



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTION AND JUDICIAL REVIEW DIVISION
MISC.CIVIL APPLICATION NO. 35 OF 2017
(JUDICIAL REVIEW)

REPUBLIC.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....2ND RESPONDENT

EX PARTE

TOM OGALO OLUOCH

RULING OF THE COURT

The Application

1. The application before the court is dated 21st June 2017 and brought under Order 53 Rule 3 & 4 of the Civil Procedure Rules, Sections 7 (1) & (2), 11 (1) (e) & (h) of the Fair administrative Action Act 2015 and Section 8 & 9 of the Law Reform Act Cap 26 of the laws of Kenya by the ex-parte applicant who seeks Orders of Certiorari, Mandamus and Prohibition to issue as against the 1st and 2nd Respondents.

The application is supported by the statutory statement and the verifying affidavit sworn by **TOM OGALO OLUOCH** on 13th June 2017.

2. The ex-parte applicant alleged that he was awarded the ODM nominations certificate upon winning the party nominations and his name forwarded for gazettelement and that when he went to confirm his registration as a nominee he was amazed to find that he had been registered as an independent candidate vying for the same position.

3. The ex-parte applicant further alleged that he did not belong to any other political party and his registration as an independent candidate was erroneous. The ex-parte applicant alleged that the 1st Respondent suspended his registration and as a result he filed a complaint with the Independent Electoral

and Boundaries Commission Disputes Resolution Committee seeking to have his registration as an independent candidate revoked.

4. The ex-parte applicant alleged that when the 1st Respondent's Dispute Resolution Committee was faced with the question whether or not to gazette the name of the Applicant as a candidate for the position of Member of County Assembly, Timbwani Ward, Likoni Constituency, Mombasa County on the Orange Democratic Movement party ticket, the 1st Respondent resolved that the Applicant was disqualified on grounds that he was doubly registered, first as a member of the Orange Democratic Movement party and secondly as an independent candidate.

5. The ex-parte applicant alleged that unless this Court grants him the Orders sought nothing will stop the 2nd Respondent from presenting and the 1st Respondent from gazetting a different candidate as the nominee for Member of County Assembly, Timbwani Ward, Likoni Constituency, Mombasa County under the Orange Democratic Movement ticket.

Response

6. The 1st Respondent responded to the application by way of a replying affidavit sworn on 21st June 2017 by one **RUTH MAKUTHU**.

7. The deponent alleged that the complaint by the Applicant to the 1st Respondent Dispute Resolution Committee was dismissed for violation of Regulation 45 of the Elections (General) Regulations 2012 which provided that no person shall ascribe to two nomination papers in the same election and Article 193 (c) of the Constitution that a candidate is either nominated by a political party or is independent.

8. The deponent alleged that the affidavit of Luciana Jumwa Sanzua, the Returning Officer, demonstrated that the ex-parte applicant had been cleared as an independent candidate and at the same time his party had presented his name as a nominated candidate.

9. The deponent further alleged that the 2nd Respondent informed the 1st Respondent's Dispute Resolution Committee that the party had nominated another candidate one, Mwaka Bakari for the same position.

10. The deponent alleged that if the Court granted the prayers sought then it will amount to the Court substituting itself to carry out the mandate of the 1st Respondent given under the Constitution and the Elections Act.

Hearing

11. The Application came up for hearing on 27th June 2017. Mr. Mutiso, counsel for the ex-parte applicant submitted that the applicant was denied fair hearing contrary to Article 50 of the Constitution before the 1st Respondents' Dispute Resolution Committee. Further, counsel submitted that the applicant was not given any chance to respond to the allegations of double registration and reliance was only placed on the IEBC portal.

12. Mr. Mutiso submitted that the applicant did not tender any application to the 1st Respondent as an independent Candidate and if he had been granted the opportunity by the 1st Respondents' Dispute Resolution Committee he would have produced his proper details including his Identification Card which was different from what appeared on the 1st Respondents' portal, and which showed that he was born on 8th May 1957 and another that he was born in 1974. Counsel further submitted that the information on the 1st Respondent's portal was incorrect yet this was the basis upon which the ex-parte applicant was disqualified.

13. Mrs. Munyithya, counsel for the 1st Respondent submitted that the matter before this Court was bad in

law as the decision sought to be quashed had not been attached. Counsel further submitted that the decision by the 1st Respondents' Dispute Resolution Committee was arrived at after a proper hearing and was based on the Applicant having a nomination for the ODM party and also being an independent candidate. However, this Court noted that indeed the decision to be quashed was attached to the application.

14. Mrs. Munyiithya submitted that unless bias is shown or that the 1st Respondents' Dispute Resolution Committee committed an error or acted without jurisdiction, this application should not be allowed.

Determination

15. Having carefully considered this application, I find that the issues for determination are **whether the 1st Respondents' Dispute Resolution Committee afforded the ex-parte applicant a fair hearing and whether the said Committee erred in reaching its decision.**

16. Article 50 (1) of the Constitution of Kenya provides that:

“every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

Article 47 (1) of the Constitution provides that:

“every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.

