



THE CHIEF MAGISTRATE'S COURT AT KISII

ELECTION PETITION NO. 3 OF 2013

IN THE MATTER OF ELECTION ACT 24 OF 2011 AND ELECTION (PARLIAMENTARY AND COUNTY ELECTION) PETITION RULES-2013,

AND

IN THE MATTER OF ELECTION OF THE COUNTY ASSEMBLY REPRESENTATIVE FOR KIAMOKAMA COUNTY ASSEMBLY WARD

AND

IN THE MATTER;- OF THE PETITION OF KENNEDY MOSE NYAGWAYA

BETWEEN

KENNEDY MOSE NYAGWAYA.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST RESPONDENT

MOSES OPIYO AHETE.....2ND RESPONDENT

KENNEDY MICHIRA MAINYA3RD RESPONDENT

RULING

The notice of motion application dated 14th May, 2013 filed on the 15th day of May, 2013 brought under rule 17 of the election (parliamentary and county election) petition rules – 2013 seeks inter alia for the following reliefs:-

(a) That the Honourable court be pleased to summon:-

- I. The chief of NYARIBARI CENTRAL LOCATION to produce the photo copies of the ballot papers in his custody.
- II. That District Commanding Investigation Officer Kisii central District to produce the ballot papers which were handed over to him by the in charge of Ibacho Patrol Base.
- III. The in-charge of Ibacho Patrol Base to produce the O.B of 15th March, 2013.

(b) That the Honourable court be pleased to order and direct the 1st and 2nd respondent to produce all the counter-foils of all the ballot booklets in all polling stations in Kiamokama County Assembly ward.

The application was supported by the sworn affidavit of the petitioner KENNEDY MOSE

NYAGWAYA. It is not however, as rightly contended by the Respondents counsels whether the affidavit sworn by one METHUSELA MOBISA ONDIMU, attached to the application was in support of the presented application or some was unrelated to the presented application, which fact would comment and at a later stage during the ruling.

The 1st and 2nd Respondent through the 2nd Respondent MOSES OPIYO AHERE filed a replying (undated) affidavit thereto, filed today 21st May, 2013. The 3rd Respondent was yet to file a response thereto as at the time this matter came up for directions on the hearing and disposal of the application.

I have heard the rivaling arguments made by all the counsels on record for the parties herein for and against the presented application. I have also perused the entire record, the filed petition and the filed answers hereto, supported by witnesses and their respective sworn affidavit of evidence and the documentary evidence attached therewith.

I do find, for a fact that the Witness sought to be called in evidence in this petition are well captured in the petitioner's sworn affidavit of evidence dated 10th April , 2013 filed in court on the even date and those of the rest of the witnesses, no tally NATHAN RATEMO ONDABA AND METHUSELA MOBISA ONDIMU

secondly, I further hold that the prayers sought under the second limb of the presented application for the court to issue order directing of the 1st and 2nd Respondent to produce all the count foils of all the ballot booklets in all the polling station in Kiamokama County Assembly ward can only obtained upon the court making a finding upon hearing all the evidence to be adduced by parties in support of their respective cases herein.

Thirdly, although, it was not as issue argued in this application and which issue is contentious to all the parties to this petition. In my humble view, all parties during trial of the petition shall be accorded the chance and the opportunity to test the veracity, truthfulness and the credibility of one METHUSELA MOBISA ONDIMU, a witness who has hitherto sworn and filed conflicting set of affidavits herein, through examination in chief under oath, across examination and re-examination.

The net result of my afore stated observations are that the prayers sought in the presented notice of motion application dated the 14th May, 2013 filed in the 15th May, 2013 cannot obtain at such an interlocutory stage, which prayers – in my respectful view go to the roots and substance of the entire petition and in this regard hereby order and direct that the said presented application is hereby suspended, kept in limb and / or absence for the court to make a finding thereof during the course of hearing of the main petition and upon hearing the evidence to be adduced by the respective witnesses herein. In many event , it cannot be gainsaid or over emphasized that the honourable court during the course of discharging its Judicial functions and in administering Justice to all, can not hesitate to call in evidence any person or persons , who in its opinion or finding would assist the court in arriving at a fair and just decision in the matter.

And taking cognizance of the overriding objectives of the election a (parliamentary and County elections) petition rules 2013, now direct all parties to this petition to and in compliance of section 17 of the rules thereof do hereby direct and order all parties to this petition to proceed. For the pre-trial session of the matter, for parties to confirm court the names of witnesses they intend to call, the confirmed contested and uncontested issues and further evidence to be adduced by parties if any, so as to enable the court set down the hearing of the main trial of the petition as envisaged under section 17 (h) of the election rules costs of the presented notice of motion application to be in the cause.

It is so ordered and directed.

K. SAMBU PM

21.5.2013

Court- Ruling read and delivered in open court on the 21st May, 2013 in the presence of Mr. Mongare ,court clerk, Mr. Momanyi Aunga counsel for the petitioner, Mr. Masagwe counsel for the 1st and 2nd respondent and Mr. Nyamweya counsel for the 3rd respondent.

K. SAMBU PM

21.5.2013. m