



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. E350 OF 2021**

**TIMOTHY S. MANENO.....PETITIONER**

**VERSUS**

**RETURNING OFFICER, KIBWEZI WEST,**

**NGUU/MASUMBA WARD.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**THE REGISTRAR OF POLITICAL PARTIES.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. On 8<sup>th</sup> September, 2021, the Petitioner, Timothy S. Maneno, filed his petition dated 6<sup>th</sup> September, 2021 under a certificate of urgency. He, at the same time, filed a notice of motion seeking among other orders a conservatory order of injunction restraining the 1<sup>st</sup> Respondent, Returning Officer, Kibwezi West, Nguu/Masumba Ward and the 2<sup>nd</sup> Respondent, Independent Electoral and Boundaries Commission, from in any way proceeding to conduct the election in respect of Nguu/Masumba Ward of Kibwezi West Constituency in Makueni County scheduled for 14<sup>th</sup> October, 2021 pending the hearing and determination of the application. He named the Registrar of Political Parties as the 3<sup>rd</sup> Respondent.
2. When the matter was placed before me on 8<sup>th</sup> September, 2021 I directed that the respondents be served so that I could issue directions on 9<sup>th</sup> September, 2021.
3. On 9<sup>th</sup> September, 2021 all the parties were represented and upon confirming with counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the ballot papers for the by-election had not been printed I issued directions to the parties to file pleadings and submissions in respect of the petition and come back for the hearing of the petition on 20<sup>th</sup> September, 2021. In order to preserve the substratum of the petition, I issued a conservatory order directing the 1<sup>st</sup> and 2<sup>nd</sup> respondents not to print any ballot papers in respect of the by-election pending the hearing of the petition.
4. After hearing the petition on 20<sup>th</sup> September, 2021, I delivered my decision on the spot and promised to give reasons for the decision later. This judgment contains the reasons for the orders I issued when I allowed the petition.
5. The background to this case is straight forward. On 27<sup>th</sup> July, 2021 the Independent Electoral and Boundaries Commission (IEBC) through Gazette Notice No. 7520 announced by-elections for certain electoral areas including Nguu/Masumba Ward of Kibwezi West Constituency in Makueni County. Through the same Gazette Notice the IEBC detailed the requirements that were to be met by persons desirous of participating in the by-elections.
6. The nomination of the candidates was scheduled for 25<sup>th</sup> and 26<sup>th</sup> August, 2021. On 25<sup>th</sup> August, 2021 the Petitioner approached the 1<sup>st</sup> Respondent and presented his nomination papers seeking to contest the Nguu/Masumba Ward Member of County Assembly seat as an independent candidate. He was turned away on the ground that he did not have an original identity card for the proposer, a properly drawn banker's cheque, failure to submit the name and symbol he intended to use in the by-election in compliance with sections 32 and 33 of the Elections Act, 2011, and failure to be gazetted as an independent candidate as required by Regulation 10 of the Elections (General) Regulations, 2012.

7. The Petitioner went away and the next day he again presented his nomination papers to the 1<sup>st</sup> Respondent. He was, however, not cleared to contest the by-election on the ground that he had not produced a clearance certificate from the 3<sup>rd</sup> Respondent showing that he had complied with sections 32 and 33 of the Elections Act, 2011 and neither was he gazetted as an independent candidate as required by Regulation 10 of the Elections (General) Regulations, 2012.

8. The Petitioner was aggrieved by the decision of the 1<sup>st</sup> Respondent and he approached the 2<sup>nd</sup> Respondent's Dispute Resolution Committee seeking to overturn the decision of the 1<sup>st</sup> Respondent. His claim was rejected on 3<sup>rd</sup> September, 2021 with the Committee holding that:

**“i. The Returning Officer acted in accordance with the requisite procedures as governed by the Section 32 and 33 of the Elections Act, 2011 read together with regulations 10 and 15 of the Election (General) Regulations, 2012.**

**ii. The Complainant did not adhere with the legal timelines set out in paragraph(h) of the Gazette Notice No. 7520 carried in Vol XXIII–No.156 published on 27<sup>th</sup> July, 2021 which was publicly available.**

**The Complaint is hereby dismissed with no orders as to costs.”**

9. The Petitioner subsequently filed the petition seeking orders as follows:

**(a) THAT an order of injunction do issue barring the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from proceeding with the preparations to carry out the by-election for Nguu/Masumba Ward until the Petitioner is duly cleared as a candidate.**