17. Upon perusal of the decision of the 1st Respondents' Dispute Resolution Committee dated 7th June 2017 it is evident that the Applicant was not afforded a fair hearing as he was not given an opportunity to respond to the allegations raised by one Luciana Sanswa, the returning officer, that the applicant's name appeared twice in their system on 26th May 2017. The ex-parte applicant was also not given an opportunity to respond to the allegation by one Mr. Makori that the Orange Democratic Movement Party had already cleared one Mwaka Bakari as the nominee for the party. The Committee was thus in breach of principles of natural justice which require one to be accorded an opportunity to be heard. Because of the above reasons the administrative action by the 1st Respondents' Dispute Resolution Committee can be said not to have been reasonable or procedurally fair. In the case of **REPUBLIC VS. IEBC & 3 OTHERS EX-PARTE HON. WAVINYA NDETI, NAIROBI HC MISC. APP. NO. JR 301/2017**, Odunga J. held that:

“...by parity of reasoning where for example in judicial review proceedings the Court finds that a party who ought to have been heard was not heard, it is not for the Court to proceed and determine whether a hearing would have changed the decision. Once it is found that the party was not heard that is the end of the matter and the decision must be set aside”.

18. Mrs. Munyiithya, counsel for the 1st Respondent submitted that the decision of the 1st Respondents' Committee was based on the Applicant being nominated for the ODM party and also being an independent candidate subsequently a double registration on the 1st Respondent's portal. The Applicant on the other hand submitted that the 1st Respondent's portal showed conflicting information as it indicated that he was born on 8th May 1957 and also in 1974. The portal thus showed two different dates. The ex-parte applicant attached a copy of his identification card in his submissions which shows that the Applicant was born in 1970. Due to the existence of conflicting information on the 1st Respondents' portal, the 1st Respondent should have observed due diligence and sought clarification from the Applicant as to his correct year of birth and not rushed to making a decision based on conflicting information. The decision by the 1st Respondents' Dispute Resolution Committee is hence unreasonable and unfair.

18. For the foregoing reasons, I find that the decision by the 1st Respondents' Dispute Resolution Committee dated 7th June 2017 cannot stand legal scrutiny.

19. I therefore allow the application and issue the following orders:

a) THAT an **Order of Certiorari** do issue removing from to the High Court quashing the decision of the 1st Respondent failing and/or declining to register and/or gazette the name of TOM OGALO OLUOCH, the ex-parte applicant, as a candidate vying in the 2017 General Elections for the position of Member of County Assembly, Timbwani Ward, Likoni Constituency, Mombasa County in the Republic of Kenya on an Orange democratic Movement Party Ticket.

b) THAT an **Order of Certiorari** do issue removing to the High Court and quashing the finding of the 1st Respondent registering TOM OGALO OLUOCH, the Ex-Parte Applicant, as an independent Candidate vying for the position of Member of County Assembly, Timbwani Ward, Likoni Constituency, Mombasa County in the Republic of Kenya.

c) THAT an **Order of Mandamus** do issue directing the 1st Respondent to forthwith gazette the name of TOM OGALO OLUOCH as the candidate vying for the position of Member of County Assembly, Timbwani Ward, Likoni Constituency, Mombasa County in the Republic of Kenya on an Orange Democratic Movement Party Ticket.

d) THAT an **Order of Mandamus** do issue directing the 1st Respondent to remove from their register the name/entry of TOM OGALO OLUOCH the applicant registered as an independent candidate vying for the position of Member of County Assembly, Timbwani Ward, Likoni Constituency, Mombasa County in the Republic of Kenya and retain in their register only the name/entry of TOM OGALO OLUOCH the ex-parte applicant as candidate vying in the 2017 General Elections for the position of Member of Member of County Assembly, Timbwani Ward, Likoni Constituency, Mombasa County in the Republic of Kenya on an Orange Democratic Movement Party Ticket.

e) THAT an **Order of Prohibition** do issue barring the 1st Respondent from gazetting any name other than that of the ex-parte Applicant, TOM OGALO OLUOCH, as candidate vying in the 2017 General Elections for the position of Member of Member of County Assembly, Timbwani Ward, Likoni Constituency, Mombasa County in the Republic of Kenya on an Orange Democratic Movement Party Ticket.

f) THAT an **Order of Prohibition** do issue barring the 2nd Respondent from presenting any name other than that of the ex-parte applicant, TOM OGALO OLUOCH, for registration and/or gazettment as a Candidate vying for the position of Member of Member of County Assembly, Timbwani Ward, Likoni Constituency, Mombasa County in the Republic of Kenya on an Orange Democratic Movement Party Ticket.

g) The 1st Respondent shall be served with these Orders as soon as possible, and so that it includes the name of the Applicant in the ballot.

h) Each party to bear its own costs.

Dated, Signed and Delivered at Mombasa this 27th day of June 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Mutiso for the Ex-Parte Applicant

Mrs. Munyithya for the 1st Respondent

Mr. Kaunda Court Assistant