



Bwanamaka & 3 others v Independent Electoral and Boundaries Commission; Chama Cha Uzalendo (Interested Party) (Petition E029 of 2022) [2022] KEHC 17103 (KLR) (26 July 2022) (Ruling)

Neutral citation: [2022] KEHC 17103 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E029 OF 2022
MN MWANGI, J
JULY 26, 2022**

IN THE MATTER OF INFRINGEMENT OF THE PROVISIONS OF ARTICLES 2, 10, 19, 20, 22, 23, 37, 38, 47, 48, 50, 81(A), 88(F), 249(1) (A) (B) (C), 165(3) (B), 258 AND 259 OF THE CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF EXTENSION OF TIME FOR ADMISSION, REGISTRATION AND CLEARANCE OF CANDIDATES

BETWEEN

**MAUR ABDALLA BWANAMAKA 1ST PETITIONER
ABDURAHIM MAJERO 2ND PETITIONER
JAFAR OSMAN SHARIA 3RD PETITIONER
WARE ALI BAKARI 4TH PETITIONER**

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION RESPONDENT**

AND

CHAMA CHA UZALENDO INTERESTED PARTY

RULING

1. On June 27, 2022 the petitioners filed a petition contemporaneously with a Notice of Motion application. In the said petition, the 1st petitioner describes himself as the founding chairman of the interested party herein holding membership No CCU 4182 and that he successfully vied and contested for the position of Senator, Tana River County under the interested party (Chama cha Uzalendo) in the August, 2017 general elections. It is further stated that the petitioners and the interested party



challenged the general management and running of the party and that the interested party's leadership has a history of internal party wrangles dating as far back as the 2017 general elections.

2. The petitioners state that sometimes in or about January, 2022, the 1st petitioner filed two petitions, Machakos Constitution Petition No1 of 2022 and Mombasa Constitutional Petition No 13 of 2022 questioning the hostile takeover, the enlistment of new party officials without following the due procedure and general management and running of the party. They stated that they had a legitimate expectation that the Honourable Court in the above mentioned cases would issue directions that would solve the party disputes in time to allow the interested party to issue the petitioners with nomination certificates for purposes of registration and subsequent clearance.
3. The petitioners aver that the interested party's inordinate delay was born by the party disputes and case battles arising from the cases mentioned above filed by the petitioner herein. They state that they had a legitimate expectation that the same would have been addressed in time to enable them submit the petitioners' nomination credentials to the respondent herein for filing within the set timelines.
4. The petitioners indicate that the inordinate delay of the interested party to submit the petitioner's nomination credentials to the respondent for purposes of registration violated and threatened to violate the petitioners' rights provided in Article 38, the right to make political choices, which includes the right to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected to hold office.
5. The petitioners claim that the interested party's inordinate delay to submit the petitioners' nomination credentials to the respondent and the respondent's time frames and time limitations to admit the petitioners nomination credentials out of time violate and threaten to violate the petitioner's constitutional rights espoused in Article 47 of the Constitution of Kenya , the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and the rights that entitle any person adversely affected by an administrative action be given reasons in writing.
6. The Petitioner's humble prayer is for this Court to grant the following orders;
 - i. A declaration that the delay by the interested party to submit the petitioners' names to the respondent for registration within the set timelines due to court cases was a violation of the petitioner's constitutional rights.
 - ii. A declaration that the barring of the petitioners and the interested party from submitting, registering and clearing the respondent out of time is irrational and unreasonable and a violation of Articles 38 and 47 of the Kenyan Constitution.
 - iii. A declaration be made compelling the interested party to submit the nomination credentials of the petitioners to the respondent for purposes of registration, gazettelement and clearance out of time.
 - iv. A declaration be made compelling the respondent to allow and/or admit the nomination credentials submitted by the interested party for purposes of registration, gazettelement and clearance out of time.
 - v. A declaration be made compelling the respondent to extend time to allow the interested party to submit the petitioners' nomination credentials to the respondent and further for the petitioners to be allowed to present credentials to the County Returning Officer Tana River for registration and clearance
 - vi. An order of mandamus be issued directing the respondent to register and clear the 1st petitioner to contest for the position of Senator Tana River County in the August, 2022 general elections.



