



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO 354 OF 2017**

**JOASH MOKUA MACHUKI.....PETITIONER**

**VERSUS**

**PHILIP ORINA OGECHI.....1<sup>ST</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This is a Petition dated 15<sup>th</sup> July 2017 by Joash Mokua Machuki, the petitioner, filed against Philip Okina Ogechi and IEBC, the respondents herein. It seeks declaration which are, in the main, that the 1<sup>st</sup> respondent violated and flouted the law and committed electoral malpractices, It is alleged that he hoped from Jubilee Party where he had lost the nomination for MCA, Nyacheki Ward. He also sought a declaration to the effect that the 1<sup>st</sup> respondent is not qualified to stand as a candidate for MCA for Nyacheki Ward, Kisii County on the account of party hoping.
2. According to the petition and the affidavit in support, the 1<sup>st</sup> respondent contested for nomination to stand for election for MCA Nyacheki Ward Kisii County on a Jubilee Ticket. He lost the contest and jumped to People's Democratic Party (PDP) which nominated him for the same seat.
3. The petitioner states that the 1<sup>st</sup> respondent's name was forwarded to IEBC and was gazette for that seat. The petitioner contends that the act of hoping from Jubilee to PDP was illegal and, therefore, makes the 1<sup>st</sup> respondent unqualified to stand for election. The petitioner is of the view that the 1<sup>st</sup> respondent violated section 28 of the Election Act, 2011 and should not be allowed to stand for election and for that reason his name should be removed from the contestants.
4. The petition is opposed, the 2<sup>nd</sup> petitioner filed a replying affidavit sworn on 25<sup>th</sup> July 2017 and filed in court on the same day. Douglas K Bargarett, the legal officer of the 2<sup>nd</sup> respondent, deposed that prayers (a) and (b) in the petition have been overtaken by events since publication of the names of candidates was done on 27<sup>th</sup> June 2017.
5. He also deposed that regarding prayer (c), all ballot papers have already been printed and all candidate's names are now on the ballot papers. He further deposed that the petitioner did not lodge his claim within the stipulated period before either PPDT or IEBC for resolution. Coming to this court is therefore to a wrong forum.

6. At the hearing of the petition Miss. Kariuki, learned Counsel for the petitioner urged the court to allow the petition and grant the prayers sought. Counsel submitted that the petitioner violated the law and should be removed from the register.
7. The 2<sup>nd</sup> Respondent's Counsel Mr. Mwongela on his part submitted, that the petition is not merited and should be dismissed. Counsel reiterated the facts deposed in the replying affidavit and contended that if the petition is granted it will be against public interest.
8. The 1<sup>st</sup> respondent did not file any response Mr Maina who appeared on behalf of the 1<sup>st</sup> respondent during the hearing of the petition, associated himself with submissions made on behalf of the 2<sup>nd</sup> respondent and asked that the petition be dismissed.
9. This petition is for dismissal. The petitioner has asked the court to hold that the 1<sup>st</sup> respondent violated the law when he moved from Jubilee Party to PDP. In his entire petition, Affidavit and even submissions by Counsel, there was no mention of when and on which date he changed parties.
10. The petitioner admittedly decamped from Jubilee and joined PDP. It is therefore not clear when the 1<sup>st</sup> respondent hopped parties, and whether that was in breach of the law. Without that vital evidence, it makes this petition untenable. A person can only be deemed to be breached the law if there was evidence of the date he moved from one party to another, and whether that was within the window allowed by law. In the absence of such evidence, the petition is unmeritorious.
11. The second reason why this petition fails is that the petitioner contends that the 1<sup>st</sup> respondent joined PDP and was nominated by that party. The petitioner has not shown through evidence, that he is a member of PDP and that he was aggrieved by his party's decision to nominate the 1<sup>st</sup> respondent. Moreover, the petitioner has not shown that the party (PDP) nominated the 1<sup>st</sup> respondent in violation of the Party's Constitution and rules. Without this evidence, which I am unable to trace in the pleading, this petition is a wild goose.
12. Only genuine party members can challenge activities of a party which has not acted pursuant to its rules and regulations like nomination of candidates. Members have a direct interest in the affairs of their party and, therefore, the party is accountable to them. Otherwise non-party members have no reason to question nomination activities of a political party.
13. The third reason is that the petition has been filed in the wrong forum. Issues of nomination by political parties are dealt with by PPDT under section 41 of the Political Parties Act. The petitioner could also have raised the issue with the party's internal dispute resolution mechanism (IDRM). Counsel for the petitioner admitted during the hearing of this petition that the petitioner is not a member of PDP. This would mean still he had no locus to challenge affairs of an independent political party.
14. The petitioner had a chance to move the IEBC dispute resolution committee and seek redress. Article 88(4) of the Constitution Vests powers of determining nomination disputes to IEBC. Article 88(4)(f) provides that IEBC is responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations. The petitioner had a chance to have his grievance addressed by IEBC which he did not take.
15. By deciding to move to this court, he approached the wrong forum. This is not an election petition under the Elections Act, 2011. It is a petition challenging nomination process. This court cannot therefore assume jurisdiction in matters that are meant for other forums. There are other alternative dispute resolution institutions and for that reason, the court has no justification for assuming jurisdiction that clearly belongs to other institutions.
16. Finally there is the element of laches, nominations were concluded in May. Between May and June that was a disputed resolution period. The 2<sup>nd</sup> respondent has also stated that ballot papers have been printed, following gazettment of political parties nominees for various positions,. This is a clear

indication that the petitioner's petition, even if it had merit, has been overtaken by events.

17. In view of what I have stated above, the petition dated 15<sup>th</sup> July 2017, is found wanting and is hereby dismissed with costs.

Dated, Signed and Delivered at Nairobi this 26<sup>th</sup> of July, 2017

**E C MWITA**

**JUDGE**