



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW NO. 307 OF 2017

GEORGE OMONDI OKOTH.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....1ST RESPONDENT

HON. JOSEPH OYUGI MAGWANGA.....2ND RESPONDENT

JOSHUA ODHIAMBO ODERO.....3RD RESPONDENT

COMMISSION FOR UNIVERSITY EDUCATION.....4TH RESPONDENT

UNIVERSITY OF NAIROBI.....5TH RESPONDENT

KENYA NATIONAL EXAMINATION COUNCIL.....6TH RESPONDENT

THE ETHICS AND ANTI-CORRUPTION COMMISSION.....7TH RESPONDENT

AND

ORANGE DEMOCRATIC MOVEMENT.....INTERESTED PARTY

JUDGMENT

The Petitioner, George Omondi Okoth is a registered voter in Kibra Constituency in Nairobi County. He has filed this petition challenging the eligibility of the 2nd Respondent, Hon Joseph Oyugi Magwanga and the 3rd Respondent, Joshua Odhiambo Odero, to offer their respective candidatures for the Governor and Deputy Governor’s seats in Homa Bay County. The Petitioner has anchored his petition on the essentially three grounds: that the 2nd Respondent was and is still a member of Orange Democratic Movement Political Party (the Interested Party) and therefore cannot offer his candidature as an independent candidate; that the 2nd Respondent was still in the register of membership of the Interested Party at the time he purported to present his nomination papers to the 1st Respondent contrary to **Article 85(a)** of the **Constitution** and **Section 33** of the **Elections Act** and finally that the 2nd Respondent did not have the requisite academic qualifications to offer his candidature for the Homa Bay gubernatorial seat since he

did not possess a university degree contrary to **Section 22(2)** of the **Elections Act**. In regard to the 3rd Respondent, the Petitioner contends that he was still a member of the Interested Party and further that he had offered himself as a candidate in the Ndiwa Constituency parliamentary seat and could therefore not be in a position to offer himself to be the running mate (Deputy Governor) of the 2nd Respondent. In effect, the Petitioner was saying that the 3rd Respondent did not have the requisite qualification because he had offered his candidature for two elective seats.

In support of the petition, the Petitioner swore an affidavit. In the affidavit, the Petitioner annexed exhibits to support his contention that the Petitioner was as of 5th June 2017 still a member of the Interested Party. In reply to this allegation, the 2nd Respondent annexed a copy of a letter dated 20th April 2017 which is addressed to the Interested Party. In the letter, the 2nd Respondent resigned from the Interested Party. The letter was received by the Interested Party on 28th April 2017. Although the Petitioner contends that the received stamp on the said letter is a forgery, he did not supply any evidence to support this allegation. It would have been thought the Interested Party would have sworn an affidavit to disown the stamp. No such affidavit was forthcoming. This court is satisfied that indeed the 2nd Respondent resigned from the Interested Party upon receipt by the party of his resignation letter on 28th April 2017. The Registrar of the Political Parties did confirm on 2nd May 2017 that the 2nd Respondent **“...is not a member of a fully registered political party as at 2nd May 2017”**.

Although the Petitioner's presented to court a letter from the Interested Party dated 5th June 2017 which allegedly confirms the status of the 2nd Respondent as member of Orange Democratic Movement Political Party, this court is persuaded that the definitive proof of membership or lack thereof of the 2nd Respondent's political party membership is by the Registrar of Political Parties. The claim by the Petitioner to the effect that the 2nd Respondent was a member of the Interested Party at the time he offered his candidature for the Homa Bay gubernatorial seat as an independent candidate is without merit.

The Petitioner questioned the 2nd Respondent's academic qualifications to contest the said gubernatorial seat. It is the Petitioner's case that the 2nd Respondent does not have the requisite academic qualifications to offer his candidature for the said seat. The Petitioner avers that the 2nd Respondent did not get the grades in High School to qualify him to gain entry into university. The Petitioner's case is that the 2nd Respondent obtained admission to University of Nairobi by fraud. The Petitioner questioned the manner in which the 2nd Respondent obtained his diploma and degree certificates from the said university. He annexed exhibits in a bid to establish inconsistency in the paper work at the university. The Petitioner interpreted this inconsistency and gaps as evidence that the 2nd Respondent did not obtain a legitimate qualification from the University of Nairobi.