- vii. An order of mandamus be issued directing the respondent to register and clear the 2nd, 3rd and 4th petitioners to contest for the positions of members of County Assembly Kipini East Ward, Sala Ward and Kinakomba Ward, respectively all within Tana River County.
 - viii. An order of mandamus be issued directing the respondent to include the petitioners names in the list for the next near gazettelement the June 12, 2021 online or in any other manner.
 - ix. Any other relief that the Honorable committee (sic) deems fit to grant.
7. The Notice of Motion filed by petitioners/applicants is premised on the provisions of Articles 2, 10, 19, 20, 22, 23, 37, 38, 47, 48, 50, 81(a), 88(f), 249(1) (a), (b), (c), 165(3) (b), 258 and 259 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, Sections 31(2A), 32(2C) and 74 of the Elections Act, 2011 and all enabling provisions of the law.
8. The applicants pray for the following orders-
- i. Spent;
 - ii. That pending the hearing and determination of the petition herein the interested party hereby be allowed to submit the nomination credentials of the petitioners for purposes of registration, gazettelement and clearance out of time;
 - iii. Spent;
 - iv. Spent;
 - v. Spent; and
 - vi. That this Honourable Court be at liberty to grant any further orders or reliefs.
9. The application is premised on the grounds in support of it and the affidavit of the 1st applicant, Maur Abdalla Bwanamaka Matapu, sworn on 27th June, on his own behalf and on behalf of the 2nd to 4th applicants.
10. The respondent filed grounds of opposition on July 1, 2022. A Notice of Preliminary Objection filed on July 5, 2022 by the law firm of Cootow & Associates was deemed to have been withdrawn when the said law firm was discharged from this matter as another law firm had filed a Notice of Appointment on behalf of the respondent.
11. The application herein was heard by way of written submissions. The applicants' submissions were filed on 14th July, 2022 by the law firm of Shabaan Associates LLP. The respondent filed its written submissions on July 18, 2022. The interested party did not file any response to the application.
12. In highlighting the submissions, Mr Njairo for the applicants stated that Article 38(1) of the Constitution speaks of political choices and that the applicants herein seek extension of time to be accorded to them in order to get an opportunity to represent electorates in their County.
13. He indicated that the 1st applicant would like to be a Senator while the others would like to be Members of County Assemblies. Mr Njairo submitted that the interested party had internal wrangles and a case was filed relating to the interested party and the Registrar of Political Parties. He stated that the said case occasioned delay in the presentation of the applicants' nomination documents to the County Returning Officer of Tana River.
14. The applicants' Counsel stated that the case was concluded on May 30, 2022 and the Court saw that it was wise for internal resolution to be deployed. He stated that noting that the case was ruled on May



- 30, 2022, the applicants wrote to the respondent seeking extension of time and they also filed a case before the respondent, which said that they did not have jurisdiction to deal with the petition herein.
15. While making reference to the respondent's contention in their written submissions in the contention that this Court lacks jurisdiction to hear this case and that the applicants should have filed their case before the Political Parties Disputes Tribunal (PPDT), Mr Njairo stated that each case should be determined on its own merits. He added that there have been exceptional circumstances which warrant extension of time and that the applicants had no control over the said circumstances.
 16. Mr Njairo was of the view that the applicants and the electorates of Tana River County will be prejudiced if the application is not allowed as they overwhelmingly voted for the 1st applicant as the Senator of Tana River County. He prayed for the applicants' application to be allowed.
 17. Ms G. Sitati for the respondent submitted that the applicants have been filing suits, namely Mombasa Constitutional Petition No E013 of 2022, *Chama Cha Uzalendo & 5 others and Registrar of Political Parties & others*, which Judge Mativo (as he then was) dismissed on May 17, 2022 as the petition was premature. She stated that the applicants then filed Machakos Constitutional Petition No 1 of 2022, *Alexander Gitonga Nyaga & 2 others v Registrar of Political Parties & 2 others*, which Judge Odunga dismissed for being *res judicata* as the issues had been addressed by Judge Mativo.
 18. Ms G Sitati made reference to the supporting affidavit by the 1st applicant who stated that the Tana River County Returning Officer was gracious to accommodate the applicants because the deadline for submission of nomination papers was May 31, 2022.
 19. She relied on Regulation 43(2)(a) of the *Elections (General) Regulations*, to show that the County Returning Officer extended the applicants' time for submission of their papers to 8:00p.m., but they said that they had decided to resolve their issue internally based on Judge Odunga's decision. Ms G Sitati stated that the applicants should have gone to the Disputes Resolution Committee but they did not. She submitted that Section 74 of the *Elections Act* as read with Article 88(4)(j) and (e) of the *Constitution* gives the IEBC the mandate to resolve disputes arising from nominations and also extension of time. She contended that this Court lacks Jurisdiction at the first instance, to hear the applicants.
 20. She stated that the applicants were aware of the Gazette Notice published on January 20, 2022 that gave timelines for aspirants seeking political offices to submit their nomination papers but the applications delayed their nominations by filing cases in different parts of the country.
 21. She relied on the case of *Ferdinand Waititu v IEBC & 3 others* [2013] eKLR, where the Supreme Court held that the timelines set by the *Constitution* and *Elections Act* are neither negotiable nor can they be extended by any Court for whatever reasons, which was indeed a tyranny of time.
 22. In a rejoinder, Mr Nyairo stated that the cases mentioned by Ms G Sitati were filed by other parties against the Registrar of Political Parties and that the applicants through petition No 37 of 2022 filed on June 3, 2022 approached the IEBC. Mr Nyairo cited the case of *Charo Mwashetani & 3 others* [2014] eKLR, where it was stated that the Court needs to live to its mandate in responding to timelines. He submitted that extension of time is an equitable remedy available to a deserving party.

