



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 98 OF 2017

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLES 2,4,10,19,20,21,22,23,27,38,47,48,56,81,88,159 AND 232 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 74 OF THE ELECTIONS ACT

BETWEEN

HARUN MWADALI MWAENI.....APPLICANT

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST RESPONDENT

COUNTY RETURNING OFFICER TAITA TAVETA2ND RESPONDENT

JUDGMENT

Introduction

1. On 8 August 2017 Kenyans will go to the polls. The general elections will be held. Kenyans will elect their President and the Deputy. Kenyans will elect their Governors. Kenyans will also elect their representatives in both houses of Parliament as well as in the County Assemblies. In terms of Article 88, the elections are managed by the Independent Electoral and Boundaries Commission (the IEBC) who is the 1st Respondent herein. The elections must be conducted and managed in accordance with the Constitution and the Elections Act. No. 24 of 2011.

2. The Petitioner is a member of a political party, the Thirdway Alliance Kenya Party. His party nominated him to contest for the seat of Member of the Senate, Taita Taveta County. The IEBC has however declined to accept his nomination documents. He is currently an employee of *Medicins Sans Frontieres* and works in the North Eastern part of Kenya. He is stationed at Dagahaley. As a medical doctor he renders services to refugees in the internationally recognized Dadaab Refugee Camp in Garissa. He is desirous of contesting in the election.

Background facts

3. The background facts constitute relatively a common cause.

4. In accordance with s. 16(2)(b) of the Elections Act, the IEBC published a timetable which regulated among other things the submission by candidates of various stipulated documents and necessary payments to the IEBC by certain specified dates and times. Compliance with the timetable and presentation of valid acceptable documents could secure an individual the right to participate in the elections as a Senate candidate. The time-table was published and gazette on 16 March 2017.

5. With regard to the Petitioner, the IEBC timetable scheduled him to present his documentation and payments to the IEBC through the 2nd Respondent on 29 May 2017 between the hours of 1430 hours and 1500 hours. The Petitioner did not manage to personally appear before Respondents. The Petitioner did not present his papers or make payment as scheduled on 29 May 2017.

6. For security reasons, the Petitioner had been unable to travel from his place of work to the Taita Taveta County headquarters of the IEBC and present his documentation before the cut-off date and time. The Petitioner had informed the IEBC of the Petitioner's predicament and anxiety of being time-barred and had requested an extension. The Respondents did not respond.

7. On 30 May 2017, however the Petitioner appeared before the 2nd Respondent. The latter perused and confirmed that the Petitioner's documents were in order but declined to accept the documents or to confirm the Petitioner as a candidate. Reason: the Petitioner had presented himself as well as his documents after the set cut-off date and time.

8. Determined to be on the ballot come 8 August 2017, the Petitioner sought the intervention of the IEBC's dispute resolution committee. The committee declined to extend time as no valid reason had been advanced for the non-compliance by the Petitioner. The decision by the IEBC dispute resolution committee caused the undeterred Petitioner to launch the instant Petition.

9. I must quickly point out that this Petition proceeded as an undefended cause. The Respondents, despite proven service of both the pleadings and the notice of hearing neglected or failed to appear. It certainly would have been better to have the benefit of the Respondents' case in view of the issue raised by the Petition as to condonation of set time lines in the run in to the elections. With time running out and having on one occasion refused to hear the Petitioner ex parte, I had to proceed with the hearing in the absence of the Respondents.

The Petitioner's Case

10. The Petitioner contends that the refusal by the Respondents to accept the Petitioner's nomination documents outside the cut-off date and time was null and void. Further the Petitioner contends that the IEBC's Dispute Resolution Committee by refusing to extend the time acted unreasonably and irrationally and contrary to the known levels of natural justice. This, according to the Petitioner, violated the Petitioner's right to fair administrative action as enshrined under Article 47 of the Constitution.

11. In the Petitioner's view the Respondents should have taken into consideration but they did not, the letter informing the Respondents of the Petitioner's predicament and inability to attend on the scheduled date and at the scheduled time. Additionally, the Petitioner contends that the Respondents should have considered the factual position on the ground in North Eastern part of Kenya and further that the Petitioner deserved special opportunity as he worked with a marginalized community. In conclusion, the Petitioner contended that the decision by the Respondent not to allow him to present his documents was manifestly unreasonable.

