



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL DIVISION

CONSTITUTIONAL PETITION APPEAL NO. 308 OF 2017

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLES ARTICLE 38 OF THE CONSTITUTION OF KENYA

BETWEEN

SAMUEL MANDELA GACHUGU.....PETITIONER

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....RESPONDENT

JUDGMENT

Introduction

1. Samuel Mandela Gachugu (“ the Petitioner”) is a senior citizen. He is headed to the seventies, age wise. He is a member of a political party, the Orange Democratic Movement. His party named him as its nominee for the seat of the Member of National Assembly Roy Sambu Constituency.

2. The Petitioner was indeed desirous and determined to be on the ballot paper in the elections scheduled for 8 August 2017. Then his hopes were cut short and dashed by the Respondent who, in terms of Article 88 of the Constitution , manages elections in Kenya. The Respondent disqualified the Petitioner for nonpayment of fees amounting to Ksh. 20,000.00 to the Respondent. The Petitioner’s cries and complaints went unheeded. The Respondent failed to condone the non compliance and locked the Petitioner out, prompting the Petitioner to come to this court on 21 June 2017.

3. As the elections are due to be held in just under six weeks , I fast tracked the Petition. I must also confess that this judgment has also been rashly written for delivery.

Background facts

4. The background facts are not in dispute.

5. In accordance with s.16(2)(b) of the Elections Act, the IEBC published a timetable which regulated among other things the submission of the nominated candidates by the political parties. The Petitioner’s party submitted his name. He then sought compliance by presenting himself before the Respondent’s duly appointed returning officer. He showed up before the returning officer on 2 June 2017. He was aware of all the requirements. He says he met all but one requirement. He was unable to raise the requisite fees of Ksh.20,000.00. He only had Ksh. 15,000.00. The Respondent’s returning officer declined to clear him. He

asked for time to raise the shortfall. The Respondent's returning officer reminded him that he would run out of time and indeed the Petitioner did. He never raised the requisite amount prior to a 4.00 O'clock deadline.

6. Unperturbed and still determined, the Petitioner wrote to the Chairman of the Respondent. It is however unclear whether the Petitioner lodged any complaint with the Respondent. He did, on 12 June 2017, fill a complaint form but there is no indication of the same ever having been lodged with the Respondent's dispute resolution committee. The fact still remains that the Respondent refused to certify the Petitioner's candidature.

The Petition

7. The Petition is pegged on the fact of the Respondent's failure to condone the Petitioner's inability to meet the requirement for payment of the prescribed nomination fees. The Petitioner claims he has been discriminated against. He contends that the same affirmative action availed to women, youth and people living with disability do also obtain in his favour. He states that the Respondent should not make financial ability a precondition for any Kenyan seeking to be a candidate for any elective position.

8. The Respondent filed a Replying Affidavit on 29 June 2017. The affidavit was to the effect that the Petition was fatally defective and devoid of any merit. The affidavit asserted that the Respondent was merely enforcing a law which is in place and must be applied. The Respondent finally stated that the Petitioner had failed to avail any particulars of the alleged discrimination.

The Hearing

9. The fast tracked hearing proceeded *ex parte*. Counsel for the Respondent arrived in court nearly an hour after the appointed time of 0745 hrs. I had already heard the Petitioner's oral submissions.

10. The Petitioner simply transubstantiated what had been written down in the Petition.

11. The Petitioner submitted that he was a senior citizen and could not raise the required fees. He urged the court to order affirmative action to apply to him as well as it applied to the youth and the disabled as well as women. According to the Petitioner, it is very discriminatory on the part of the Respondent to charge fees yet the Respondent is fully funded. The Petitioner wrapped up his submissions by stating that he was willing to comply if the court could extend time for him. The Petitioner additionally submitted that he had tried all avenues to ensure that he was certified to contest the elections to no avail.

12. It is clear that the Petition questions the Respondent's decision to deny the Petitioner clearance on basis of lack of nomination fees. In my view, it is a silhouetted appeal rather than a constitutional petition *strict sensu*. The Petition however lacks all the necessary particulars to rank it as a challenge to violation of the Petitioner's fundamental rights and freedoms. I appreciate however that the Petitioner is a *pro se* litigant and I have to try discerning his issues. I must also make justice count substantively rather than summarily reject the Petition for want of formalities as to pleadings.

Determination

The Issue

13. The core question that I have to decide is whether the Respondent's decision not to certify the Petitioner as a candidate effectively disqualifying him from contesting the forthcoming elections ought to be vacated. The Respondent's decision was arrived at on the basis that the Petitioner never met the requirement of paying the prescribed nomination fees. The nomination fees was payable in terms of Regulation 25 of the Elections (General) Regulations, 2012.

