



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Election Petition 1 of 2008**

**AYUB JUMA MWAKESI .....PETITIONER**

**VERSUS**

**MWAKWERE CHIRAU ALI .....1<sup>ST</sup> RESPONDEN**

**ALI MAALIM HASSAN .....2<sup>ND</sup> RESPONDENT**

**THE ELECTORAL COMMISSION OF KENYA ..3<sup>RD</sup> RESPONDENT**

**RULING/DIRECTIONS**

1. First, I am sincerely humbled and grateful for the confidence shown and expressed by the parties and counsel in the Presiding Judge of this Election Court. I hereby assure the parties, the electorate and counsel that I shall not betray that trust and confidence and this court will discharge its duties in dealing with the Petition in accordance with the Constitution of Kenya and without any discrimination, fear or favour. Thank you again.
2. I am told that there is a ruling on 9<sup>th</sup> October 2009 as to whether an application to strike out the Petition ought to be heard first before the hearing of the Petition. I have been asked to await the Ruling and not fix a hearing date. The Petition insists on the fixing of date in any event.
3. There was also a similar argument that there is another application coming for hearing on 13.10.09 for interpretation of the Court of Appeal ruling as to whether it was only the Petition against the Returning Officer had been struck out or the entire Petition. On this ground, I have been asked by the Respondents to postpone the fixing of dates while the Petitioner insists on hearing dates being fixed.

This court as an Election Court has the highest regard,

respect and loyalty to the Court of Appeal. It is the supreme Court of our land. However, the election Laws, this court is under strict direction that an election matter takes precedence to other proceedings and must be given priority. In view of the time frame or the term of an elected Member of Parliament (M.P.), It is imperative that an election petition be heard timeously and expeditiously. It has been seen in the past even in the last Parliament most petitions were rendered almost nugatory as by the time they were heard, the term of the last Parliament was virtually up.

As a result and as a matter of principle and to prevent the public and the electorate losing confidence in the electoral process and resolution of such disputes, the election court must be seen to move with

commitment and judicial haste in an election petition. Unless there is stay of proceedings it shall be deemed that the election petition is still on and is proceeding to trial.

The Court will not pre-empt the Court of Appeal but neither will it speculate on the possible outcome or results of the proceedings there.

If and when a stay order is served or the Petition is struck out, this court will be bound and act accordingly.

As of now in order to block some dates within this year for the hearing of the petition, it is pertinent that I give hearing dates within a reasonable time. The Court of Appeal has the powers to direct this court if necessary about any postponements or otherwise. It also has powers to stay proceeding etc. In the absence of any such stay orders or directions, this court while giving time to parties is still bound to fix hearing dates convenient and as a matter of principle.

With regard to the question whether the new Interim Independent Electoral Commission is a necessary party or should be formally joined or not, it comes clear that the petitioner is of the view that section 41 of the Amended Constitution provides for transitional provisions that automatically make the Interim Independent Electoral Commission a party in this case and there is no need to amend or formally enjoin it. That they already are parties on basis of S.41. The Counsel for the Respondents disagree.

As a result, this court will leave it at that. Since in the circumstances, and having not been requested to give an interpretation or since the court has not been moved, I will not take any position.

Each party will know how to articulate its positions whether in submissions in the petition, or preliminary proceedings or applications. For now it is an issue which cannot bar this court to fixing a date. If the issue goes to jurisdiction one will still be able to raise preliminary issues and if one strongly is of the view that it is mandatory for a joinder, then he should know what to do. The court cannot otherwise compel the petitioner to take steps that he does not wish to take. He is the primary mover of the petition and has a right to go as he deems it fit. I will give hearing dates within this term.

**Dated and delivered at Mombasa this 5<sup>th</sup> day of October 2009.**

**M. K. IBRAHIM**

**J U D G E**

**Further Order by Consent**

Hearing of the Petition shall proceed on 23<sup>rd</sup> and 24<sup>th</sup> November 2009 at

9 a.m.

**IBRAHIM, J**