12. It was additionally, the Petitioner's contention that he had been discriminated against contrary to Article 27 of the Constitution and further that both the Petitioner, his party Thirdway Alliance of Kenya and the people of Taita Taveta County had been disenfranchised contrary to Article 38 of the Constitution.

13. In argument, the Petitioner's counsel Dr Ekuru Aukot submitted that there existed excusable and justifiable circumstances for the late attempt at presenting the Petitioner's nomination papers. Counsel

made reference to the improvised explosive device (IED) which exploded along Daadab-Liboi Road killing six police officers and also the IED which exploded in the Aligabay Area killing four travelers. The explosions led to travel advisories and restrictions and the Petitioner was restricted on his travel until the 29 May 2017 when he was able to travel. In the Petitioner's view, the Respondent should have taken into consideration such facts which were relevant. Counsel urged the court to take judicial notice of the above facts.

14. The Petitioner's counsel also argued that his political rights under Article 38 had been violated by the Respondents' failure to take into account the unique situation the Petitioner found himself in and also by ignoring previous communication to the IEBC on the Petitioner's predicament.

15. It was also Dr. Aukot's contention that, the failure by the Respondents to take into account the fact that the Petitioner was working with the under privileged and marginalized persons led to a violation of the Petitioner's minority rights. And further that a denial of political opportunity to contest was tantamount to the discrimination contrary to Article 27 of the Constitution.

16. Counsel finally faulted the IEBC for not giving any written reasons for their decision contrary to constitutional requirements for fair administrative action.

Discussion and Determination

17. The instant Petition is clearly a challenge to the decision by the Respondents dispute resolution committee delivered on 6 June 2017, which decision declined to extend time for the Petitioner to present his nomination papers. It is in my view a pseudo appeal from the Respondent's dispute resolution committee although silhouetted as a constitutional petition and registered as an "Election Petition Appeal".

18. The Petition alleges a violation of the Petitioner's rights under Articles 27, 38, 47 and 56 of the Constitution. In my view however, the Petition falls for determination with regard to Article 47 rights only.

19. In a moment, I will return shortly to this Article as well as the rights enshrined thereunder.

20. It is a well accepted principle in constitutional litigation that a party who alleges violation of his rights or fundamental freedoms protected or guaranteed by the Constitution must, in his pleadings, state with reasonable specificity the manner of the alleged violations or infringement: see **Anarita Karimi Njeru v Republic [1976-80] KLR 1272**, **Masaai Mara Sopa Ltd v Narok County Government [2016] e KLR** and **Peter M. Karuiki v Attorney General [2014]eKLR**. In my view, it matters not whether the pleadings in question were commenced by way of petition, plaint or originating summons or motion. Once allegations of violation of the Constitution are made, there is need for some reasonable precision.

21. In the instant case, apart from the allegations touching on Article 47, there is virtually no indication on how the Petitioner's rights under Article 27, 38 and 56 have been violated or infringed by the Respondents.

22. Article 27 of the Constitution blockades any discrimination on the specified grounds or on any other ground. In pleading discrimination, the Petitioner has not been specific on how the Respondents have discriminated against the Petitioner save to state [at paragraph 19 of the Petition] that the Respondents "*have violated the provisions of Article 27 by discriminating the Petitioner and denying him equal enjoyment (sic) political opportunities on ground of social origin and place of work*". The particulars discrimination were however not pleaded.

23. Discrimination has been defined as "a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured. "See **Peter K. Waweru -v- Republic [2006] eKLR**. The Petitioner herein has not stated who has been favoured and treated differently. Neither has the Petitioner pleaded the alleged ground of discrimination with the requisite

precision. To simply state that there is discrimination on basis of social origin without more is not good enough. To simply also state that the discrimination was on basis of the Petitioner's place of work, also without more should also not suffice.

24. With regard to Article 38, again in my view, there is a rather omnibus and wide allegation of violation of the Petitioner's Political rights without clarity or elaboration.

25. Article 38 has an array of political rights. The Petitioner seems to have zeroed in on Article 38(3)(c) which entails the right to be a candidate for public office and if elected to hold office. Every citizen is entitled to this right without unreasonable restriction. Once again there are no particulars of the manner of violation of this right. I must however regard it that the complaint revolves around the denial to present nomination documents.