Analysis

14. The elections must be conducted and managed in accordance with the Constitution and the Elections Act. No. 24 of 2011 (“the Act”). Pursuant to s.109(1) of the Act, the Respondent made the Elections(General) Regulations 2012 (“ the Regulations”) for inter alia, the better giving effect to the Act.

15. Part V of the Regulations provides for the nomination of candidates for the National Assembly.

16. Generally, under the Act and the Regulations a candidate is nominated by delivery to the returning officer of an application form on the appointed day. Where he is an independent candidate, he must also avail names of one thousand registered voters in the constituency or county. Additionally, under Regulation 25 the application for nomination

“for candidature at parliamentary election shall be accompanied by a non-refundable nomination fee, in banker’s draft of—

a. ten thousand shillings for a candidate who is a youth, woman or person with disability; and

b. twenty thousand shillings for any other candidate. “

17. A cursory reading of the Regulations will reveal that no parliamentary candidate may contest an election unless s/he has paid the prescribed deposit by the set deadline. In the instant case, the deadline was 2 June 2017 and the prescribed fees was Ksh.20, 000.00.

18. It is common cause that the Petitioner did not have the requisite deposit as he presented his nomination application alongside the other documents. It is also common cause that the Petitioner sought condonation of the default and that the Respondent declined.

19. I bear in mind that the Petitioner has asked the court to judicially review and vacate the Respondent’s decision not to condone the Petitioner’s default and to direct that the Petitioner be duly certified as candidate in the forthcoming elections. I have no doubt that this court has the necessary jurisdiction especially under Article 165(6) and also Article 23 of the Constitution which grants this court the authority to uphold and enforce the Bill of Rights by granting appropriate relief as each case may call for.

20. The petitioner has contended that his political rights have been violated.

21. Political rights under the Constitution are no doubt central to Kenya’s democratic society: see Article 1(2) of the Constitution. The protection thereof is therefore an important constitutional purpose and not simply individualistic. On the other hand such political rights are not absolute : see Article 25. They are subject to other rights and also to such reasonable and justifiable limitations: see Article 24. Political rights are achieved largely through universal suffrage and as prescribed under Article 38 and Chapter Seven of the Constitution. Article 88 of the Constitution put into effect the realization of political rights by setting up the Respondent with the mandate of organizing and managing electoral systems and process in Kenya. The Respondent performs a vital constitutional function and must do so within the confines of the Constitution and any other law which upholds constitutional values.

22. In the execution of its mandate of organizing and managing the electoral process and systems in Kenya, the Respondent must thus adhere to our constitutional values key amongst is the need to ensure that the citizenry participates in free fair and transparent elections. Participation, either as a voter or a candidate , is guaranteed by the Constitution and the Respondent must always endeavour to encourage and promote the same even as it applies any law to the process and subjects the citizenry to such law.

23. The Petitioner in the instant case argues that the steps he took were substantially in compliance with all the law and thus the Respondent ought to allow him to participate as a candidate in the forthcoming general elections. The Respondent disputes this and states that it had simply applied a specific law as it is enjoined. The law stated to have been applied is the Act and the Regulations.

24. Before determining whether the Petitioner is correct, let me dispose of the Petitioner's alternative argument that he has been discriminated against.

25. The Petitioner's argument in this regard was that while the Regulations have granted reprieve to the youth, women and people leaving with disability by allowing them to pay a lesser amount as nomination fees, the Petitioner is a senior citizen who lives in a pauper state. According to the Petitioner, the Regulation 25 favours a category of people (youth, women and people with disability) and this is contrary to Article 27(1) of the Constitution which dictates the right to equal protection and benefit of the law. For the Petitioner, there is discrimination when senior citizens are not considered and also given special favour like the youth or women.

26. The Petitioner's arguments in this regard should not and cannot be accepted.

27. First, the Petitioner did not lay out the particulars of the alleged discrimination. Generally, discrimination is any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantages on; or withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds outlined under Article 27(4) of the Constitution. In the case of **Peter K. Waweru v Republic [2006]eKLR** discrimination was defined as

'... A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured'.

28. It is no doubt true that Regulation 25 imposes a burden on the Petitioner and all other candidates. The burden has however not been imposed by reason of the Petitioner's age as the Petitioner argues. The burden has been fetched upon all candidates intending to contest the elections without exception save the youth, women and people with disability who are subjected to a lesser burden. The Petitioner has not shown how there has been differentiation which would amount to discrimination.

