



**Omusolo v Independent Electoral and Boundaries Commission & another
(Petition 3 of 2022) [2022] KEHC 10556 (KLR) (22 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10556 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
PETITION 3 OF 2022
JR KARANJA, J
JUNE 22, 2022**

BETWEEN

MAURICE OTEBANGOR OMUSOLO PETITIONER

AND

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

**RETURNING OFFICER AMUKURA WEST WARD TESO SOUTHBUSIA
COUNTY 2ND RESPONDENT**

RULING

1 The petition dated May 23, 2022 is brought under the provisions of the Constitution of Kenya, 2010 and Statute Law i e Articles 1(1) (2), 2,3,19,20,21 (1), 23, 38,47,50 (1), 81 and 88 of the Constitution together with the provisions of the Elections Act 2011 and the Elections (General) Regulations, 2012.

The petitioner, Maurice Otebanger Omusolo, seeks the following reliefs:-

- 1 A conservatory order of injunction barring the Respondents from proceeding with the preparations to carry out the election for Amukura West Ward, Teso South Constituency, Busia County until the petitioners is duly cleared as a Candidate.
 - 2 Orders directing the first respondent to accept and Review the petitioner's application for nomination as an independent candidate for Amukura West ward and if found fit, to proceed and gazette the petitioner as an independent candidate as mandated by law.
- 2 These reliefs are sought on the basis of the grounds set out in the petition and supported by the affidavit of the petitioner deponed on May 23, 2022. Thus, the petitioner being desirous of running as an independent candidate for member of the County Assembly for Amukura West Ward in Teso South Constituency, Busia County, obtained all the requisite clearance documents in order to facilitate his



registration and gazette as such independent candidate. In the process, a clearance certificate was obtained from the office of the Registrar of Political Parties which in turn directed the petitioner to present the requisite documentation and clearance to the first respondent, The Independent Electoral and Boundaries Commission [I E B C], through the second respondent, The Returning Officer, Amukura West Ward, Teso South Constituency, Busia County.

- 3 Accordingly, the petitioner presented the necessary documents and clearances to the second respondent who was at the time the duly gazetted Assistant Registration officer named M/s Monica Toto, for onward transmission to the first respondent's head office in Nairobi for necessary processing, but after perusing the necessary Gazette Notice No 5519, found that his name and symbol were not among those gazetted as independent candidate for Amukura West Ward, Teso South Constituency. After making the necessary inquiry at the office of the second respondent, the petitioner learnt that his nomination application and the supporting documents were never forwarded to the first respondent's head office in Nairobi, thereby shattering his legitimate expectation of being gazetted as the independent candidate for Amukura West Ward in Teso South, especially after learning that he was required to personally present his nomination application to the first respondent at its head office and not its constituency office through the second respondent within a given period of time.
- 4 In the supporting affidavit, the petitioner exhibits "inter-alia" copies of his application papers and clearance documents marked MOO-2, the clearance certificate issued by the Registrar of Political parties dated April 19, 2022, marked MOO4, An extract copy of Gazette Notice Vol CXXIII No 203 dated October 1, 2021, indicating the appointment of Monica Toto as the Assistant Registration Officer for Teso South Constituency marked MOO-6.
- 5 It was the petitioner's contention that he was assured by the second respondent that his nomination documents would be forwarded to Nairobi for processing and gazette but he was later shocked to discover that his name was missing among the candidates gazetted to run as independent candidates in the Gazette Notice No 5519 of May 18, 2022. It was then that he confirmed from the respondents that his nomination papers were not forwarded to the first respondent and that the nomination exercise had since lapsed as the deadline for submission of nomination documents was on May 2, 2022 and even though this was re-scheduled to between May 29, 2022 and June 7, 2022, he was apprehensive that the process would be concluded without his participation thereby depriving him of his right to vie for an elective office and the electorate in Amukura West Ward being deprived of an opportunity to vote for a candidate of their choice.
- 6 The petitioner further exhibited a copy of the media release by the first respondent on May 18, 2022, setting the date for candidate registration as between May 29, 2022 to June 7, 2022. The release is marked "MOO-9".

For all the foregoing reasons, the petitioner urges this court to grant the reliefs sought herein against the respondent. A further affidavit dated June 13, 2022, which he filed herein was in response to the respondents' grounds of opposition dated May 30, 2022 and the respondents' replying affidavit deposed by the respondents' registration officer, Monica Toto, on June 3, 2022.

- 7 The petition was heard by way of written submissions on the basis of the supporting grounds and the pleadings by both parties.

In that regard, the petitioner's submissions dated June 6, 2022, were filed by Omusolo Mungai & Co Advocates, while the respondents submissions dated June 10, 2022, were filed by Olendo, Orare & Samba LLP.

The basic issue arising for determination is whether the petition is competent and proper before this court and if so, whether the petitioner is entitled to the reliefs sought herein against the respondents.