**(b) A declaration that the Petitioner satisfied the threshold under Article 85 Constitution of Kenya and is therefore qualified to be nominated and cleared to vie as an independent candidate on the by-election slated for the 14<sup>th</sup> October 2021 Nguu/Masumba Ward.**

**(c) A declaration do issue that the rejection of the Petitioner as a candidate based on failure to deliver his clearance letters from the 3<sup>rd</sup> Respondent to 2<sup>nd</sup> Respondent violates Articles 1, 3, 10, 24, 38(3)(c), 85, 159(2)(d) and 25 Constitution of Kenya, 2010.**

**(d) An order of mandamus do issue directing the 1<sup>st</sup> Respondent to clear the Petitioner to vie as an independent Candidate on the by-election slated for 14<sup>th</sup> October 2021 Nguu/Masumba Ward and a nomination certificate do issue immediately.**

**(e) An order of certiorari do issue to remove to the High Court and quash the decision of the 2<sup>nd</sup> Respondent's Dispute Resolution Committee dated 3<sup>rd</sup> September 2021.**

**(f) Any other order that this Honourable Court may deem fit and just to grant to ensure that rule of law is upheld by the Respondents in exercise of its legislative (sic) function.**

**(g) The cost of the Petition be paid by the Respondents.**

10. The Petitioner's nomination was rejected for non-compliance with sections 32 and 33 of the Elections Act, 2011. It is important to reproduce those provisions. Section 32 states:

### **32. Approval of symbol for independent candidate**

**(1) An independent candidate shall submit the symbol the candidate intends to use during an election to the Commission at least twenty-one days before nomination day.**

**(1A) Where there is a vacancy in the office of the Governor, an independent candidate shall submit to the Commission, the symbol that the person intends to use during an election at least seven days before nomination.**

**(2) The Commission shall, upon receipt of the symbol submitted to it under this section approve or reject the symbol.**

**(3) The Commission may refuse to approve the symbol of an independent candidate if the symbol—**

**(a) is obscene or offensive;**

**(b) is the symbol of another candidate or of a political party; or**

**(c) so nearly resembles the symbol of another candidate or political party or any other legal entity registered under any other written law.**

11. On its part Section 33 provides that:

### 33. Nomination of independent candidates

**(1) A person qualifies to be nominated as an independent candidate for presidential, parliamentary and county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person—**

**(a) has not been a member of any political party for at least three months preceding the date of the election;**

**(b) has submitted to the Commission, at least sixty days before a general election, a duly filled nomination paper in such form as may be prescribed by the Commission;**

**(c) has, at least ninety days before the date of a general election or at least twenty-one days before the date appointed by the Commission as the nomination day for a by-election, submitted to the Commission the name and symbol that the person intends to use during the election.**

**(d) is selected in the manner provided for in the Constitution and by this Act.**

**(2) The Commission shall publish in the Gazette, the names of persons intending to contest in the election as independent candidates at least fourteen days before the nomination day.**

12. Also identified as the reason for the rejection for the Petitioner's papers are regulations 10 and 15 of the Elections (General) Regulations, 2012. Regulation 10 provides:

#### **Independent candidate symbol.**

**10. (1) The Commission shall by notice in the Gazette and through electronic and print media of national circulation and other easily accessible medium, publish the symbol approved for each independent candidate.**

**(2) The symbols published under subregulation (1) shall be gazetted at the same time as the list of persons nominated to contest the election.**

13. Regulation 15 states:

#### **Certain requirements for independent candidates.**

**15. A person who is a Kenyan citizen, and who intends to contest for an elective post as an independent candidate shall—**

**(a) obtain and file with the Commission a clearance certificate from the Registrar of Political Parties certifying that the person has not been a member of any political party for at least three months immediately before the date of the election; and**

**(b) file with the Commission a form of intention to contest, in the prescribed form.**

14. The evidence placed before the 2<sup>nd</sup> Respondent's Dispute Resolution Committee shows that on 4<sup>th</sup> August, 2021 which was 21 days before the two days set aside for receiving nomination papers by the 1<sup>st</sup> Respondent, the 3<sup>rd</sup> Respondent had issued two letters showing that the Petitioner was not a member of a fully registered political party as at 4<sup>th</sup> August, 2021 and that his symbol was not similar to that of any fully registered party. The only dispute in this case is the means of the transmission of the two clearance letters from the 3<sup>rd</sup> Respondent to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

15. According to the respondents, the law requires a candidate to obtain and file with the IEBC a clearance from the 3<sup>rd</sup> Respondent certifying that he has not been a member of any political party at least ninety days before the date of a general election or at least twenty-one days before the date appointed by the Commission as the nomination day for a by-election.