In that regard, the Petitioner roped in the Ethics and Anti-Corruption Commission to investigate the allegation of the 2nd Respondent's academic qualification or lack thereof. In response to this petition, the Ethics and Anti-Corruption Commission swore two affidavits. The first affidavit was sworn by Jackline Makena. She confirmed that a complaint had been lodged with the Commission concerning the 2nd Respondent's studies at the University of Nairobi. In paragraph 7 of the affidavit, she swore that:

“I am advised by the commission's advocate on record that since EACC carries out independent investigations, it will be prejudicial for it to participate in the petition while investigations are still ongoing.”

On 18th July 2017, another officer of the Commission, Patrick Owiny swore another affidavit, this time supporting the petition despite the fact that investigations have not been completed. In paragraph 25 of his affidavit, he swore that:

“the doubtful manner in which the 2nd Respondent obtained the said diploma and also the said degree raises questions on the validity of the said documents and further impacts negatively on

his conduct and integrity, which issues disqualify him from being eligible to vie as a governor before the same is resolved. The said issues ought to be heard and determined by this Honourable (Court) before the elections on 8th August 2017.”

On his part, the 2nd Respondent annexed copies of the diploma and the degree certificates that he obtained from the University of Nairobi. He further annexed copies of transcripts of the units of the courses that he has undertaken at the university to enable him qualify for the said diploma and degree certificates. That the 2nd Respondent qualified from the University of Nairobi is supported by an affidavit sworn by Joseph Oluoch Awino, an employee of the University of Nairobi.

This court has perused the exhibits presented to the court by the Petitioner and the Respondents. It is common ground that **Section 22(2)** of the **Elections Act** sets out the qualifications for certain elective seats. It provides that:

“Notwithstanding subsection (1)(b), a person may be nominated as a candidate for election as President, Deputy President, County Governor or Deputy County Governor only if the person is a holder of a degree from a University recognized in Kenya.”

It is the contention of the Petitioner that even though, on the face of it the 2nd Respondent is possessed of a degree certificate from the University of Nairobi, he questioned the qualifications of the 2nd Respondent to enroll for the said degree program and further questioned the manner in which the diploma and degree programs were fast-tracked at the University of Nairobi. On the other hand, the 2nd Respondent reiterates and is firm that he studied and obtained the diploma and degree in question after satisfying all the requirements to enroll in the said university. An employee of the university attributed the discrepancy and inconsistency evident to poor record management by the university.

This court’s evaluation of the affidavit evident presented to it clearly points to the following facts; the 2nd Respondent *prima facie* has the requisite qualification under **Section 22(2)** of the **Elections Act** to offer his candidature for the gubernatorial seat of Homa Bay County. The thrust of the Petitioner’s case is that the court ought to make an inquiry into how the 2nd Respondent was admitted to the University of Nairobi to ascertain whether he had the required qualifications to enroll to undertake the said course at the university. The exhibits presented to the court clearly shows that this court cannot make a determination, one way or the other, based on affidavit evident alone. This is a case that requires the deponents to be cross-examined to determine the veracity and the credibility of what they have deposed to. The main actor in the whole saga, the University of Nairobi did not appear before this court despite being served. It would be crucial for the official university’s side of the story to be heard.

