



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(Coram: A.C. Mrima, J.)
CONSTITUTIONAL PETITION NO. E174 OF 2022

-between-

1. THE EQUITABLE PARTY
2. DR. PATRICK LUMUMBA SAISI
3. BONFACE SHANGA AMUNYANYI.....PETITIONERS

-and-

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....RESPONDENT

JUDGMENT

1. The dispute subject of the Petition herein was precipitated by the refusal by the Respondent to review the 1st Petitioner's nomination rules and to issue a Compliance Certificate so as to enable the 1st Petitioner take part in the General election slated for the 9th August, 2022 (hereinafter referred to as '*the General election*').
2. On 22nd April, 2022 *vide* a Petition dated 21st April, 2022, the three Petitioners herein, being the party itself and two of its members, challenged the said refusal by the Respondent by filing the Petition together with an application by way of a Notice of Motion which was evenly dated.
3. In the main, the Petition prayed for the following reliefs: -
 1. *A declaration that the petitioner's fundamental rights and freedoms have been violated.*
 2. *A declaration that the Respondent acted ultra vires its statutory powers.*
 3. *An order declaring the Respondent's letter of 9th April, 2022 denying the 1st Petitioners' participation in the nominations for party contestants as an individual party for the 2022 General Elections as unconstitutional, null and void.*
 4. *An order directed to the Respondent to review and/or clear the applicant Party to carry out nomination primaries within the times limit set.*
 5. *An order directed to the Respondent to review and approve the 1st petitioner's list of Nominees and/or candidates to enable them to participate in the august 9th General election pending the hearing and determination of the suit.*
 6. *Aggravated Damages.*
 7. *General Damages.*
 8. *Costs of this petition.*

9. Any other relief that this Honourable court may deem just to grant.

4. The Notice of Motion sought the following orders: -

1. That the application herein be certified urgent and be heard Ex-parte in the first instance.
2. That the honourable court be pleased to issue an order directed to the respondent to clear the applicant party to carry out Nomination primaries within the times limit set in any event before the 28th of April, 2022 pending the hearing and determination of the instant suit.
3. That the honourable court be pleased to issue an order directed to the respondent to review and approve the applicant's list of Nominees and/or candidates to participate in the August 9th General Election pending the hearing and determination of the suit.
4. That the Costs of this Application be provided for.

5. The Petition and the application were both supported by Affidavits sworn by the 2nd and 3rd Petitioners.

6. The Petition and the application were opposed by the Respondent. It filed a Notice of Preliminary objection dated 25th April, 2022 and a Replying Affidavit sworn by one *Chrispine Owire*, the Respondent's Director of Legal Services.

7. The Notice of Preliminary objection was tailored as follows: -

1. THAT the instant pleadings by the Petitioners as filed are fatally defective and untenable before this Honourable Court for reason that they offend the provisions of Section 27 of Elections Act 2011. The 1st Petitioner was registered on March 25, 2022 and was therefore incapable of compliance with the mandatory provision of Section 27 of the Elections Act 2011.

2. THAT the 1st Petitioner was registered on March 25, 2022 and at the point of mandatory compliance with the submission of its nomination rules being October 18, 2021, as per Section 27 of the Elections Act, it was not a registered party but a provisionally registered party hence not entitled to participate in an election as per the provisions of Section 5(7) as read with Section 15 (2) of the Political Parties Act 2011.

3. THAT the Petition does not meet the threshold set out in *Anarita Karimi Njeru v Republic (1979) 1 KLR 154* re-iterated by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance, Civil Appeal No. 290 of 2012* as the Petition has failed to specifically demonstrate with reasonable precision the manner in which the Respondent has violated their Constitutional rights.

8. Given the urgency of the matter in view of the timelines set by the Respondent and the nature of the objection raised, this Court gave directions for the joint hearing the Petition, the application and the Notice of Preliminary objection.

9. The matter was heard yesterday, hence, this judgment.

10. I have carefully considered the pleadings and the submissions made by the parties. Of the several issues raised in the matter, one of the paramount ones is the contention that the Petition is a non-starter by dint of the operation of the law.

11. I will, therefore, first deal with the said issue.

12. Citing Articles 82(1)(b) and 88(4)(d) of the Constitution as the basis of the Elections Act, the Political Parties Act and the Independent Electoral and Boundaries Commission Act, the Respondent posited that the 1st Petitioner having attained full registration on 25th March, 2022 could not legally take part in the General election by dint of Section 27(1) of the Elections Act as read together with Sections 5(7) and 15(2) of the Political Parties Act.

13. As a result, the Respondent submitted that the Petition could not lie and was for dismissal with costs.

14. Responding to the issue, the Petitioners took refuge in Article 159(2)(d) of the Constitution and Section 80(1)(d) of the Elections Act in urging the Court to disregard the procedural technicalities for substantive justice.