Analysis And Determination

23. I have considered the application herein the supporting affidavit and submissions filed by the applicants. I have also read the grounds of opposition and submissions filed by the respondent. I have also taken into consideration the oral highlights and the authorities relied on by each Counsel.



The issue for determination is if this Court should extend time for submission of nomination papers by the applicants.

24. In the supporting affidavit sworn by the 1st applicant, he averred that the inordinate delay in submitting their nomination papers was occasioned by pending Court cases filed by himself as against the interested party herein with regard to the leadership of Chama Cha Uzalendo. He mentioned that the two cases were Mombasa Constitutional Petition No 13 of 2022 and Machakos Constitutional Petition No 1 of 2022. He deposed that the Constitution Petition in Machakos High Court was decided on May 30, 2021 and that Judge Odunga directed the parties to establish a dispute resolution and reconciliation mechanism.
25. He further deposed that on or about May 31, 2022, he and other aggrieved aspirants wrote to the Returning Officer in charge of the Tana River County notifying him/her of the directions given by the Court in Machakos Constitutional Petition No 1 of 2022, and made a request for the Returning Officer to accommodate Chama cha Uzalendo to submit their names for registration out of time, should a resolution be made.
26. The 1st applicant averred that he presented himself to the County Returning Officer for the registration of candidates conference where he got furnished with compliance documents and later on, he was slotted in for a registration exercise scheduled for May 31, 2022 which never materialized for the reasons he has stated above (in his affidavit).
27. The 1st applicant further averred that having solved their disputes and fully complied with the nomination requirements of Chama Cha Uzalendo and filled in the nomination forms and paid all the requisite nomination fees, he had been nominated as the party's flag bearer to be their Senatorial candidate in the forthcoming August, 2022 general elections. He also stated that the 2nd to 4th petitioners had also been cleared by the party to vie for members of County Assemblies of their respective wards. He stated that having complied with all the requirements of the IEBC for the position of the Senate, he was ready to submit his forms for registration and clearance.
28. Paragraph 12 of the affidavit in support of the application is not relevant to this Court as the applicants are addressing "this honorable nomination tribunal", but this Court is not a nomination Tribunal. The said paragraph seems to have been copied from other pleadings, and just pasted to the pleadings herein without being amended.
29. The 1st applicant deposed that the inordinate delay to submit the candidates' names in time having been occasioned by Court proceedings, which was a factor not within the control of the Party (Chama Cha Uzalendo), then the same could not be a reason to bar the aspirant's names being submitted for registration and clearance out of time.
30. He stated that Article 38(3) of the Constitution provides for the right to hold public office, or an office within a political party of which the citizen is a member and, if elected to hold office.
31. The applicants' prayers are for this Court to exercise its equitable discretion in their favour and direct the respondent to register and clear the applicants out of time upon compliance and grant the orders sought in the application.
32. The 1st applicant stated that should this Court not favour them with the directions sought, they will suffer irreparable loss and damage for they have invested a lot in the ongoing campaigns. He further stated that the people of Tana River shall suffer irreparable loss should they be denied their Constitutional right to vote for candidates of their choice.