16. The Petitioner's case is that the failure to present to the IEBC clearance certificates from the 3<sup>rd</sup> Respondent in respect of his party membership and symbol was a consequence of an excusable human error in light of the higher ideals set by the Constitution as regards electoral contests. His averment, which was not disputed, is that when he presented his applications for clearance to the 3<sup>rd</sup> Respondent on 3<sup>rd</sup> August, 2021 he was told to leave the matter with them. He later became concerned by the delay and when he went to the offices of the 3<sup>rd</sup> Respondent he was informed that his applications had been misfiled in the docket of persons intending to register new political parties instead of the docket for persons seeking to run for political office as independent candidates. The two clearance letters were handed over to him and he proceeded to the 2<sup>nd</sup> Respondent's head office where he was asked by the legal department to explain in writing why the letters were delayed. He indeed wrote a letter but the same was never replied to by the 2<sup>nd</sup> Respondent. According to the Petitioner, the failure to submit the clearance letters cannot be attributed to him.

17. In submissions filed in support of the petition, the Petitioner urged that his averment that he had been assured by an employee of the 3<sup>rd</sup> Respondent that the clearance letters would be transmitted to the 2<sup>nd</sup> Respondent was not rebutted by the respondents. The Petitioner referred to the decision in **Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others [2014] eKLR** for submission that an inadvertent human error is excusable as long as it is not substantive.

18. The Petitioner submitted that Article 259 requires the Constitution to be interpreted in a manner that enhances the rights contained in the Bill of Rights. The Petitioner pointed out that Article 38(3)(c) of the Constitution provides that every adult citizen has the right, without unreasonable restrictions, 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.

19. It is the Petitioner's submission that Article 85 of the Constitution does indeed recognize the right of a person who is not a member of a registered political party and has not been a member for at least three months immediately before the date of the election to stand as an independent candidate for election.

20. Further, that Article 193(1)(c)(ii) recognize that a person can run for the office of a member of county assembly as an independent candidate so long as they are supported by at least five hundred registered voters in the ward concerned. It is the Petitioner's case that the only requirements for any person intending to contest membership of a county assembly as an independent candidate is non-membership of any political party and support of at least five hundred registered voters in the ward concerned. He asserts that any limitation of a constitutional right can only be done in accordance with the provisions of Article 24 of the Constitution. The decision in the case of **Solomon Gichira v Independent Electoral and Boundaries Commission & Another [2017] eKLR** is cited as holding that Article 38 of the Constitution must be interpreted in a manner that extends the right to every citizen as opposed to only those who belong to political parties.

21. The Petitioner argues that under Article 24(2)(b) of the Constitution a provision in any legislation shall not be construed as limiting a right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation. He stressed that his right to contest for political office as an independent candidate under Article 38(3)(c) can only be limited by the requirements of Articles 85 and 193 of the Constitution. Reliance was placed on the decision in **Petition No. 288 of 2014 William Omondi v Independent Electoral and Boundaries Commission** in support of the contention that the right to contest an election as an independent candidate is only fettered by the Constitution and not by the Independent Electoral and Boundaries Commission, the Registrar of Political Parties and the courts.

22. According to the Petitioner, sections 32 and 33 of the Elections Act, 2011 and regulations 10 and 15 of the Elections (General) Regulations, 2012 cannot be used to restrict the constitutional rights of persons to contest elections as independent candidates. Further, that the failure to deliver the clearance letters is not substantial error and is therefore excusable. The Court is urged to fall back on Article 159(2) (d) of the Constitution and administer justice without undue regard to procedural technicalities. The Petitioner views the requirements of the Elections Act, 2011 and the Elections (General) Regulations, 2012 as procedural technicalities which should not stand in the way of fairness and substantive justice.

23. Another line of argument that was adopted by the Petitioner in support of his case was that Section 34(e) of the Political Parties Act, 2011 which gives the function of ensuring and verifying that no person is a member of more than one political party and notifying the 2<sup>nd</sup> Respondent of the findings squarely places the responsibility of notifying the 1<sup>st</sup> and 2<sup>nd</sup> respondents on whether a person of any political party upon the 3<sup>rd</sup> Respondent. The Petitioner therefore contended that the responsibility of transmitting clearance certificates lies on the 3<sup>rd</sup> Respondent and not the candidate as suggested by the 3<sup>rd</sup> Respondent.

24. In conclusion, the Petitioner urged this Court to allow his case stating that allowing him to contest the election will not be prejudicial to any party.

25. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' position was that under the provisions of sections 32 and 33 of the Elections Act, 2011 and regulations 10 and 15 of the Elections (General) Regulations, 2012, the candidate is required to obtain and file with the 2<sup>nd</sup> Respondent a clearance certificate from the 3<sup>rd</sup> Respondent certifying that the person has not been a member of any political party for at least three months immediately before the date of election and file a form of intention to contest. Further, that an independent candidate shall submit the symbol he intends to use to the 2<sup>nd</sup> Respondent at least 21 days before the nomination day. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the cited law also requires the 2<sup>nd</sup> Respondent to publish in the Gazette, the names of persons intending to contest in the election as independent candidates at least 14 days before the nomination day. It was the 1<sup>st</sup> and 2<sup>nd</sup> respondents' submission that the Petitioner did not diligently follow up on the issue of the clearance of his symbol and name for purposes of nomination as an independent candidate. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the Petitioner failed to provide the job portfolio or identity of the person who assured him that the clearance certificates would be dispatched to the 2<sup>nd</sup> Respondent and the means for such dispatch.

26. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the Petitioner did not explain why it took him 14 days before following up on the clearance letters. The Court was therefore urged to rely on the doctrine that the law of equity does not aid the indolent but the vigilant and dismiss the petition.

27. In a replying affidavit sworn on 13<sup>th</sup> September, 2021 by Joy Onyango, a compliance officer with the 3<sup>rd</sup> Respondent, it was conceded that through separate letters dated 4<sup>th</sup> August, 2021 the 3<sup>rd</sup> Respondent confirmed that the Petitioner was not a member of a fully political party and his proposed symbol was not similar to a symbol of a fully registered political party.

28. It was the 3<sup>rd</sup> Respondent's case that the process of confirming one's party membership status is through feeding the Integrated Political Party Management System with a passport or identity card number and not through perusal of letters as averred by the Petitioner. Further, that the letters from the 3<sup>rd</sup> Respondent on an independent candidate's party membership and symbol are not addressed to the 2<sup>nd</sup> Respondent but are collected by the candidate for presentation to the 2<sup>nd</sup> Respondent. The 3<sup>rd</sup> Respondent denied any communication between its employee and the Petitioner to the effect that the clearance letters would be sent to the Petitioner or the 2<sup>nd</sup> Respondent by the 3<sup>rd</sup> Respondent.

29. In my view, the question to be answered in this petition is whether the 3<sup>rd</sup> Respondent made an assurance that it would deliver the clearance letters to the 2<sup>nd</sup> Respondent and if so, what was the impact of such an assurance.

30. The Petitioner made lengthy arguments as to the effect of sections 32 and 33 of the Elections Act, 2011 and regulations 10 and 15 of the Elections (General) Regulations, 2012 on his political rights under Article 38 of the Constitution. He seemed to suggest, without boldly coming out to state so, that the said provisions are unconstitutional. He also alluded to the said provisions being in conflict with Section 34(e) of the Political Parties Act, 2011. The Petitioner's arguments along those lines are indeed not convincing. He never set out to prove unconstitutionality of the stated provisions.

31. The allusion to a conflict between the provisions of the Elections Act, 2011 and the regulations made thereunder on the one hand and the Political Parties Act, 2011 on the other hand is neither here nor there. Indeed, the function given by Section 34(e) of the Political Parties Act, 2011 to the Registrar of Political Parties is to **“ensure and verify that no person is a member of more than one political party and notify the Commission of his findings”**. A reading of the provision clearly shows that it refers to a situation where there is an issue as to whether a person is a member of more than one political party. It does not concern a situation where the issue is whether a person is not a member of any political party. There is therefore no conflict between the said provision and the law established in sections 32 and 33 of the Elections Act, 2011 and regulations 10 and 15 of the Elections (General) Regulations, 2012. In any case the applicable law to nomination of candidates is the Elections Act, 2011 and the regulations made thereunder.

32. The respondents are correct that a candidate is expected to submit evidence from the 3<sup>rd</sup> Respondent that he or she is not a member of a registered political party and that the proposed symbol is not similar to that of any registered political party. They, however, appear to read the provisions narrowly to mean that only the candidate can submit those documents. Such narrow interpretation can indeed end up limiting constitutional rights. In my view, a candidate can present the documents to the 2<sup>nd</sup> Respondent through an agent. Such an agent can include the 3<sup>rd</sup> Respondent.