15. The Petitioners posited that the Gazette Notices issued by the Respondent on various activities towards the General election failed to comply with Section 27(2)(b) of the Elections Act in not giving the timelines as required and as a result the said Notices are null and void.

16. There are some uncontested facts in this matter. They include the following: -

(i) That the 1st Petitioner, as a political party, attained full registration on 25th March, 2022.

(ii) The 1st Petitioner, *vide* a letter dated 28th March, 2022 addressed to the Respondent by its legal representative, forwarded a copy of its Membership register, Election and Membership Rules and its Constitution.

- (iii) The letter dated 28th March, 2022 sought official recognition of the 1st Petitioner's activities towards the General election.
- (iv) The Respondent replied to the 1st Petitioner's letter aforesaid through its letter dated 9th April, 2022 stating its inability to comply with the 1st Petitioner's request.
- (v) The 1st Petitioner intends to carry out the nominations of its candidates for the General election on 28th April, 2022.
- (vi) That the Respondent has declared the 9th August, 2022 as the day set for the conduct of the General election.

17. On the basis of the admitted set of facts, I will ascertain whether the 1st Petitioner was legally qualified to participate in the General election by the time it wrote to the Respondent for recognition. However, before doing so, I need to address the response raised by the Petitioners regarding Article 159(2)(d) of the Constitution and Section 80(1)(d) of the Elections Act.

18. The Supreme Court in **Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others** [2014] eKLR held as follows on the applicability of Article 159(2)(d) of the Constitution: -

42. *In the Law Society case, this Court reiterated its earlier decision when it warned itself on a blanket invocation of Article 159 thus:*

Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that "justice shall be administered without undue regard to technicalities." It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis Raila Odinga and 5 Others v. IEBC and 3 Others; Petition No. 5 of 2013, [2013] e KLR.

19. Further in **Raila Odinga vs. I.E.B.C. & Others** [2013] eKLR, the Supreme Court held that: -

Article 159(2)(d) of the Constitution was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.

20. In this case, the issue at hand is whether the Petitioners complied with specific provisions of the Constitution and the law. Such issues cannot be reduced to the realm of procedural imperatives. They are not. They are serious issues which go to the root of the Petition. They are key in determining whether the jurisdiction of this Court was properly invoked.

21. The Petitioners' position that the issue on compliance with the Constitution and the law was a procedural technicality to be cured by the application of Article 159(2)(d) of the Constitution cannot hold. It is hereby rejected.

22. Having so found, I will now address the 1st Petitioner's eligibility to participate in the General election.

23. The Constitution through Articles 82(1)(b) and 88(4)(d) gave Parliament the mandate to enact legislation on the delimitation by the Independent Electoral and Boundaries Commission of electoral units for election of members of the National Assembly and county assemblies, *the nomination of candidates*, the continuous registration of citizens as voters, the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, *including the nomination of candidates for elections* and the progressive registration of citizens residing outside Kenya, and the progressive realisation of their right to vote.

24. Resulting from the above constitutional basis, Parliament passed various pieces of legislation including the *Elections Act* No. 24 of 2011 and the *Political Parties Act* No. 11 of 2011.

25. In its preamble, the Elections Act provide that it is an Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, County Governor and County Assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes.

26. The Political Parties Act is defined as an Act of Parliament to provide for the registration, regulation and funding of political parties, and for connected purposes.

27. On the restriction of political parties in taking part in elections, **Section 5(7)** of the Political Parties Act provides as follows: -

A political party that has been provisionally registered under subsection (2) shall not be entitled to participate in an election.

28. *Section 2* of the Political Parties Act define "**election**" to mean '*the act of selecting by vote, of a person or persons from among a number of candidates to fill an office or to membership of any political party and includes a presidential, parliamentary or county election*'.

29. The Elections Act in Section 2 defines *election* and *nomination* in the following terms: -

"election" means a presidential, parliamentary or county election and includes a by-election;

“nomination” means the submission to the Commission of the name of a candidate in accordance with the Constitution and this Act;

30. The Black’s Law Dictionary, 9th Edition, Thomson Reuters Publishers, defines ‘**election**’ at page 595 as follows;

3. *The process of selecting a person to occupy an office (usually a public office), membership, award, or their title status.*

31. The Encyclopaedic Law Dictionary Legal & Commercial, Wadhwa and Company Publishers defines ‘**election**’ at page 551 to mean;

An act or process of electing; the fact of being elected; the right, power or privilege to make a choice.

32. The Black’s Law Dictionary (supra) defines ‘**Nomination**’ at page 1148 in the following manner: -

1. *The act proposing a person for election or appointment.*

33. The Encyclopaedic Law Dictionary (supra) defines **nominate** as follows: -

to designate, name; select or propose for appointment to an office or place; to propose as a candidate for election to office.

34. A further restriction is provided for in **Section 15(2)** of the Political Parties Act which provides thus: -

Provisional registration shall not entitle any political party to organise or hold public meetings in connection with any election, or to propose or campaign for any candidate in any election.