33. Article 88(4) confers the IEBC with certain powers for different processes for the pre-election period, during elections and post elections. The said Article provides as follows –

“4. The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

- (a) the continuous registration of citizens as voters;
- (b) the regular revision of the voters’ roll;
- (c) the delimitation of constituencies and wards;
- (d) the regulation of the process by which parties nominate candidates for elections;
- (e) 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;
- (f) the registration of candidates for election;
- (g) voter education;
- (h) the facilitation of the observation, monitoring and evaluation of elections;
- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
- (j) the development of a code of conduct for candidates and parties contesting elections; and
- (k) the monitoring of compliance with the legislation required by Article 82(1)(b) relating to nomination of candidates by parties.”

34. It is therefore not disputed that under Article 88(4)(d) of the *Constitution*, the respondent herein, is responsible for the regulation of the process by which parties nominate candidates for elections. Under Article 88(4)(e), it is also responsible for settlement of electoral disputes, including disputes in relation to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

35. Section 31(2A) of the *Elections Act* provides that every party shall submit the names of the party candidates who have been elected to participate in the general elections under the said Act at least sixty days before the elections.

36. It follows from the said provisions that by the 8th of June, 2022, the interested party should have submitted to the respondent the names of its nominees to political office for the general elections scheduled for August 9, 2022.

37. Provisions for resolution of election disputes by the respondent are stipulated under Section 74 of the *Elections Act*. It states as follows –

- (1) 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 nomination but excluding elections petitions and disputes subsequent to the declaration of election results.
- (2) An electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the commission.



- (3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.” (emphasis added).
38. In the instant matter, I do not see any issue that can be termed as an electoral dispute that would call for the intervention of the Dispute Resolution Committee (DRC) of the respondent or the filing of any complaint with the DRC. I therefore do not agree with the reasoning by Ms G Sitati that the issue of extension of time to submit a request for nomination papers was a “dispute” in the true meaning of the word.
39. In the decision rendered by Judge Odunga on May 30, 2022 in the High Court at Machakos Petition No 13 of 2022, in striking out the petition for being res judicata the Judge encouraged reconciliation between the parties to the petition.
40. Gazette Notice of No 432 dated January 19, 2022 and published in Vol. CXXIV – No 14 on January 20, 2022 under the Elections (General) Regulations, 2012 on election of the members of the Senate stated as follows in paragraphs K –
- “The days for the nomination of political party candidates and independent candidates for the senate Elections shall be between Sunday 29th May and Tuesday May 31, 2022. The nominations papers shall be delivered by candidates to the respective Returning Officers between the hours of eight O’clock in the morning and one O’clock in the afternoon and between the hours of two O’clock and four O’clock in the afternoon at place designated by the commission.”
41. The 1st applicant and other members of the interested party through TELOW Advocate LLP on May 31, 2022 wrote to the Returning Officer, Tana River County seeking indulgence on the nomination of the affected candidates as they sought clearance with the interested party. The letter expressed that the said Party would conduct its internal dispute mechanism and sought extension to another date to provide credentials to applicants for clearance and gazettement as aspirants in the elections for the year 2022.
42. Through a text message, the Returning Officer invited the applicants for a candidate registration exercise on May 31, 2022 at 2:00p.m., sharp at the KMTC Hola. The applicants were further advised to follow their checklist. My understanding of the contents of the letter by the 1st applicant is that as at May 31, 2022 the internal dispute between him, his co-applicants and the interested party had not been resolved and that is the reason why they did not appear before the Tana River County Returning Officer on May 31, 2022 at 2:00p.m., as scheduled.
43. The respondent did not file a replying affidavit and its failure to do so has not assisted at all in determination of the matter herein. The grounds of opposition filed cannot be equated to or take the place of a replying affidavit, as some of the said grounds of opposition would have been best served if they were averments in an affidavit. The authorities relied on by Counsel for the respondent to the effect that this Court lacks jurisdiction to determine the matter before it are not applicable to the circumstances herein.
44. I hold that this Court has jurisdiction to try this matter before it under the provisions of Article 165 of the Constitution and as held earlier, the matter before this Court does not fall in the realm of pre-election disputes that could have been determined by the IEBC Disputes Resolution Committee. Blacks Law Dictionary 10th Edition defines a “dispute” as a conflict or controversy, especially, one that has given rise to a particular law suit.