33. In the case at hand, the Petitioner presented clear and undisputed evidence to the Court that he was assured by an employee of the 3<sup>rd</sup> Respondent by the name Brian that his clearance letters would be transmitted to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The 3<sup>rd</sup> Respondent did not deny that the said Brian is a member of its workforce. Such an assurance created a legitimate expectation on the part of the Petitioner that his clearance letters would be delivered on schedule.

34. The 3<sup>rd</sup> Respondent having promised to act as an agent for the Petitioner had a duty to deliver the clearance letters to the 1<sup>st</sup> and 2<sup>nd</sup> respondents before the close of business on 4<sup>th</sup> August, 2021. The Petitioner was clear that he went to the offices of the 3<sup>rd</sup> Respondent on 3<sup>rd</sup> August, 2021 and he was assured that the letters would be transmitted once ready. That the Petitioner was indeed assured that his clearance letters would be delivered once ready is confirmed by the fact that the letters were dated 4<sup>th</sup> August, 2021 and not 3<sup>rd</sup> August, 2021 when he presented himself in the offices of the 3<sup>rd</sup> Respondent and applied for clearance.

35. The 1<sup>st</sup> and 2<sup>nd</sup> respondents erred in the manner they treated the Petitioner. Any person tasked with the duty of interpreting constitutional provisions has to look at the bigger picture. That is to say that constitutional rights must be protected by all means and where any statutory provision is likely to limit a constitutional right, the provision should be read in a manner that will embrace the enjoyment of the constitutional right. Statutory provisions should not be read so as to limit rights especially where it has been shown, like the Petitioner has done in this case, that the failure to comply with the law was largely caused by a public office or officer.

36. In this case, the Petitioner has provided the name and telephone number of the 3<sup>rd</sup> Respondent's officer who kept assuring him that his documents would be transmitted to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The Petitioner's right to contest for political office in a situation where he had fully complied with all the constitutional requirements cannot be sacrificed for a mistake that was not his. Had the letters been released to him by the 3<sup>rd</sup> Respondent, then it can be said that he was indolent. In this case the 3<sup>rd</sup> Respondent undertook to do for him that which the law required him to do. There is no law barring the 3<sup>rd</sup> Respondent from directing transmitting clearance letters to the 2<sup>nd</sup> Respondent. Denying the Petitioner an opportunity to present his papers therefore violated his political rights.

37. One of the reasons cited for denying the Petitioner an opportunity to contest in the by-election was that he had not been gazetted by the 2<sup>nd</sup> Respondent as an independent candidate as required by the law. As already stated, the failure to comply with the law was as result of an assurance to the Petitioner by the 3<sup>rd</sup> Respondent's employee that his clearance papers would be transmitted directly to the 2<sup>nd</sup> Respondent. The responsibility for gazetting candidates belongs to the IEBC and the Petitioner cannot be blamed for the failure to have his name gazette as a candidate in the by-election. In any case, the key purpose of gazetting is to let the people of a given electoral area know the candidates in the election or by-election. Indeed, the Petitioner is the one who should be complaining of prejudice because of the failure to gazette him. Fortunately, at the time of the delivery of this decision the Petitioner had emerged the winner in the by-election.

38. For the reasons stated above, I allow the petition and reaffirm the orders issued on 20<sup>th</sup> September, 2021 as follows:

(a) A declaration is hereby issued that the Petitioner, Timothy S. Maneno, satisfied the threshold under Article 85 of the Constitution of Kenya and is therefore qualified to be nominated and cleared to vie as an independent candidate in the Nguu/Masumba Ward by-election slated for 14<sup>th</sup> October, 2021.

(b) A declaration is hereby issued that the rejection of the Petitioner's candidature by the 1st Respondent, the Returning Officer, Kibwezi West, Nguu/Masumba Ward and the 2nd Respondent, Independent Electoral and Boundaries Commission, based on the alleged lack of clearance from the 3<sup>rd</sup> Respondent, the Registrar of Political Parties, violates Article 85 of the Constitution.

(c) An order of mandamus is hereby issued directing the 1<sup>st</sup> Respondent to forthwith and not later than 72 hours from 2.00pm today

(20/9/2021) clear the Petitioner to vie as an independent candidate in the by-election for Nguu/Masumba Ward slated for 14<sup>th</sup> October, 2021 and issue him with a nomination certificate.

(d) An order of certiorari is hereby issued removing into this Court and quashing the decision of the 2<sup>nd</sup> Respondent's Dispute Resolution Committee dated 3<sup>rd</sup> September, 2021.

(e) The Petitioner's costs for the proceedings shall be met by the 2<sup>nd</sup> Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KABARNET THIS 29TH DAY OF OCTOBER, 2021.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**