35. In its bid to provide for conduct of elections, the Elections Act elaborately and deliberately sets out timelines within which some activities must be undertaken.

36. Some of the relevant provisions to the matter at hand include Section 27 of the Elections Act. It states as follows: -

27. Submission of party nomination rules.

(1) *A political party shall submit its nomination rules to the Commission at least six months before the nomination of its candidates.*

(2) *An amendment to the nomination rules shall only be effective ninety days after submission of the amendments to the Commission.*

(2A) *Upon receipt of the nomination rules from a political party under subsection (1), the Commission shall, within fourteen days, review the rules to ensure compliance with the prescribed regulations and—*

(a) *issue the political party with a certificate of compliance; or*

(b) *require the political party to amend the rules to ensure such compliance within fourteen days.*

(2B) *For purposes of subsection (2A), the Commission shall, by notice in the Gazette, issue Regulations prescribing guidelines to be complied with and the process by which political parties nominate candidates for nomination in accordance with Article 88 (4) (d) of the Constitution failing which the rules shall become void.*

37. The rule of the thumb in legislative interpretation is that reference should be made to the literal and ordinary meaning of words in order to accord a purposive interpretation so as to reveal their true intention.

38. The Supreme Court of Kenya in [Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others, \[2014\] eKLR](#), confirmed that a purposive interpretation should be given to statutes so as to reveal their true intention. The Court observed as follows:

In Pepper vs. Hart [1992] 3 WLR, Lord Griffiths observed that the “purposive approach to legislative interpretation” has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted’.”

39. Applying the above guidance to Section 27(1) of the Elections Act, there is no doubt that the law requires any political party intending to nominate a person to take part in the General election to submit to the Respondent its nomination rules at least six months before the nomination of the candidates.

40. The 1st Petitioner has set the **28th April, 2022** as the day to carry out the nomination of its candidates. It, therefore, means that the 1st Petitioner was supposed to deposit its nomination rules with the Respondent sometimes in October, 2021.

41. It is, however, undisputed that in October 2021 the 1st Petitioner was only provisionally registered and that it attained full registration on 25th March, 2022.

42. That being the case and pursuant to Section 5(7) of the Political Parties Act, the 1st Petitioner could not submit its nomination rules to the Respondent in October, 2021 as it had not attained full registration. On that very footing, the 1st Petitioner cannot, therefore, carry out the intended nomination exercise even though it has now attained full registration. It is caught up by time. It is time-barred and cannot participate in the General election.

43. In saying so, this Court is alive to the legal position that an election is a process and not an event. The Supreme Court in Petition 2 & 4 of 2017 (Consolidated), **John Harun Mwau & 2 others -vs- Independent Electoral and Boundaries Commission & 2 others** [2017] eKLR dealt with the issue of nomination of candidates and expressed itself as follows: -

[231]The nomination process is deeply rooted in the Constitution, which recognizes that an electoral contest must be preceded by the nomination of candidates to vie for elective positions.

44. The Apex Court went further to hold that: -

...Nomination, therefore, is not just a formality, or an exercise in futility, nor can it be dispensed with, save for lawful cause.

...In summary, therefore, at a general level, nomination is depicted as a process through which candidates are identified for participation in an election, subject to them being properly qualified under the law, for the elective seat that they seek. It is a critical component of an electoral process, without which there would be no election.

45. Deriving from the above, it follows that the challenge by the Petitioner in these proceedings is untenable. The 1st Petitioner having attained full registration in March 2022 is legally unable to take part in the forthcoming General election. It is on that basis, that this Court agrees with the Respondent that the Petition is a non-starter.

46. This Court further notes that the Petition does not challenge the validity of any of the provisions of the Elections Act or the Political Parties Act or any law in any manner whatsoever. The Petition is only pointed to the 1st Petitioner taking part in the General Election.

47. In view of the foregoing position, a consideration of the rest of the issues in this matter will be only academic and will not aid the Petitioners in any way. It is for these reasons that the Court opts to end this discussion here.

48. As I come to the end of this judgment, I must thank Counsel for their diligence in conducting this matter. It is only through such deliberate and sustained effort that the matter has been determined at the earliest.

49. In the end, the Petition, the Notice of Motion and the Notice of Preliminary Objection are determined as follows: -

(a) The Petition and the Notice of Motion dated 21st April, 2022 be and are hereby dismissed.

(b) The Notice of Preliminary Objection dated 25th April, 2022 is upheld.

(c) The Petitioners shall shoulder the costs of the Petition.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF APRIL, 2022.

A. C. MRIMA

NVI.

Judgment virtually delivered in the presence of:

Mr. Musebe, Learned Counsel holding brief for Messrs. Guserwa & Company Advocates for the Petitioner.

Mr. Muganda, Learned Counsel for the Respondent.

