



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

MISCELLANEOUS APPLICATION NO. 2 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS

IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26) LAWS OF KENYA

AND

IN THE MATTER OF: APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: IN THE MATTER OF THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC)

AND

IN THE MATTER OF: IN THE MATTER OF IN NOMINATION DISPUTE COMPLAINT NO. 334 OF 2017

AND

IN THE MATTER OF: NOMINATION CERTIFICATE DATED 29TH APRIL, 2017

AND

IN THE MATTER: ARTICLES 22(1), (2), (a), (b), (c)

AND

22, 23(1), 27(1), (2), 50 OF THE CONSTITUTION OF KENYA (2010)

IN THE MATTER OF: SECTION 13(1), RW 31(2A) OF THE ELECTIONS ACT

BETWEEN

REPUBLIC APPLICANT

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC)

DISPUTES RESOLUTION COMMITTEE OF THE INDEPENDENT

ELECTORAL & BOUNDARIES COMMISSIONRESPONDENT

AND

JOSEPH NUNDA AWICH 1ST INTERESTED PARTY

ORANGE DEMOCRATIC MOVEMENT PARTY2ND INTERESTED PARTY

EX-PARTE

JUDITH ANYANGO ELIZABETH OYUGI APPLICANT

RULING:

1. The Notice of Motion dated 19th June 2017, is premised on **Order 53 Rules 1(1) (2) and 4 of Civil Procedure Rules and Section 8 and 9 of the Law Reform Act (Cap 26), Articles 22, 23, 47 and 258 of the Constitution of Kenya 2010** and all other enabling provisions of the Law and the *Ex-Parte* Applicant seeks the following orders:-

(a) An order of CERTIORARI to remove into this Honourable Court and quash the Ex-Parte judgment delivered by the respondent on 8th June, 2017 and instead order that the Ex-Parte applicant who had already been cleared to contest as the nominated Orange Democratic Movement Party (ODM) Member of County Assembly for East Asembo Ward, within Rarieda Constituency, Siaya County remains the Nominated candidate for that seat.

(b) The Ex-Parte judgment delivered by the respondent on 8th June, 2017 be quashed.

(c) An order of PROHIBITION directed at respondent prohibiting them from gazetting the names of the 1st Interested party (Joseph Nunda Awich), at the Kenya gazette as the purported nominated Orange Democratic Movement Party Constituency, Siaya County and in place thereof Gazette the Ex-Parte applicant as the duly nominated Orange Democratic Movement Party (ODM) Member of County Assembly for East Asembo Ward within Rarieda Constituency, Siaya County.

(d) In the event that 1st Interested Party (Joseph Nunda Awich), has been gazetted at the Kenya Gazette as the nominated Orange Democratic Movement Party (ODM) Member of County Assembly for East Asembo Ward within Rarieda Constituency, Siaya County, the said gazette be declared null and void.

(e) Costs of and incidental to the Application be borne by the 1st Interested party.

(f) Such further and other reliefs that the Honourable Court may deem just and expedient to grant in the circumstances of this case.

2. The Respondent filed a Replying Affidavit dated 27th June 2017, whereas the 1st Interested Party filed a Replying Affidavit dated 27th June 2017. The 2nd Interested Party did not appear nor file any response.

3. I have read the statements of Facts, the verifying Affidavit and annexures thereto. The facts which are not contested by the parties in their respective affidavits are as follows:-

(i) That on 8th June 2017, the Respondent heard the 1st Interested Party complaint No. 334 of 2017 in absence of the Ex-Parte Applicant and judgment delivered on 8.6.2017.

(ii) That the Ex-Parte Applicant's Counsel were served at 3.20 p.m. On 8.6.2017

(iii) That the Ex-Parte Applicant started the process of going Independent and that on 16th May 2017, the Ex-Parte Applicant was informed by IEBC Officials who handled her that if they had gazette her as an independent candidate, then they were going to issue a colligenda to correct the error..

(iv) That the Ex-Parte Applicant had been a member of ODM and on 6th December 2016, paid the nomination fees to contest the East Asembo Ward within Rarieda Constituency, Siaya County, as member of County Assembly.

4. The Respondent contends that the *Ex-Parte* Applicant on 19th day of May, 2017, as per **gazette notice Volume CXIX number 65 of an even date at page 2412 item 1547** the Applicant was gazetted as an Independent Candidate for the County Assembly Ward of East Asembo within Siaya County. For anyone to be declared an Independent Party the following conditions must be satisfied:-

(i) Should not have been a member of any political party for at least three months preceding the date of the election.

(ii) 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;

(iii) Has, at least ninety days before the date of 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.

(iv) Is selected in the manner provided for in the Constitution and by the Act.

5. The Respondent further averred that due to the strict timelines and personal service upon the Respondents in the Complaints being an uphill task, the Respondent required the Complainant to avail in the complaint the Respondent's (*in the complaint*) telephone number to enable the Respondent's officers to inform the Respondent in the complaint of the filing of the said complaint and the date of the hearing of the same. That the Respondent informed the Applicant of the filing of complaint and hearing date of the same and in turn the Applicant directed that her Advocates will attend to the hearing.

