



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 386 OF 2017**

**IN THE MATTER OF AN APPLICATION BY HON. KELVIN OSELU OBONDO FOR ORDERS OF CERTIORARI PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF AND/OR VIOLATION OF ARTICLE 10, 25,38, 47, 50, 81 OF THE CONSTITUTION, 2010**

**IN THE MATTER OF THE ELECTION ACT**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORMS ACT, CHARPTERS 26, LAWS OF KENYA**

**AND**

**IN THE MATTER OF ORDERS 53 OF THE CIVIL PROCEDURE RULES 2010**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THE INDEPENDENT ELECTORAL BOUNDARIS COMMISSION.....RESPONDENT**

**AND**

**NICHOLAS ORICHO.....1<sup>ST</sup> INTERESTED PARTY**

**ORANGE DEMOCRATIC MOVEMENT.....2<sup>ND</sup> INTERESTED PARTY**

**EX-PARTE APPLICANT: OSELU HON. KELVIN OBONDO**

**RULING**

The applicant Hon. Kelvin Oselu Obondo has moved this court by way of a Notice of Motion dated the 12<sup>th</sup> July, 2017 under order 53 Rule 1 of the Civil Procedure Rules section 3A of the Civil Procedure Act and sections 8 and 9 of the Law Reforms Act seeking the following orders;

- a. That on order of CERTIORARI do issue to remove and bring to this honourable court for purposes of it being quashed the decision of the respondents Tribunal made on the 8<sup>th</sup> June, 2017 in complaint number 601/2017.
- b. That an order of MANDAMUS does issue to compel the respondent to include the name of the Ex-parte applicant as the Orange Democratic Movement nominee for member of parliament, Kisumu East Constituency.
- c. That such other orders and reliefs as the honourable court may deem fit.

The application is supported by the statement of fact filed herein, the verifying affidavit of Hon. Kelvin Oselo Obondo and the grounds set out on the body of the application.

The summary of the applicant's case is that; he participated in the Orange Democratic Movement's nominations for Member of Parliament for Kisumu East constituency and duly emerged the winner having garnered 15,631 votes against the 1<sup>st</sup> interested party who garnered 12,290 votes. That unknown to the applicant, the 1<sup>st</sup> interested party declared himself as the winner and had acquired a provisional Nomination certificate with declared votes of 11,920 contrary to what was announced by the returning officer. On the 29/4/2017, the applicant was issued with a final nomination certificate.

Thereafter a petition was filed at the National Appeals Tribunal (NAT) by other candidates namely Hon. Gor Sungu and Shakeel Shabbir and which the applicant was enjoined as an interested party. The Tribunal withdrew the provisional certificate held by the 1<sup>st</sup> interested party and directed the 2<sup>nd</sup> interested party and the respondent to carry out fresh process of determining the party nominee for Kisumu East Constituency following which decision, the applicant was issued with a final nomination certificate dated 29/4/2017 while the certificate held by the 1<sup>st</sup> interested party was nullified. That the 1<sup>st</sup> interested party filed a complaint with the Political Parties Dispute Tribunal being Complaint No. 60/2017 seeking orders to be declared the winner of the Nomination exercise and the same was dismissed with the PPDT upholding the decision of NAT by nullifying the nomination certificate held by the first interested party and ordered the National Elections Board to determine the candidate for Kisumu East Constituency in a manner consistent with the party's constitution, Election and Nomination Rules.

The applicant then moved to the IEBC Dispute Resolution Committee via complaint No. 109/2017 on the grounds that he was the winner of the aforesaid nominations and that the first interested party had been awarded the nomination certificate unprocedurally without following the party nomination and election Rules as directed by the NAT and PPDT.

That in a judgement delivered on the 8<sup>th</sup> June, 2017, the IEBC Dispute Resolution Committee dismissed the complaint without considering the issues before it which aggrieved the applicant and hence this application. He contends that the dismissal of the complaint based on want of service upon the respondent was not founded as he had been served and by so doing, the IEBC abused his rights and especially his right to a fair hearing and his legitimate expectation to participate in a General Election.

The respondent filed a replying affidavit on the 18<sup>th</sup> July, 2017 sworn by Ruth Makuthu, who is a senior legal officer with the respondent in which she summarizes the first respondent's case as hereunder;

That, to the extent that the application seeks to quash the decision of the respondent given on 8/6/2017, the same is incompetent and ought to be struck out as there was no decision made on the said date but without prejudice to the competency of the application, she avers that, assuming the decision the applicants seeks to challenge is the one given in complaint no. 109/2017, the commission found that he did not join the first interested party as a party to the proceedings in that complaint. A copy of the complaint is annexed to the affidavit to prove that indeed the first interested party was not enjoined in the proceedings.

That whereas the Ex-parte applicant vide his affidavit of service annexed to the application alleges that he

served the 1<sup>st</sup> interested party with the suit papers in the complaint, the said affidavit of service was not presented or availed before the Dispute Resolution Committee at the hearing on the 7<sup>th</sup> June, 2017 as proof of such service. Therefore, as at 7/6/2017 when the Dispute Resolution Committee considered the Ex-parte applicant's complaint, the 1<sup>st</sup> interested party was not a party to the complaint and there was no evidence that he had been served or had been joined as a party.

That by its omission of the 1<sup>st</sup> interested party, the Ex-parte applicant was attempting to steal a match on the 1<sup>st</sup> interested party by having the allegations before the Dispute Resolution Committee go unchallenged by the 1<sup>st</sup> interested party, the person whose nomination was sought to be nullified.