45. After the internal dispute resolution mechanism between the applicants and the respondents was deployed, the events worked out in favour of the applicants as they were given nomination certificates by the interested party. The applicants are however silent as to what transpired between the 3rd to 26th of June, 2022 as no reason is given to explain why they made no effort to submit their nomination papers to the respondent and that the said respondent declined to accept their nomination papers.
46. This Court is of the view that the applicants could have written to the County Returning Officer, Tana River, requesting him/her to admit their nomination papers out of time. There is no evidence that they approached the respondent for extension of time to submit the said documents after May 31, 2022. If they did, they have not brought that evidence to the attention of this Court. The contention by their Counsel that they petitioned the IEBC to do so is not borne by any evidence and therefore remains as a statement from the bar.
47. The applicants' Counsel relied on the decisions by Judge Mativo (as he then was), in *Republic v Kenya Revenue Authority ex parte Stanley Mombo Amuti* [2018] eKLR and *Charo v Mwasbetani & 3 others* [2014] KLR – SCK, to show that the applicants herein can be granted extension of time to submit their nomination credentials to the respondent herein.
48. To my mind, the decision that addressed the issue of extension of time at length is the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* [2014] eKLR. The said Court set out the guiding principles on extension of time as follows –
1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court;
 3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to case basis;
 4. [where] there is a reasonable cause for the delay, the delay should be explained to the satisfaction of the court;
 5. Whether there will be any prejudice suffered by the respondents if the extension of time is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, public interest should be a consideration for extending time.”
49. The applicants filed the application herein on June 27, 2022 after being issued with nomination certificates on June 3, 2022. They have not explained the delay between the 6th June to June 26, 2022. The applicants herein as political aspirants must have been aware that a week, a day and even minutes are of critical importance when it comes to election related timelines and that once the clock starts ticking, there is no back tracking.
50. This Court takes cognizance that Article 38 of the *Constitution* of Kenya provides for the political choices of citizens as voters and also for persons aspiring for political office. In this instance, the applicants did not act with the speed that would be expected of persons aspiring to vie for political office in the forthcoming general elections.



51. The applicants were cleared by the interested party though belatedly to vie for political office in different capacities, but they are dead silent on what happened between the said time and when they moved to this Court.
52. As was held in the Nicholas Salat case, extension of time is an equitable remedy available only to a deserving party. The decisions in *Charo v Mwasbetani & 3 others* (*supra*) and Republic v Kenya Revenue Authority *ex parte* Stanley Mombo Amuti (*supra*) would have come to the aid of the applicants if they had moved to this Court expeditiously to file the current application and petition.
53. In the circumstances herein, I hold that the exceptional circumstances that existed by the fact that the Constitutional Petition at Machakos High Court was determined on May 30, 2022 and nomination clearance certificates were given to the applicants by the interested party on June 3, 2022 was extinguished by their lethargy.
54. As the old adage goes, time waits for no man and despite the fact that the applicants stand to have their names not being on the ballot papers in the general elections scheduled for August 9, 2022, they have to a large extent contributed to their failure through the filing of the Constitutional Petition in Machakos which was found to be *res judicata*. Had the 1st applicant and his co-applicants resorted to Alternate Dispute Resolution with the interested party after the Mombasa Constitutional Petition was dismissed by Judge Mativo (as he then was), they would not have been caught up by time.
55. It is the finding of this Court that the application herein is unmeritorious. It is hereby dismissed.
56. Since the applicants herein filed the application in pursuit of their political rights to represent the people of Tana River County, each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 26TH DAY OF JULY, 2022.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Meme h/b for Mr Masake for the Petitioners/applicants

Ms G. Sitati for the respondent

Mr Oliver Musundi – Court Assistant.

