



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

ELECTION PETITION APPEAL NO. 347 OF 2017

ABDULLAHI ALI DHIMA.....APPLICANT

VERSUS

THE INDEPENDENT ELECTIONS

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

ISIOLO NORTH RETURNING OFFICER

JAGA GALGALO HALKE.....2ND RESPONDENT

R U L I N G

1. The Ex-parte Applicant as a member of the Democratic Party (DP) was nominated by his party as the candidate for Member of County Assembly position for Bulla Pesa Ward, Isiolo. The party forwarded its list of preferred candidates by a letter dated 5th June 2017 received by the 1st Respondent, the Independent Electoral and Boundaries Commission (IEBC) on the same date.

2. On the 31st May, 2017 the Ex-parte Applicant went to the Returning Officer to submit his nomination papers, only to be barred from presenting them because his name was not reflected in the Candidates Registration Management System (CRMS). He filed with the IEBC's Dispute Resolution Committee (DRC), Complaint No. I.E.B.C/DRC/NM/238/2017 which was heard and dismissed on grounds that the Returning Officer had acted within the ambit of the law and was within his right to refuse to admit the Applicant's nomination papers.

3. The Applicant has come to court seeking judicial review orders of:

a. Certiorari to bring into this court for the purposes of quashing, the decision made on the 9th June, 2017 by the 1st Respondent's Dispute Resolution Committee dismissing the Complaint No. I.E.B.C/DRC/NM/238/2017.

b. Certiorari to bring into this court for the purposes of quashing, the decision of the 2nd Respondent to refuse to admit the Applicant's nomination papers therefore denying him the chance to vie for the position of Member of the County Assembly for Bulla Pesa Ward, Isiolo County under the banner of the DP.

c. Mandamus to be issued to compel the Respondents herein to forthwith receive the Applicant's

nomination papers and admit him as the candidate for the Democratic Party for Bulla Pesa Ward.

4. The Applicant alleges that the decision of the Returning Officer to bar him from presenting his papers was unreasonable and based on procedural impropriety on grounds that:

i. The Applicant having produced evidence showing that the DP had submitted his name to the IEBC, the Returning Officer was enjoined to confirm the same with the Commission before refusing to admit the Applicant's nomination papers merely because the system did not reflect the Applicant's name.

ii. Given that other candidates of DP on the same list it submitted were cleared to contest as their names appeared in the system, in all likelihood the 2nd Respondent's decision was actuated by malice and was based on falsehood.

5. The Applicant also contends that the decision of the IEBC is vitiated by bad faith, unreasonableness and illegality since there was uncontroverted evidence that the Commission had received the list of DP including the Applicant's name; the IEBC had a duty to upload on the CRMS, all the names that it received from the Parties, while the duty of the Applicant's party was to submit the names of its candidates which it did.

6. M/s. Ruth Makuthu, a Senior Legal Officer with the IEBC swore a replying affidavit in which she averred that on 31st May 2017, the Ex Parte Applicant presented himself before the 2nd Respondent for Nomination for the position of member of County Assembly Bulla Pesa Ward, and upon presenting his identity card, his particulars were not displayed in the CRMS of the IEBC. She averred further that it was the responsibility of the participating political parties to ensure that their nominees' names and full details were uploaded onto the CRMS and every political party including the DP, the sponsoring party for the Ex-Parte Applicant had the control and custody of his secret username and password to access the CRMS for that purpose.

7. M/s. Makuthu deposed that Gazette Vol. CXIX Notice No.35 of 17th March 2017 clearly prescribed the dates for submissions of nomination papers by aspirants to the County Assembly as 28th and 31st of May, 2017. She asserted that the Returning Officer acted within the law in declining to accept the Applicant's nomination papers on the 1st June, 2017, a date which was set aside for submission of nomination papers for aspirants seeking seats in the National Assembly.

8. The Applicant was represented by learned counsel Mr. Kibe Mungai, while the Respondent was represented by learned counsel Ms Olao. Both counsels reiterated the grounds put forward by their clients. I have considered the rival arguments and note that there is no dispute that the Applicant was the preferred candidate for the DP, for the Member of County Assembly position for Bulla Pesa Ward in Isiolo. The IEBC has not denied that the DP did submit the list of preferred candidates said to have been transmitted on 15th May 2017.

9. On the eligibility of the Ex-parte Applicant to be granted the Judicial Review orders of Certiorari to remove into this court and quash the decision of the DRC, I had regard to the decision of the Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996**, which stated that;

"...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

10. I am aware that Judicial Review has since expanded to include abuse of power and bad faith as stated in **R vs Commissioner for Co-operatives ex-parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd (1999) 1 EA 245** at page 249 where the Court of Appeal held that:

“It is axiomatic that statutory powers could only be exercised validly if they are exercised reasonably. No statute ever allows anyone on whom it confers a power to exercise such power arbitrarily, capriciously or in bad faith.”

11. I have considered the submissions of each party in the application and find that there was procedural impropriety, on the part of the IEBC in the process of arriving at the decision against Ex-parte Applicant. It was the duty of the IEBC to upload the names in the party lists into their CRMS. In my view it was unreasonable and irrational for the IEBC to bar the Applicant instead of cross-checking with their list if his name was erroneously omitted from the CRMS at the time of uploading. It is noted that the Applicant presented himself on time on the date set aside for aspirants for the Member of County Assembly position to present their papers.

12. The Returning Officer sent the Ex-parte Applicant away to check with his party even as he protested that his party had already forwarded a list by a letter dated 15th May 2017. Only for him to be told that he was time barred when he returned the following day.

13. Under gazette Notice No. 35 of 17th March 2017 to which Mr. Kibe Mungai referred this court the role of the parties was to supply the list of their candidates to the IEBC. The gazette notice did not caution parties to ascertain from the CRMS that all the names of their preferred candidates had been uploaded.

14. The discretion of the Returning Officer as contained in Regulation 245 of the Election General Rules 2012, allows him/her where on the date of presenting nomination papers something may render the nomination defective, to ask a candidate to rectify it. That nomination may thereafter be admitted, this could have been done in this case by confirming what the Ex-parte Applicant was saying from the list submitted by DP. The DRC had the time during the hearing of this complaint to extend the time.

15. For the foregoing reasons the application succeeds with the following orders:

i. An order of Certiorari is hereby issued to bring into this court for the purposes of quashing, the decision made on the 9th June, 2017 by the 1st Respondent’s Dispute Resolution Committee dismissing the Complaint No. I.E.B.C/DRC/NM/238/2017.

ii. An order of Certiorari is hereby issued to bring into this court for the purposes of quashing, the decision of the 2nd Respondent to refuse to admit the Applicant’s nomination papers therefore denying him the chance to vie for the position of Member of the County Assembly for Bulla Pesa Ward, Isiolo County under the banner of the DP.

iii. An order of Mandamus is hereby issued to compel the Respondents herein to forthwith receive the Applicant’s nomination papers and admit him as the candidate for the Democratic Party for Bulla Pesa Ward.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th DAY OF June, 2017.

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L. A. ACHODE

JUDGE

In the presence offor the Applicant

In the presence offor the 1st Respondent

In the presence offor the 2nd Respondent