) That the affidavit and annexure thereto in the application herein be retained for use in the hearing and determination of the Petition herein.
- (8) That with utmost respect to the learned judge, this Honourable Court do give direction as to the reviewing of the judgment the Hon. Justice Majanja delivered in open court on September 26, 2012 in the petitioner's application dated September 24, 2012.
- (9) That the court do give any other or further orders that will favour the cause of justice.
- (10) That costs be in the cause.

3. In essence the applicant seeks orders to review my decision of 26<sup>th</sup> September 2012 in which I declined to issue conservatory orders restraining the 2<sup>nd</sup> respondent from contracting over the BVR kits with Safran Morpho or its Canadian affiliates or subsidiaries. In an earlier ruling delivered on 27<sup>th</sup> July 2012, I also declined to issue a conservatory order restraining the 2<sup>nd</sup> respondent from proceeding with tenders for the procurement of BVR kits. The latter order was issued prior to the government procuring BVR kits directly through contracting with the Canadian government.

4. I have heard and considered the parties respective arguments and depositions and I in my view the only issue is whether I should issue a conservatory order having dismissed a similar application.

5. Although the petitioner has claimed that there are new provisions of law being invoked, I do not think there is any merit in the application. The issues of integrity, procurement law, national principles and values were all the subject of the prior determinations. The plaintiff seeks substantially the same reliefs that have been adjudicated upon and the law and principles governing the doctrine of *res-judicata* to applies to the application in full force.

6. As I stated in my decision of 26<sup>th</sup> September 2012, in an application for conservatory orders the court is called upon to balance various values and national principles pending final determination of the petition. This is an exercise I engaged in and I concluded that it would be improper to grant conservatory orders or any orders interfering with the constitutionality underpinned electoral process.

7. Apart from the fact that there are no new circumstances either of law or fact that would entitle me to review my previous decision; the applicant's motion is in my view *res-judicata*. Accordingly, the petitioner's Notice of Motion dated 3<sup>rd</sup> October 2012 is hereby dismissed.

**DATED and DELIVERED at NAIROBI this 8<sup>th</sup> October 2012**

**D.S. MAJANJA**  
**JUDGE**

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

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