



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CONSTITUTIONAL PETITION NO. 11 OF 2017

IN THE MATTER OF ALLEDGED CONTRAVENTION OF FUNDAMENTAL RIGHT & FREEDOMS UNDER ARTICLES 38 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

PETER KIMANI WANJOHI:.....PETITIONER

AND

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION:.....1ST RESPONDENT

RETURNING OFFICER

(TURBO CONSTITUENCY):.....2ND RESPONDENT

RULING

The Petitioner herein Peter Kimani Wanjohi filed the petition herein on 14th June, 2007 praying principally that the Respondents be restrained from barring the applicant from running as an independent candidate for Huruma Ward and also a mandatory injunction to compel the Respondents to clear the petitioner as an independent candidate for member of county assembly for Huruma ward. Filed with the petition was an application by way of Notice of motion of even date made under sections 1A, 1B, 3, 3A of the Civil Procedure Act, and O.40 Rules 2 and 4 of the Rules thereunder, and Article 38 of the Constitution. This application makes exactly the same prayer as the petition. And the applicant has sworn an affidavit with annexures in support of the same. He has also sworn a further affidavit.

In court, Ms. Nasiloli for the Applicant, submitted that the Respondent denied the Applicant the opportunity to stand for the ward sat on the basis that the Applicant failed to meet the threshold of signatures required. That the Applicant submitted signatures and only 3 names on the list had been cancelled, and he was not given the opportunity to avail more while he had ready names. That this has been a breach of his fundamental right.

In response, Mr. Yego for the Respondents, submitted that a mandatory injunction as prayed for herein can only issue an exceptional circumstances, while the petitioner has not convinced the court that this petition has overwhelming chances of success. Also that this application is incompetent in as far it seeks to challenge a decision of a constitutional body on its merit without proof that the said decision was made outside jurisdiction or in excess of jurisdiction. He relied on the case of **Dr. Billy Elias Nyonje -vs- National Alliance Party of Kenya and Independent Electoral and boundaries Commission** (Jud.

Rev. 61 of 2013)

That the Independent Electoral and Boundaries Commission Disputes Resolution Tribunal made a decision and the application must show that same was outside jurisdiction or that rules of natural justice were not followed. That Under Article 193, and independent candidate must be supported by at least 500 registered voters in the ward, but that on 30th May, 2017, he had 318 signatures. And after being given the opportunity to correct the anomaly, the following day, he had 479 signatures, and not all from Huruma Ward.

Counsel also drew the attention of the court that the printing of ballot papers are almost complete and any order would be in futility. And that Under Section 33 of the Elections Act, nomination of candidates must be concluded 60 days to the elections, yet we remain only with 39 days. He urged that both the application and the petition be dismissed.

I have considered the submissions of both sides. I have also carefully perused the pleadings filed by the 2 protagonists. As I understand it, the Applicant's case stems from the constitutional requirement on nominations of independent candidates; Article 193(ii) requires that an independent candidate be supported by at least 500 registered voters in the ward concerned. It is the contention of the Applicant (Par. 3) that on 31st May, 2017, he went to submit the names of his supporters but that 3 names were eliminated reducing the numbers to 497. What does this mean? Simple. That the applicant had in fact failed to meet this constitutional threshold on the nomination and or clearance of independent candidates for election as ward representative. He was obviously accorded the opportunity to do so, but he ended up with less signatures than are constitutionally required. This court has not been told when this exercise of nomination or clearance ran as to enable this court consider whether the denial of the Applicant of a chance to avail additional signatures was out of an arbitrary decision of the Respondents or out of the fact that time for the exercise had lapsed. The one thing that clearly comes out of the submissions of both sides, is that as at the close of the exercise, the applicant had not submitted the required number of signatures in support of his nomination.

Secondly, it is clear that the applicant filed his complaint before the Independent Electoral and boundaries Commission disputes committee and his complaint was not allowed. I am guided by the case cited by the Respondent **Dr. Billy Ellias Nyonje -vs- NAP and Independent Electoral and boundaries Commission** (Judicial Review No. 61 of 2013) in which the Hon. Lenaola J (as he then was), held that it is not for this court to look into whether the decision was right or not. But rather that it is incumbent upon the applicant to prove that the said decision was made without or in excess of jurisdiction or rules of natural justice. In this case, there has been no allegation made on the part of the applicant, that the decision was made in excess of (or without) jurisdiction or in breach of the rules of the natural justice.

Thirdly, the Election Act (Section 33(1)(b)) dictates that nomination process must be complete at least 60 days to the date of election. The elections are scheduled for 8th August, 2017 and only 39 days remain to that day. This court has not been referred to any legal provision that would allow this court to allow and or order for the nomination or clearance of a candidate this late in time, particularly since it is the same party who failed to meet the constitutional requirement as to the number of signatures of his supporters.

Fourth, counsel for the Respondent has drawn the attention of the court as to the fact that the printing of ballot papers containing names of nominated candidates are almost complete. This court takes judicial notice of this fact considering the various official statements of the chair of the Independent Electoral and boundaries Commission. Same have also been widely contained in the print media. The question to ask therefore is whether it would be prudent and reasonable to order inclusion of the name of the Applicant on the ballot papers that have probably been printed. The issuance of such an order may be an exercise in futility and in breach of the cardinal principle that court orders should not in vain.

Lastly, I have considered the issue of public interest in this matter. The applicant, just like all the other aspiring candidates in the August, 2017 elections were accorded the opportunity to present their clearance and or nomination documents including submission of the required number signatures of supporters. Dates for such submissions were issued by the Respondents. Apparently, it is the applicant who failed to

fulfil the requirements, especially the constitutional requirement as to signatures of supporters. Why then would this election process be interfered with in his favour this late in time? The elections are national event, only coming up every 5 years. Being part of the community of Kenya, this court is fully aware of the anxiety and enthusiasm with which all Kenyans await the election date so that they may have the opportunity to vote in leaders of their choice. There are over 40m of them. I am not convinced that the Applicant has shown any or sufficient reason as to make this court issue orders that may interfere with this process. On the other hand, I am convinced that it is in public interest that this court refrains from issuing such an order, for public interest herein outweighs the personal interest of the applicant.

It is for these reasons that I am not convinced that any fundamental rights of the applicant have been infringed on as claimed, or that the applicant, has on a balance of probabilities proved that this application dated 14th June, 2017 has any merit nor that any of the orders prayed for therein can issue. I accordingly therefore decline to grant the prayers sought. I dismiss the application of the applicant dated 14th June, 2017 wholly with costs to the Respondents. Orders accordingly.

DATED, SIGNED and DELIVERED at ELDORET, this 29th day of June, 2017.

D.O. OGEMBO

JUDGE

Ruling read out in open court in presence of: -

- 1. Ms. Nasiloli for the Petitioner and*
- 2. Mr. Aseso holding brief for Mr. Yego for the Respondent*

D.O. OGEMBO

JUDGE