



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

PETITION NO. 364 OF 2017

BETWEEN

STEPHEN HARRY OUMA ARUNDA.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....RESPONDENT

JUDGMENT

Introduction

1. **Stephen Harry Ouma Arunda**, the petitioner, is a citizen of Kenya and a registered voter, while **The Independent Electoral and Boundaries Commission**, is a Constitutional Commission established under Article 88 of the Constitution whose mandate is to register voters and conduct elections in this country among others.

2. The petitioner registered as voter at Ngere primary School west Seme ward, Seme Constituency in Kisumu County in 2013 and voted in that year's general elections at that polling station and says he has never transferred from his polling station.

The petition

3. The petitioner filed a petition dated 24th July 2017 in which he states that on 5th July 2017, he sent his details to the respondent's established **SMS code 70000** through which voters could check their registration status, and was surprised to discover that he was now a registered voter at Kabiro primary school, Kabiro ward, Dagoretti North Constituency, Nairobi County yet he had never requested for transfer to that polling station.

4. The petitioner avers that he complained to the respondent by letter dated 5th July 2017, and even visited the respondent's offices to request normalization of his registration status to his preferred polling station but the respondent failed to do so. The petitioner therefore brought this petition contending that his Constitutional rights had been violated and sought the following reliefs-

1) That an order of Certiorari is hereby issued to remove to this Honourable Court to be quashed the decision of the respondent to transfer the petitioner's voter registration to Kabiro Primary

School polling station (Code 019).

2) That an order of prohibition is hereby issued prohibiting the respondent herein from by themselves, their agents and or assigns acting jointly and or severally from proceeding with any further transfer of the respondent's voter registration to Kabiro Primary School Polling station (code 019).

3) That an order of prohibition hereby issued prohibiting the respondent herein from revoking/ deleting the voter registration of the petitioner from Ngere Primary school polling station (code 007).

4) That declaration that the respondent is obliged to act lawfully, fairly and reasonably in the exercise of their respective Constitutional and statutory mandate including acting only when the petitioner in his notification in a prescribed manner of wishes to transfer his voter registration to another electoral area.

5) That a declaration do issue that the respondent's decision against the petitioner is unjust as they violate his rights to fair administrative action under Article 47 of the Constitution, Article 83 (3) of the Constitution and section 7(1) of the Elections Act, 2011.

6) That the Honourable Court be pleased to issue such orders, directions as may be necessary to safeguard and prevent the violation (sic) the petitioner's rights and freedoms under the Constitution of Kenya, 2010.

7) That the Honourable Court be pleased to award general damages to the petitioner for violation of his (sic) fundamental rights and freedoms under the Constitution of Kenya, 2010.

5. He also sought costs and such orders as the Court may deem just.

6. The respondent filed grounds of opposition to the petition, dated 25th July 2017 and filed in Court on the same day. The respondent cited section 6A of the Elections (Amendment) Act 2016 saying it imposes an obligation on registered voters to verify their biometric details within a certain period and report any anomalies to the respondent for correction.

7. The respondent further stated that by virtue of **Gazette Notice No 4413** of 10th May 2017, registered voters were given 30 days to verify their registration status between 11th May 2017 and 9th June 2017 which the petitioner did not do. The respondent also stated that the petitioner did not place evidence before Court that he was a registered voter in Seme Constituency, Kisumu County or demonstrate that the respondent transferred his registration.

8. The respondent contended that although the petitioner's rights were guaranteed, there was no evidence before Court that an unfair administrative action had been taken by the respondent to inform challenge of the same before court through this petition.

9. The petition proceeded by way of oral evidence. The petitioner who testified as **PW1**, told the Court that he registered as a voter at Ngere primary school polling station in 2013 and voted in that year's general election in that polling station and Constituency. He told the Court that he has never transferred his vote to any other polling station. He testified that on 5th July 2017 he checked his registration status through the respondent's **code 70000** which returned a result showing that he was now a registered voter at Kabiro Polling station, Kabiro Primary School in Dagoretti North Constituency, Nairobi County yet he did not even know where Kabiro Primary School was. He also told the Court that he never applied to transfer from his polling station and, therefore, did not know how his name ended up at Kabiro Primary School. He told the Court that although he wrote a letter requesting the respondent to correct that anomaly, it was to no avail hence this petition.

10. In cross examination, the petitioner told the Court that although he is aware of the Electoral process and that after close of registration of voters, people are given an opportunity to verify their registration, he did not visit his registration centre during the verification period for 2017 because he had no reason to. The petitioner further told the Court that he was not aware that the verification period ended on 9th June 2017, but that he only checked his registration status through the short code 70000. He testified that after realizing the anomaly, he visited the respondent's Head office and saw a **Mr. Odende** who promised that the issue would be sorted out but it was not.

11. The respondent called one witness, **YUSUF ABBAKAR MOHAMMED (DW1)** an Electoral manager with the respondent at Msambweni Constituency where he is also the returning officer. Mr. Mohammed told the Court that he was the registration officer in Dagoretti North Constituency and participated in this year's registration of voters exercise. The witness told the Court that he never met the petitioner during the registration exercise and had never met him before. He testified that transfer of voters is done when a voter visits the polling station he intends to transfer to and a fills form for that purpose. If there is no activity, the voter would go to his office to fill that form but when there is activity, such as voter registration, he fills the form with the registration clerks. The process of transfer is completed later.

