



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL PETITION NO 366 OF 2016
IN THE MATTER OF ARTICLES 24, 27, 38, & 85 OF THE CONSTITUTION OF KENYA
IN THE MATTER OF SECTIONS 13 & 28 OF THE ELECTIONS ACT
BETWEEN
ISAAC ALUOCH POLO.....PETITIONER
VERSUS
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...RESPONDENT
AND
THE REGISTRAR OF POLITICAL PARTIES.....INTERESTED PARTY

JUDGEMENT

Even as the Court seeks to do justice, it cannot be lost to it that despite having a conscience, it is a court of law and not of mercy.^[1] It is also bound by the law and more so the Constitution which binds all.

A reading of the pleadings herein reveals that the provisions of the law upon which the petition is premised were amended during the pendency of this petition thereby effectively rendering this petition a mere academic exercise since the core content of the petition was overtaken by events. This raises the question whether it was necessary for the petitioner to pursue the petition thereby engaging the courts valuable time under such circumstances.

The provision of the law cited by the petitioner are section **13 (1)** of the Elections Act^[2] on nomination of candidates by a political party which "then" provided as follows:- "A political party shall nominate its candidates for an election under this Act at least forty-five days before a general election under this Act in accordance with its constitution and nomination rules."

The petitioner also cites section **13 (3)** of the same act which "then" provided that "Notwithstanding subsection **(1)**, in the case of any other election, the Commission shall by notice in the prescribed form, specify the day or days upon which political parties shall nominate candidates to contest in a presidential, parliamentary or county election in accordance with its constitution or rules, which shall be at least forty-five days before such election."

Also cited by the petitioner is section **28** of the act on submission of party membership lists which

"then" provided that "A political party that nominates a person for any election under this Act shall submit to the Commission a party membership list of the party at least forty-five days before the date of the general elections."

The petitioner argues that the above provisions have been mis-interpreted or mis-applied by political parties and or have been permitted by the Respondent to submit names of candidates who have not been there members for a period of ninety days. The petitioner also argues that article **85 (a)** of the constitution provides that persons contesting elective seats as independent candidates must not have been members of a political party for at least ninety days.

The petitioner argues that to the extent that the above provisions of the law do not limit the period within which a political party candidate ought not to have been a member of a party, the position contrasts with the requirements of article **85 (a)** of the constitution, hence, the said provisions permit discrimination and unequal treatment and unfairly limit the right to political association of independent candidates.

It is important to point out that the petitioner does not seek a declaration that the said provisions of the law are unconstitutional but seeks to have the "practice by the Respondent declared to be discriminatory and contrary to article 27". He also seeks a declaration that for a political party candidate to be cleared to vie, he ought to have been a member of the party for at least ninety days.

That was the law when Kenya went for elections in 2013. However, during the pendency of this suit, Parliament amended section **13 (1)** of the Elections by section **6** of the Elections Laws (Amendment) Act No. 1 of 2017. The amended provision reads as follows:-

"A political party shall nominate its candidates for an election under this Act at least ninety days before a general election under this Act in accordance with its constitution and nomination rules."

Section **28** of the act was also amended as follows:-

Submission of party membership lists

(1) A political party that nominates a person for an election under this Act shall submit to the Commission a membership list of the party—

(a) in the case of a general election, at least one hundred and twenty days before the date of the election; and

(b) in the case of a by-election, forty-five days before the date of the by-election.

Evidently, the law has since changed rendering this petition a mere academic exercise. It is trite that as a general principle, the rights and liabilities of parties to any judicial proceedings pending before court are determined in accordance with the law as it was at the time when the suit was instituted. Time and again, it has been expressed that a court should not act in vain.^[3]

No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. In the instant case, a consideration of the petition based on provisions of the law that have since been amended would become academic, cosmetic and of no utilitarian value or benefit as the aim of the petition has been overtaken by the amendments.^[4]

A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in its favour. A suit is academic if it is not related to practical situations of human nature and humanity.^[5]

The petitioner as I understand him seems to persuade the court to buy the notion that he is not challenging the constitutionality of the sections in question, but he is challenging the "constitutionality of

the Respondents actions" which he terms unconstitutional. The actions in question as I understand them is the act of allowing different time frames for independent and political party sponsored candidates to submit their party lists.

If I correctly understand the petitioners argument as captured above, then one wonders where the discrimination lies because the actions complained of are grounded on the constitution (Article 85 (a) of the constitution and the sections cited by the petitioner referred to above). Thus, if the petitioner is not challenging the provisions of the law upon which the Respondents acted, how then can he challenge actions and/or decisions premised on such clear provisions of the constitution and the law. It has not been shown that the Respondent acted against the law. In fact, the acts reflect what the law was then. Hence, the petitioners argument that he is only challenging the constitutionality of the Respondents actions are unfounded and totally unsustainable.

I agree with counsel for the first Respondent that this petition is bad in law, scandalous, vexatious, frivolous and exceedingly unsustainable. Having so found, I find no need to delve into the question of damages. But it will suffice for me to state that there is absolutely no basis at all upon which the damages sought can be awarded.

To me, this petition is premised on a clear misapprehension of the law. I find that the petitioner has failed to demonstrate that the challenged actions are unconstitutional or in any manner infringes any provisions of the constitution or the law since the Respondent allowed the time frames prescribed in the law and the constitution. The petitioner is not entitled to any of the reliefs sought in the petition. The upshot is that this petition has no merits at all and I hereby dismiss it with costs to the Respondents.

Orders accordingly

Signed, Dated at Nairobi this 28th day of June, 2017

John M. Mativo

Judge

[1] Yusuf Gitau Abdalla vs. The Building Centre (K) Ltd & 4 Others, Petition 23 of 2014

[2] Cao 7, Laws of Kenya

[3] Political Parties Forum Coalition & 3 others v Registrar of Political Parties & 8 others [2016] eKLR

[4] Oladipo vs. Oyelami {1989} 5 NWLR (Pt. 120) 210; Ukejianya vs. Uchendu }1950} 13 WACA 45

[5] See Plateau State vs. A.G.F. {2006} 3 NWLR (Pt. 967) 346 at 419 paras. F-G wherein the Nigerian Supreme court defined an academic suit or petition the above terms