29. Secondly, the alleged unequal treatment refers to persons of different categories. The Petitioner like all other able bodied men who want to subject themselves to the people's choice are not equal to the youth women and people with disability. Indeed, the Constitution recognizes this and under Articles 27(6) &(7), 54 and 55 has sought to extend special treatment to women, youth and people with disability. The constitutional value is to have laws policies and rules which encourage and engineer access and participation for these persons in political social economic and other spheres of life.

30. It is the affirmative action principle in play and in favour of women youth and people living with disability. The Constitution itself has classified these categories of people and encouraged the differentiation through promulgation of laws or policies to this effect. I consequently find nothing discriminatory in Regulation 25 or the application of the said regulation by the Respondent in the instant case.

31. I come to the question of application of Regulation 25.

32. It would be important in interpreting or applying Regulation 25 to do so in light of the constitutional values.

33. In **Harun Mwadali Mwaeni v Independent Electoral & Boundaries Commission & Another [2017]eKLR** this court pointed out that stated that our constitutional values and principles dictate that the Respondent should always apply electoral laws with a view to assisting the citizenry to enjoy their political rights. The court was dealing with the question as to whether the time stipulated under the Regulations for presenting nomination papers and paying nomination fees could be extended. The court stated as follows

"[42] Condonation ought to be entertained as our constitutional principles and values would dictate as much. Essentially, constitutional values encourage enfranchisement rather than

disenfranchisement. Allowing a minimal time difference may only encourage such a value, while an inflexible approach will not. The IEBC as well as the court ought to adopt an approach which favours enfranchisement rather than disenfranchisement. The circumstances where condonation is allowed however ought to be exceptional, otherwise it may end up as a free for all and the result would be a disorganized and shambolic electoral process. Cogent evidence of sabotage or kidnapping of the candidate may serve as good examples in these respects, but an unforeseen storm lasting a day may not.

34. Legislation and regulations dealing with elections must be interpreted in favour of enfranchisement and not disenfranchisement. The same applies to the application of any such law.

35. Regulation 25 is preemptory. It suggest that a parliamentary candidate may not contest an election unless he has paid the requisite nomination fees among other requirements. There was evidently non compliance on the part of the Petitioner as on the due date he failed to make payment.

36. The Respondent had power to enforce the law and indeed the Regulations. The Respondent likewise had power to act in such a manner as to facilitate the citizens', including the Petitioner's, participation in the elections. What then happened?

37. The Petitioner owned up to not having the adequate funds. The Petitioner sought time extension. He never seemingly went back to the Respondent that he had the full funds to pay for his nomination and sought time extension. The Petitioner should have done so. Instead, the Petitioner went on a challenge spree. He seems to have headed to the Respondent's dispute resolution committee but once again says nothing about what transpired, even though the Respondent says he did not appear before it. Then the Petitioner launched this Petition and again sought an array of orders including not only extension of time to pay but also exemption altogether from payment on basis of discrimination.

38. I am satisfied that nonpayment of nomination fees as provided for under the Regulations may be condoned by the Respondent where appropriate. I am also satisfied that the Respondent has powers to waive the payment of the nomination fees upon application by any party. I state so for the reason that a reading of Article 38 of the Constitution does not provide for a property qualification the way Article 48 (Access to justice) provides. Imposition of the nomination fees may have been well intentioned to help keep away non serious contenders but it also appears an additional burden in the form of property requirement to the right to political rights hence the need for the Respondent not to be inflexible when enforcing it. In exceptional circumstances the Respondent ought to be ready to waive the requirement.

39. In the instant case, the Petitioner did not seek this waiver. He sought to simply compare himself to others and that was not helpful. It is not for this court to grant waiver or condonation, that must be left to subsist within the Respondent's precinct. This court may only review a decision of the Respondent in that regard. As it were, no application for waiver and condonation was made and thus this court must desist from making a first instance decision for the Respondent.

40. I should emphasize that had the petitioner applied to the Respondent for waiver then the Respondent would have been duty bound to consider the application in light of the Petitioner's circumstances and also in light of the purpose of such payment in the overall electoral framework as understood through the constitutional values which I have laid out in some of the preceding paragraphs.

41. For now, I must add that this Petition was in one way or the other rather novel. The Petitioner ought to be congratulated for taking it up even though it was not brought as a public interest litigation but to enforce an individual right. The Petition did not challenge the constitutionality of the requirement to pay the nomination fees. Such fees may be a hindrance to the exercise of political rights. I must refrain however from making any determination on that aspect and leave that to another day.

Conclusion and disposal

42. I have found no fault with the Respondent. I have also found no element of discrimination.

43. I have to dismiss the Petition and it is dismissed.

44. I make no order as to costs on this Petition.

Dated, signed and delivered at Nairobi this 30th day of June, 2017.

J.L.ONGUTO

JUDGE