26. Finally, the Petitioner's pleadings with regard to Article 56 are also relatively wanting. Article 56, is indeed not part of the Bill of Rights. Rather it is intended to assist in optimizing affirmative action programs.

27. In the end, I hold the view that the Petitioner's pleadings with regard to the alleged violations of his rights under Article 27, 38 and 56 of the Constitution do not meet the formality threshold as set out in the case of **Anarita Karimi Njeru v Republic (Supra)**. I would consequently not expect the Petitioner to prove the allegations and in my view, in any event, he has not.

28. It leads me to Article 47 of the Constitution.

29. The allegation is that the Respondents acted unreasonably and irrationally by denying the Petitioner the right to present his nomination papers or declining to extend the time for such presentment. It is also alleged that failure to avail written reasons violated the Petitioner's Article 47 rights.

30. The starting point would be that the cut-off date and time for the Petitioner to present his nomination documents was 29 May 2017 at 1400 hours. It is also a common cause that the Petitioner failed to make the cut after he only surfaced before the 2nd Respondent on 30 May 2017. He advanced reasons for the no-show.

31. It is not in controversy that the IEBC is enjoined under Act 88(4) (e) of the Constitution as read together with Section 74 of the Election Act to resolve nomination disputes. The dispute in this case concerned the denial by the 2nd Respondent to allow the Petitioner to present his nomination papers. The process of receiving the Petitioner's (or any other nominees) papers and documents is a statutory and administrative right conferred upon the 1st Respondent.

32. It is clear that in the execution of both its administrative duties as well as quasi-judicial duties, the IEBC is bound to observe the constitutional provisions as well as the law: see Article 249(2)(a) of the Constitution. In setting timelines, receiving and accepting or rejecting nomination papers from prospective candidates, the IEBC was in my view executing a substantive administrative and constitutional duty, while in hearing and resolving nominations disputes it set out to act on a quasi-judicial functionary.

33. It appears to me that weighing all the above considerations, this court ought not to usurp the administrative and quasi-judicial functions of the IEBC. The question is thus not whether this court agrees with the decision of the IEBC in refusing to extend time (for the presentment of the Petitioner's papers) but whether the decision was properly taken in accordance with the regulating law and the tenets of natural justice. To a large extent, that is what Article 47 avails to distressed and dissatisfied parties.

34. I must start by stating that the fairness of the cut-off date and time as well as the period which the Petitioner was permitted to prepare for the submissions of nomination papers are not challenged. I did not hear the Petitioner to state that the time-lines and cut off date and time set by the IEBC and which the Petitioner admittedly failed to meet were unreasonably restrictive. The Petitioner indeed admits having

been aware of the time-line.

35. The Petitioner however urges that the IEBC had power to condone the non-compliance but that it unreasonably failed to exercise the power a day after the Petitioner showed up before the 2nd Respondent and further days after the Petitioner appeared before the IEBC's dispute resolution committee. According to the Petitioner there was a good cause to condone the non-compliance and extend time.

36. The time-table, timelines and cut off dates/ time, in my view, impose an interdict on all participants in the elections scheduled for 8 August 2017. The Petitioner, the IEBC as well as all other candidates or nominees are bound. There must be no room for any tardiness especially by the prospective candidates. The nominees as already identified by their political parties must not be sluggish or lethargic. Attention to detail alacrity and speed must guide them once they are conscious of the cut-off date and time. This allows for certainty. Certainty for the political party nominating them and certainty also for the IEBC as it prepares and organizes the elections.

37. The IEBC as well as the Elections Act (see ss. 13-19,31-35 & 74) imposes timelines, timetables and deadlines within which certain things must be done to enable the IEBC to properly prepare the election. The IEBC is constitutionally bound to deliver free and fair elections. The citizenry expects nothing short of this: see Articles 38(2) and 81(e) of the Constitution. If timelines or time-tables and deadlines are not adhered to it may be impossible to conduct orderly elections.