On his part, the first interested party filed a replying affidavit on the 17<sup>th</sup> July, 2017, wherein he avers that he was not aware of the complaint in 109/2017 until he was served with the memorandum of Appeal dated 19/6/2017. He denies that he was contacted by the process server as alleged in the affidavit of service.

He avers that he emerged the winner in the nomination after he garnered a total of 11,972 votes and was declared the winner following which he was issued with a nomination certificate. That after him was Shakeel Shabbir who came second, then Gor Sungu who was third and the applicant who was 4<sup>th</sup> with less than 1200 votes. He was issued with a nomination certificate dated the 29/4/2017 but he learnt through the media that his nomination certificate has been withdrawn by an order of the 2<sup>nd</sup> interested party's NAT following a complaint by Shakeel Shabbir and Gor Sungu but the applicant was not a party to this complaint. No candidate filed any complaint against the applicant.

The interested party moved to PPDT in complaint No. 60/2017 seeking orders that NAT do rehear the matter as he was never served and the complaint was heard in his absence. That at the same time Shakeel Shabbir filed complaint No. 78/2017 seeking to enforce the orders of NAT in which the 2<sup>nd</sup> interested party was supposed to select a nominee for the forth coming General Elections. The two matters were consolidated but complaint no 60/2017 was dismissed while complaint no 78 was allowed. The applicant's complaint no 109/2017 in which he was seeking to be declared a winner was also dismissed. That following the judgements of NAT and PPDT, the 2<sup>nd</sup> interested party nominated the first interested party as a nominee and he was issued with a certificate, his name was forwarded to the respondent and it appeared in the IEBC website until 24/5/2017 when it was irregularly removed and upon inquiry he was informed not to worry as it was irregularly removed by the officials of the respondent after colluding with the Applicant without the 2<sup>nd</sup> interested party's knowledge.

He avers that the certificate annexed by the applicant is a forgery.

The 2<sup>nd</sup> interested party has opposed the application vide a replying affidavit filed on 20/7/2017, sworn by Dominic Lukas Mutindi wherein he avers that the first interested party was cleared as per the 2<sup>nd</sup> interested party's constitution and the same was done pursuant to the decision by PPDT dated 10/5/2017, That following the said decision, NAT nominated the first interested party and it has never issued any nomination certificate to the applicant. He averred that the IEBC party system was intruded by junior staff who have since been disciplined who inter changed the names of the interested party with that of the applicant.

The court has considered the application, the affidavits and the submissions by the parties in support of their respective positions. The applicant herein has sought to quash the decision of the respondent's Tribunal made on the 8<sup>th</sup> day of June, 2017 in complaint number 60/2017 and to include the name of the Ex-parte applicant as the ODM nominee for member of parliament, Kisumu East Constituency.

It has emerged from the submissions by the learned Counsels that the proceedings sought to be quashed are in complaint no 119/2017 and not 60/2017. Counsel for the applicant submitted that it was an error on his part to indicate 60/2017 and not 109/2017. The court will therefore excuse the error and proceed to consider the merits of the application on the premise that the correct complaint number is 109/2017 which

is dated the 8<sup>th</sup> June, 2017.

The applicant and the first interested party participated in the party primaries of the ODM party. Both parties claim to have emerged the winners in the nomination exercise and each claimed to have a nomination certificate. Petition was filed at the ODM's NAT by other candidates who participated in the nomination and the NAT ordered the ODM party to carry out fresh nominations in Kisumu East. This complaint was filed by Shakeel Shabbir and was complaint no 78/2017. The interested party herein filed complaint no 60/2017 both of which were consolidated but the interested party's complaint was dismissed while that of Shakeel being 78/2017 was allowed in that the ODM party was directed to determine the party nominee in accordance with its constitution and the rules.

The applicants complaint no 109/2017 which is the subject of this application was dismissed on 8<sup>th</sup> June, 2017 on the ground that the applicant did not join the first interested party as a party to those proceedings nor was he served with the complaint.

This court has perused the decision by the Dispute's Resolution Committee in complaint no 109/2017. It is on record that the applicant (the complainant in the complaint) had complained against the returning officer Kisumu East Constituency as the respondent. The first interested party herein was not enjoined in that complaint and the proceedings were Ex-parte and only the complainant was heard.

As rightly observed by the committee, the first interested party was not enjoined in the proceedings and there is no evidence to show that he was aware of the complaint yet it is his nomination certificate that was being challenged. Indeed, in the absence of the interested party, the committee was not in a position to make a finding as to which of the two nomination certificates was genuine.

Even without prejudice to the foregoing, the ODM party (the 2<sup>nd</sup> interested party) in its replying affidavit sworn by Dominic Lucas Mutindi has confirmed that the first interested party emerged the winner in the nomination exercise as per the results received by the NEB from the returning officer, following which he was issued with a provisional nomination certificate. Though it was annulled by NAT and PPDT, the 2<sup>nd</sup> interested party directly nominated the 1<sup>st</sup> interested party as it's nominee for the National Assembly for Kisumu East Constituency. The 2<sup>nd</sup> interested party further confirms that it has never issued a nomination certificate to the applicant and that the first interested party is its nominee.

This court finds that the decision by the IEBC Dispute Resolution Committee is based on sound legal principles. The application dated 12<sup>th</sup> July, 2017 has no merits and the same is dismissed with no orders as to costs.

**Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of July, 2017.**

.....

**L. NJUGUNA**

**JUDGE**

*In the presence of*

..... *For the Applicant*

..... *for the 1<sup>st</sup> Interested Party*

..... *for the 2<sup>nd</sup> Interested Party*