6. The first Interested Party in his Replying Affidavit contends that he is an ODM member, contesting for the seat of County Assembly, East Asembo Ward, Rarieda Constituency, urging the **IEBC** had jurisdiction to hear and determine his complaint. That the 1st Interested Party filed the complaint on 5.6.2017, collected the same, travelled to Rarieda in the evening to effect service on the *Ex-Parte* Applicant on 6.6.2017. That on 6.6.2017 the 1st Interested Party could not trace the *Ex-parte* Applicant and on calling her, she informed him she was in Nairobi. On 7.6.2017 the 1st Interested Party travelled to Nairobi to effect service upon the *Ex-Parte* Applicant, however, he gave summons to his Advocate to effect services, who called the *Ex-Parte* Applicant, who refused to disclose her location in a bid to frustrate the 1st Interested Party serving summons on her. That on 8th June 2017, the 1st Interested Party's Advocates informed him that the *Ex-Parte* Applicant had directed that the Applicant had directed that the summons be served upon Nchoe, Jaoko & Co. Advocate, whom she described as her advocates, despite there being no notice of appointment, that the 1st Interested Party's advocates traced the said firm of advocates and effected service on 8th June 2017 at 3.20 pm, which was received without protest.

7. That upon filing of the complaint, the 1st Interested Party averred that, the day and time for the hearing was to be communicated by the Independent Electoral & Boundaries Commission (**IEBC**) Committee for Nomination Disputes Resolution. On 8th June 2017 at 6.30 pm, after having served the **Ex-Parte** Applicant with the Complaint, the Ist Interested Party received a call from the **IEBC** Nomination Disputes Resolution Tribunal, advising that the said complaint would be heard at 8.00 pm. The **Ex-Parte** Applicant herein was also informed of the sitting time.

8. The Interested Party further claims that on 26th May 2017, he received a call from the Orange Democratic Party National Elections Board's secretary, Dr. Robert Arunga requesting for his personal details in respect to the party's nominations, that the Interested Party was also informed that aspirants for the nomination of Member of County Assembly for East Asembo Ward being, William Owiti, Judith Anyango, Elizabeth Oyugi and Daniel Okiddy Ojwang had withdrawn their party membership and as such ceased to be members of the party, that on 27th May, 2017 a party official by the name Steven called the Ist Interested Party and requested him to submit his passport photo, a name of proposer and a seconder together with copies of their national identity cards, that he duly complied with the directions and provided the said documents as requested. Later in the evening he was issued the Orange Democratic Party's nomination certificate for member of County Assembly for East Asembo Ward.

9. That on 28th May 2017 his documents for clearance were forwarded to the returning **IEBC** Officer for Rarieda constituency, were rejected on 28th May 2017 reason being that his name was forwarded late and that in a twist turns of events the **Ex-Parte** Applicant (*already registered as independent*) was cleared as the Orange Democratic Movement candidate on 30th May 2017. The 1st Interested Party further contends that the **Ex-parte** Applicant resigned from ODM when nomination was not issued in her favour.

10. The complaint to **Dispute Resolution Committee of the Independent Electoral & Boundaries Commission, Complaint No. 334 of 2017**, was filed by the 1st Interested Party and on 8th June 2017 at around 6.00 p.m. or thereabouts determined the dispute after the **Ex-Parte** Applicant failed to appear.

11. The issues for determination in this notice of motion are:

(i) Whether the Respondent heard the 1st Interested Party through complaint No. 34 of 2017 without the Respondent having issued any hearing notice and without the Ex-Parte Applicant being served with either a hearing notice or the complaint No. 334 of 2017 at all, contrary to the Law and procedure established currently in Kenya.

(ii) Whether the Ex-Parte Applicant was as of the time of hearing the complaint an Independent candidate?

12. In this application, it is contended by the **Ex-Parte** Applicant that the Respondent heard the 1st interested party through complaint **No. 334 of 2017** without the respondent having issued any hearing notice and without the **Ex-Parte** Applicant being served with either a hearing Notice or the complaint **No. 334 of 2017** at all, contrary to the laid down procedure established currently in Kenya and the decision made is therefore arbitrary. In the instant application the 1st Interested Party deponed in his affidavit the efforts he made to serve the **Ex-Parte** Applicant by travelling to Rarieda, Siaya, calling the Respondent and eventually handing over the documents to his Advocates who served the **Ex-Parte** Applicant's Counsel on 8th June 2017 at 3.20 p.m. The Respondent on her part deponed that the **Ex-Parte** Applicant was duly informed of the filling of the complaint and hearing date, who instructed that her Advocates were to attend. The **Ex-Parte** Applicant did not file an affidavit to challenge or controvert the service as alleged by the Respondent and the 1st Interested Party. There is no dispute the Advocates on record were served on 8.6.2017 at 3.20 pm. before the complaint had been heard and determined as judgment had been deferred to 6.00 p.m. The **Ex-Parte** Applicant and her Advocates had sufficient time to proceed to **IEBC** tribunal and put their defence or seek adjournment or seek any appropriate orders. They did not attend or send anyone to hold their brief and no explanation was given for their non-attendance, having received hearing notice. I find in view of the strict timelines personal service upon