38. The purpose consequently of timelines, timetables and cut-off dates/times whether imposed by the IEBC or by law, is to facilitate the smooth running of the election process. It allows for orderly elections. It allows for all parties to prepare for the elections. The IEBC is able to announce the contesting political parties and the candidates. The IEBC is also able to prepare and distribute ballots. The planning and preparation is rather infinite but may only be achieved with success if there are time-lines.

39. On the other hand the citizenry and especially the voter is also timeously informed of everything he or she has to be aware of before casting his vote, including the ultimate candidates who launch campaigns before him or her.

40. The IEBC time-lines consequently expect strict adherence and in determining whether non-compliance may be condoned, the IEBC (and the court for that matter) has to reflect on the purpose of the time-lines, which I have sought to delimit in the three preceding paragraphs.

41. The general rule, in my view, ought to be that there should be no condonation where there is non-compliance, for the simple reason that the public would favour an orderly election which may only be achieved if there is adherence to the time-lines. Condonation may however be availed in certain circumstances.

42. Condonation ought to be entertained as 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.

43. Where there are established exceptional circumstances then a tolerant approach is required of both the IEBC and the court.

44. I now return to the Petition at hand.

45. The IEBC refused to accept the nomination documents of the Petitioner, even though the documents were in order. The reason for the refusal was that the Petitioner was late. He was time-barred. Undaunted,

the Petitioner pursued the issue through the IEBC dispute resolution committee. He sought an extension of time. The committee declined to indulge him. According to the committee there was no valid reason.

46. It is clear that the IEBC dispute resolution committee correctly appreciated that it had powers to extend time. The IEBC could condone the delay but only on “valid ground(s) or reason(s)”, which must constitute exceptional circumstances.

47. Before the IEBC dispute resolution committee there was evidence of the terrorist IEDs having exploded in north eastern Kenya on two occasions. There was also the Petitioner’s affidavit evidence that he could not have travelled because of the insecurity. I have no doubt of the security situation in the northern part of Kenya. While there was no evidence that there was a general travel embargo in north eastern Kenya, there was evidence that the Petitioner’s travel was restricted.

48. Before this court the Petitioner additionally availed documentary evidence from the local police stationed in Dadaab that the local travel, including the Petitioner’s, was limited due to the security situation.

49. In the result, I find fault on the part of the IEBC dispute resolution committee. The committee was clearly unreasonable or irrational in its approach and decision, given the evidence before it. The committee was ready to be flexible but then in a rash manner and without evaluating the evidence before it only ended up being dismissal. There is the fact that the Petitioner had pre-empted and notified the Respondents on the possibility of delay due to the security situation. The Respondents should have taken this into consideration. I do not also see how the extension of time for a day would have given the Petitioner any unfair advantage or even prejudiced the Respondent’s preparedness. There was need for flexibility and indulgence by IEBC.

Conclusion and disposal

50. I am convinced that the Petitioner has discharged the burden cast upon him that the Respondent’s acted unreasonably or irrationally. I am also convinced that the Petitioner has shown that the Respondents violated the Constitution or law when it acted irrationally and declined to be flexible and also in, refusing to extend time for the Petitioner to present his nomination documents.

51. In view of the afore-going, the Respondents’ decision to refuse to accept the Petitioner’s documents and further refusal to condone the Petitioner’s failure to adhere to a set time-line was unreasonable and contrary to the Constitution. I would allow the Petition.

52. The court, under Articles 22 and 23(3) of the Constitution, may fashion appropriate orders and remedies, including by way of judicial review. I consequently by way of disposal make the following orders:

a. I find and declare that the Respondents violated the Petitioner’s rights to fair administrative action as guaranteed and protected by Article 47 of the Constitution and the Fair Administrative Action Act, 2015.

b. The decision of the 1st Respondent on or about 5 June 2017 in support of the decision of its official the 2nd Respondent taken on 30 May 2017 to refuse to accept the documents of the applicant, is hereby reviewed and set aside and duly quashed.

c. The Respondents are hereby directed to accept forthwith, and in any event not later than 48 hours, the Petitioner’s nomination documents for verification and if found to be proper to place the Petitioner’s name on the list of candidates duly nominated and entitled to contest for the position of member of the Senate, Taita Taveta County in the 8 August 2017 elections.

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

Dated, signed and delivered at Nairobi this 16th day of June, 2017.

J.L.ONGUTO

JUDGE