8 With regard to the first issue, the jurisdiction of this court to deal with the matter at this juncture has been brought into the fore by the respondents through their grounds of apposition and submissions. In that regard, the respondents contended that the petition is premature before this court on the basis of Article 88 (4) (e) (f) of the Constitution as read with s 74 of the Elections Act, 2011 which gives the respondents the authority to solve disputes relating to or arising from nominations. Therefore, in failing to seek the intervention of the first respondent [IEBC] regarding his nomination the petitioner did not, as was required, invoke and exhaust the dispute resolution mechanism under the Constitution and the Elections Act.

9 The respondents submitted that the first respondent is mandated with clear Constitutional and statutory provisions to receive and determine nomination applications and its functions order Article 88 (4) of the Constitution include the regulation of the process by which parties nominate candidates for elections and the settlement of electoral disputes including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

10 The respondents also submitted that this petition is incompetent for want of jurisdiction as the first court of call on the issues raised herein by the petitioner was the first respondent (IEBC) which would effectively oust the jurisdiction of this court as a court of first instance in such issues and donate such jurisdiction to the first respondent.

In buttressing the foregoing arguments and contentions the respondents cited several decisions of the Court of Appeal including Erick Kyalo Mutua v Wiper Democratic Movement Kenya & Another [2017], eKLR, Fredrick Odhiambo Oyugi & Orange Democratic Movement & Others [2017] eKLR and Tom Dola & Two Others v Chairman, National Land Commission & Others [2020] eKLR.

11 The respondents also cited the decisions of the Court of Appeal in Speaker of the National Assembly v James Njenga Karume [1992] eKLR and Geoffrey Muthinja & Another Vs Samuel Muguna Henry & Others [2015] eKLR. The petitioner with regard to the issue of jurisdiction framed it as an issue for determination to wit, whether he ought to have exhausted the dispute resolution mechanisms under the Elections Act prior to filing this petition. It was submitted by the petitioner in that regard that the first respondent has no jurisdiction to remedy the present dispute as its jurisdiction is statutorily limited to those disputes raised before the date of nomination.

12 The petitioner further submitted that he cannot qualify as an independent candidate since his nomination paper is yet to be considered by the first respondent and the nomination day has since passed. s 74 of the Elections Act as well as s 33 of the Act were invoked by the petitioner in support of his arguments.

The Law on the electoral system and process in this County is founded on the provisions of {the {>/akn/ke/act/2010/constitution Constitution}}, 2010 and for the purposes of this petition the most relevant provisions are Articles 81, 82, 85 and 88 of the Constitution.

13 Article 81 provides that:-

“ The electoral system shall comply with the following principles-

- a freedom of citizens to exercise their political rights under Article 38,
- b not more than two thirds of the members of elective public bodies shall be of the same gender.
- c fair representation of persons with disabilities,



- d universal suffrage based on the aspiration for fair representation and equality of vote and
 - e free and fair elections which are-
 - i by secret ballot
 - ii free from violence, intimidation, improper influence or corruption
 - iii conducted by an independent body,
 - iv transparent and
 - v administered in an impartial neutral, efficient accurate and accountable manner.”
- 14 Article 82, mandated Parliament to enact legislation to provide for “*inter alia*” the nomination of candidates and the conduct of elections and referendums and the regulations and efficient supervision of elections and referendums, including the nomination of candidates for elections.
- Articles 85, provides for the eligibility to stand as an independent candidate while Article 87, provides for electoral disputes to the effect that Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.
- 15 Article 88 of the Constitution establishes the Independent Electoral and Boundaries Commission (IEBC), an independent public body responsible for conducting or supervising referenda and elections to an elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament. In that regard, the IEBC regulates the process by which parties nominate candidates for elections and settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results (see, Article 88 (4) (d) and (e)).
- 16 The basic Statutory Law on the electoral process and disputes in the Elections Act, 2011 which was enacted pursuant to Article 82 of the Constitution and which provides for the conduct of elections to the Office of the President, the National Assembly, the Senate, the County Governor and County Assembly and for conduct of referenda as well as election dispute resolution and all connected purposes.
- 17 An electoral process is elaborate and cannot be equated to an event and is normally divided into several segments which includes the nomination of candidates to an elective position.
- In this petition the petitioner alleges that his expected nomination and gazettement as an independent candidate for the Office of Member of County Assembly – Amukura West Ward, Teso South in Busia County was thwarted or aborted by the respondents when he submitted his nomination documents to them, but they failed to gazette him accordingly.
- 18 The petitioner contended that the omission by the respondents to gazette him as such independent candidate despite receiving his nomination papers was a violation of his Constitutional rights by the respondents and a breach of his legitimate expectation to be gazetted as the independent candidate for the aforementioned elective office. The petitioner therefore seeks a remedy from this court to the effect that the respondents be compelled and/or directed to accept and review his application for nomination as an independent candidate for Amukura West Ward, Teso South and subsequently gazette him accordingly.
- 19 The pleadings herein clearly indicate that the petitioner moves this court as an election court rather than a Constitutional court. The present petition is therefore an election petition and not a Constitutional petition even though provisions of the Constitutions have been invoked herein.