the **Ex-Parte** Applicant was frustrated by the **Ex-Parte** Applicant's non-cooperation and the **Ex-Parte** Applicant having been informed of the matter through a telephone call by the Respondent as well as the **Ex-Parte** Applicant, having been served, through her Advocates, **Ex-Parte** Applicant was duly given an opportunity to be heard, that the respondent did not abuse the power nor acted unreasonably by hearing the matter **Ex-Parte**, after it was satisfied the **Ex-Parte** Applicant had been served. I therefore find the **Ex-Parte** Applicant is to blame for her absence from the hearing and cannot claim she was condemned unheard contrary to the rules of natural justice. That once a party is served and fails to attend hearing, there is nothing wrong with the tribunal proceed ex-parte. I find no justification in the **Ex-Parte** Applicant's allegation that she was condemned unheard.

13. On the issue of whether the **Ex-Parte** Applicant was at the time of hearing of the complaint an Independent Candidate, it has been urged that, the **Ex-Parte** Applicant, 1st Interested Party and others after losing nomination of a member of County Assembly for East Asembo they withdrew their party membership from ODM. The **Ex-Parte** Applicant avers that she was prompted to start the process of going independent in order not to suffer the consequences of botched nomination. She urged that she did not tender her resignation.

14. **Section 13(2) of Electoral Act Provides:-**

"A political party shall not change the candidate nominated after the nominations of that person has been received by the Commission: Provided that in the event of the death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may after notifying the candidate that the party seeks to substitute, where applicable, substitute its candidate before the date of presentation of nomination papers to the Commission."

15. The **Ex-Parte** Applicant was on 19th May 2017 **vide gazette notice volume CXIX number 65** in an even date at page 2412 item 1547 gazetted as an independent candidate for the County Assembly Ward, of East Asembo within Siaya County. The law is clear when one can be declared as an independent candidate. The candidate should satisfy the following:-

(i) Should not have been as member of any political party for at least three months preceding the date of the election;

(ii) 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;

(iii) 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.

(iv) Is selected in the manner provided for in the constitution and by the Act.

16. The Respondent and by the act indeed caused the gazetment of the ex-parte Applicant as an independent candidate which to date has not been revoked, and which is still a valid notice to the whole world, that the ex-parte Applicant is an independent candidate. The assertion that she did not resign is not tenable in view of **Section 13(2) of the Election Act** nor could the ODM party issue valid certificate after the **Ex-parte** Applicant was gazetted as an independent Candidate in complete contravention of ODM nomination rules which provides:

Nomination of Member of the County Assembly

A person seeking nomination for elections as member of the County Assembly shall fulfill the following requirements;

(i) Be registered as a voter in the Ward or County, for which he/she seeks election.

(ii) Be a registered member of the Party.

(iii) Be in possession of post-secondary school qualification recognized in Kenya.

(iv) Demonstrate active participation in party programs six months prior to seeking nomination, provided National Executive Committee may for good cause, which shall be specifically documented except an applicant from the requirement, subject to any conditions it may deem fit.

(v) Meet the minimum requirements for County Assembly Candidates as may be set out by the Independent Electoral and Boundaries Commission

17. I find the *Ex-Parte* Applicant assertion that she withdrew from list for Independent Candidates, from East Asembo Ward, Rarieda, Siaya, untenable and without any basis as the *Ex-Parte* Applicant did not follow the matter with **IEBC to have her name revoked from the list of the gazetted independent candidates. I therefore find and hold that the **IEBC** Dispute Resolution Committee in their judgment of 8.6.2017 rightly found the *Ex-Parte* Applicant was duly gazetted as an independent candidate vide **Gazette Notice Number 4891 of 2017 at page 2412 at Number 1547.****

18. The motion before me is devoid of merit and is dismissed with an order that each party bear its own costs.

19. I proceed to make the following orders:-

(a) The Declaration made by the Independent Electoral & Boundaries Commission (IEBC) Dispute Complaint No. 334 of 2017 be and is hereby upheld.

(b) That the 1st Interested Party's name be gazetted as Orange Democratic Movement Candidate, the member of the County Assembly, East Asembo Ward, Rarieda Constituency by the Independent Electoral & Boundaries Commission (IEBC) as determined in Dispute Complaint No. 334 of 2017.

DATED AND DELIVERED AT SIAYA THIS 30TH DAY OF JUNE, 2017.

J.A. MAKAU

JUDGE

DELIVERED IN THE PRESENCE OF:

MR. JAOKO FOR THE EX-PARTE APPLICANT

MR. OGEJO FOR RESPONDENT

M/S. KIRUGU FOR THE 1ST INTERESTED PARTY.

C.A.

1. L. ODHIAMBO

2. S. OORO

J. A. MAKAU

JUDGE