It was unfortunate that the Ethic and Anti-Corruption Commission took an inconsistent position in this case. In any event, it was questionable that one of their officers chose to take sides in a civil dispute instead of taking appropriate action in execution of its mandate under the Law. The Ethics and Anti-Corruption Commission’s reputation for independence and integrity will be enhanced if it avoids being entangled in partisan disputes, especially of a political nature. It should perform its duties by putting forward facts that may assist the court but not by supporting one party in what is essentially a political dispute. This court’s evaluation of the evidence in regard to the academic qualifications of the 2nd Respondent leads it to the conclusion that the exhibits presented by the Petitioner is disputed and will be subject to further indepth examination to establish its veracity and credibility. In the context of this election, *prima facie*, the 2nd Respondent has presented to the court his degree certificate from the University of Nairobi. It has not been alleged that the said certificate is a forgery. Indeed the 2nd Respondent presented to court transcripts which indicate that he undertook the units to qualify him to be awarded the degree in question.

The discrepancies in the 2nd Respondent’s admission documents at the University of Nairobi can only be explained by the University of Nairobi which chose not to appear before the court. The University of Nairobi is recognized by law as an institution that can award degrees of the kind that it awarded to the 2nd

Respondent. On the evidence placed before this court, this court is satisfied to the required standard of proof on a balance of probabilities that the Petitioner placed no sufficient evidence before the court that establishes the thrust of his argument to the effect that the 2nd Respondent does not possess the academic qualifications to offer his candidature for the gubernatorial seat of Homa Bay County.

As regards the qualification of the 3rd Respondent, this court is satisfied that he has only offered his candidature for the Deputy Governor of Homa Bay County. The explanation given by the 3rd Respondent as to the appearance of his name as a candidate in Ndhiwa Constituency is satisfactory. It was a mistake which has been corrected. Further, he is not a member of the Interested Party as claimed by the Petitioner.

Before this court concludes this judgment, it is imperative to re-emphasize the importance of adherence to strict timelines that is provided under the **Constitution** and the **Elections Act**. This court wishes to reiterate that Election is a process that would easily be derailed if strict compliance with the set timelines is not adhered to. In this regard, this court concurs with the sentiments expressed by Mativo J in **Caroli Omondi –vs- Registrar of Political Parties & Another [2017] eKLR:**

“Time in principle and applicability, is a vital element in the electoral process set by the Constitution and this is an important consideration which ought to guide this court. The court takes into account the fact that the issue in question involves imperatives of timelines demanded by the Constitution in helping the second respondent to prepare and manage electoral process and that Article 85(a) of the Constitution and Section 33(1) of the Elections Act, 2011 are in my view a careful product of the constitutional scheme requiring a proper mechanism aimed at ensuring adequate preparation for the electoral process which does not begin and end on the polling day but embraces wider and deliberate system aimed at promoting democratic values and practices that are consistent with the spirit and intent of the Constitution in ensuring preparation for a fair, free, credible, transparent and accountable elections and a purely ethic system of elections.”

In the present petition, it was apparent that by the time the petition was filed and listed for hearing, the ballot papers in respect of the Homa Bay County gubernatorial seat had already been printed and delivered to the Country. There was no explanation given as to why the Petitioner delayed in presenting his case before the court. Timelines being a critical component in electoral process, irrespective of the merits or otherwise of any case that may be lodged before court, where a case is presented to court beyond the timelines prescribed by the Law, the court will have no option but to dismiss it because public interest demand that electoral disputes be resolved in a timely fashion.

Finally, it is doubtful whether the Petitioner has the requisite *locus standi* to challenge the eligibility of the 2nd and 3rd Respondents to offer their candidature for the gubernatorial and deputy gubernatorial seats of Homa Bay County. There is no doubt that any citizen has a right to seek the enforcement of the provisions of the Constitution and the Law irrespective of his area of residence. However, in Electoral disputes, it is only a registered voter in a particular electoral area who has *locus standi* to challenge the elections of a particular candidate in that electoral area. In this petition, the Petitioner is a registered voter in Kibra Constituency. He lacks capacity to challenge the qualifications of a candidate in Homa Bay County.

These are the reasons why this court dismissed this petition with costs on 21st July

2017. For the avoidance of doubt the costs shall be payable to the 1st, 2nd, 3rd and 6th Respondents only. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF JULY 2017

L. KIMARU

JUDGE