With regard to the present dispute, it arises from the electoral process of nomination or is related to that process thereby implying that the cause of action arose at the time the petitioner allegedly presented his nomination documents to the respondents and the respondents failed to gazette his name and symbol as an independent candidate.

- 20 Whether or not the petitioner was eligible to stand as an independent candidate was not a contested issue or did not arise herein. The remedy he seeks is based on the fact of submission of his nomination papers to the respondents and their failure to gazette him accordingly.

Clearly, the present dispute was germinated from the nomination process and from the aforementioned provision of the Constitution the mandate to deal with and determine electoral disputes arising from an electoral process conducted prior to the actual election does not in the first instance lie with this court but with Constitutional public bodies and/or tribunals which operate independently such as the first respondent herein.

- 21 The jurisdiction of this court in that regard is restricted or confined to electoral disputes arising after the declaration of election results in terms of Articles 88 (4) (e) of the Constitution and s 74 (1) of the Elections Act which provides that:-

“Pursuant to Article 88 (4)(e) of the Constitution the commission shall be responsible for the settlement of electoral disputes including disputes relating to or arising from nominations but excluding election petitions and dispute subsequent to the declaration of election results”

- 22 The present dispute relates to or arises from the nomination process which was conducted within a specified period of time such that if the petitioner fell aggrieved by the respondents’ conduct which led to the failure to have him gazetted as the independent candidate for the seat of Member of the County Assembly for Amukura West Ward the opportunity to move to the first respondent’s committee on dispute resolution was wide open.

- 23 The failure by the petition to move to the first respondent’s dispute resolution committee and instead move this court for the desired remedy was a costly mistake for which the blame lies squarely on him. The principle of exhaustion as clearly explained by the Court of Appeal in Kenya Revenue Authority v Universal Corporation Ltd [2020] eKLR was deliberately ignored by the petitioner who had the necessary knowledge that his dispute with the respondents related move to his nomination as an independent candidate than anything else.

- 24 In Speaker of the National Assembly v James Njenga Karume [1992] eKLR, it was held by the Court of Appeal thus:-

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.....”

This observation alluded to the application of the exhaustion principle where there exists other dispute resolution mechanisms prescribed by the Constitution or an Act of Parliament. In the later decision in Rep v National Environment Management Authority Ex-parte Sound Equipment Ltd [2011] eKLR, the Court of Appeal stated that:-

“.....where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial



review would be granted and that in determining whether exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it

25 In yet another decision by the Court of Appeal in *Martin Kabubii Mwangi v County Government of Laikipia* [2019] eKLR, it was stated that the exhaustion principle does not permit an election as to the parts of a statute that one should rely on. That, it removes discretion on the part of a litigant from choosing whether to follow the applicable statutory provision or not.

The suit in that case was filed before the exhaustion of the remedy under the law i.e. S.77 of the County Government Act and did not fall in the category of suits that can be determined by Courts in the first instance.

26 Similarly, this petition was filed prior to the exhaustion of the remedy under the law i.e. s 74 (1) of the *Elections Act* which clearly provides that:-

“Pursuant to Article 88 (4) (e) of the *Constitution*, the Commission shall be responsible for the settlement of electoral disputes including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results.”

Commenting on this provision of the law, the Supreme Court in *Sammy Ndungu Waity v Independent Electoral & Boundaries Commission & three others* [2019] eKLR, stated that:-

“Needless to state, the foregoing section is a replica, nay, a derivative, of Article 88 (4) (e) of *the Constitution*. Together, these provisions constitute the normative architecture for the resolution of pre-election disputes including those arising from nominations.”

27 It is clear therefore that a court cannot entertain nomination disputes such as the present one where the process under s 74 of the *Elections Act* has not been invoked.

On pre-election disputes, including those relating to or arising from nominations, the *Constitution* is clear that there are to be resolved by the IEBC through its committees on Disputes Resolutions. Such disputes are reserved for the first respondent by Article 88 (4) (e) of the *Constitution*, a mandate which cannot be usurped by this court in the first instance.

28 For all the foregoing reasons this court does hereby make a definite finding that the present petition is incompetent and improper before it for want of jurisdiction. In the circumstances, the petitioner is not entitled to any remedy from this court and has himself to blame if he failed to refer the question of his nomination to the first respondent’s Dispute Resolution Committee.

In sum, the petition is dismissed with costs to the respondents.

J R KARANJAH

J U D G E

[DATED & DELIVERED THIS 22ND DAY OF JUNE 2022]