12. According to Mr Mohammed, Dagoretti North Constituency had the highest number of voter transfer in the Country. The witness testified that between January and 19th March 2017 mass voter registration(**MVR 2**) Dagoretti North Constituency registered 30,000 voters. He told the Court that during this period, the respondent hired many people to assist in the voter registration exercise. The witness testified that during that period, it was possible to make mistakes since he could not do the transfers himself. He said such mistakes are corrected during verification period. It was the witness' evidence that voters are required to verify their registration status at their polling stations and use that window to correct any anomalies before the final register.

13. The witness told the Court that by the time of hearing of the petition, the register of voters had been configured hence it was too late to make any correction without interfering with the principal register. He testified that there was a possibility that the petitioner's name was erroneously transferred due to the many voters who were transferring their registration. He admitted that there were many errors in the register and according to him, had the petitioner verified his details during the verification period, the mistake would have been corrected but the register could not be opened now to allow correction of the mistake.

14. In cross examination, Mr. Mohammed told the Court that the petitioner could have been wrongly transferred. This is because they had tried to trace his request for transfer without success. The witness told the Court that once a transfer request is received, it is entered in the server, and said he was the one with the password. He also told the Court that it was optional for voters to check their registration status. He was of the view that the transfer of the petitioner was not intentional.

Submissions

15. At the close of their respective case, Counsel for the parties submitted orally. **Mr. Otieno**, learned Counsel for the petitioner, submitted that political rights and sovereign power of the people cannot be over emphasized. Counsel submitted that people have the right to vote where they registered since **Article 38(2)** gives the free will of the electorate to exercise that democratic right, and that is why the petitioner registered to vote at Ngere primary school polling station.

16. According to counsel, the petitioner did not know who the candidates in Dagoretti North Constituency were and he would not, therefore, exercise the right to choose his representative in exercising his democratic right. Counsel submitted that the petitioner did not check his registration status because there was no reason to do so since he did not suspect that his name would have been transferred elsewhere. However, on learning about the transfer, the petitioner took it up with the respondent's officers but nothing was done to rectify the situation. It was learned counsel's contention therefore, that the petitioner's rights were violated.

17. **Mr. Kilonzo**, Learned Counsel for the respondent, on his part, submitted that political rights do not exist in a vacuum and that there are laws that flow from the Constitution governing these rights. According to Counsel, **Section 3(2)** of the Elections Act is clear on the right of the voter to register, and there are various provisions on that process, including election regulations of voters which provide for preparation of the register and publication thereof.

18. **Mr Kilonzo** submitted that regulations require that claims be made within 90 days to the date of elections, and once the principal register is finalized it is circulated to stakeholders and cannot be amended thereafter. According to Counsel, this petition went to the heart of the principal register which could not be changed at this stage without interfering with the general elections. Counsel contended that the petitioner could still exercise his right to vote though in a limited manner, hence this was not a total breach of his Constitutional rights. Counsel also blamed the petitioner for failing to seize the opportunity available during the period for verification to check his registration status, until 5th July 2017 when it was too late. He prayed that the orders sought be declined.

Determination

19. At the close of submissions and given the fact that the general elections were a few days away, Counsel for the parties entered into a preliminary consent to the effect that the petitioner would vote at the polling station where he was registered at the time of this petition and the Court would then decide on the other prayers, that would not have been over taken by events at the time of voting on 8th August, 2017.

20. I have considered the petition, the response there to, evidence on record and submissions by counsel for the parties. The petition before court challenges the respondent's decision to transfer the petitioner's name from his original polling station at Ngere Primary School in Seme Constituency, Kisumu County, to Kabiro Primary School in Dagoretti North Constituency in Nairobi County without his knowledge and or request.

21. According to the petition and evidence on record which is not denied, the petitioner registered as a voter at Ngere Primary School and voted at that polling station during the 2013 general election. However in 2017, his name was transferred to Kabiro Primary School in Dagoretti Constituency without his knowledge and or request and although he brought this to the attention of the respondent, nothing was done to rectify the mistake.

22. The petitioner told the Court that this act violated his right to vote for a candidate of choice since he did not know anyone in Dagoretti North Constituency thus he could not express his political and democratic will.

23. The respondent on its part denied any wrong doing saying the transfer may have been a mistake. The respondent also blamed the petitioner for failing to check his registration status during the verification period which would have enabled the respondent correct the anomaly had it been brought to its attention in good time.

24. According to the respondent's witness, due to the high number of registration of voters, as well as transfers during the registration period, it was possible to have the petitioner's name transferred by mistake. The respondent denied that the transfer was intentional.

25. It is not denied that the petitioner registered as a voter in 2013 and voted at that polling station in that year's election. It was also not denied that the petitioner never applied for transfer from Ngere Polling Station in Seme to Kabiro Polling Station in Dagoretti. The respondent could not trace an application form for transfer.

26. The right to vote is a constitutional and an inherent right to every citizen of majority age and desirous of exercising that right. **Article 38(3)** of the constitution provides that ***every adult citizen has the right to without unreasonable restriction be registered as a voter.*** The right to register and vote cannot be unreasonably limited, since it is one of the fundamental rights enshrined in the Bill of Rights which are an

integral part of Kenya's democratic state, the framework for social, economic and cultural policies. That is why Article 19(3) provides that ***the rights and fundamental freedoms in the Bill of Rights (a) belong to each individual and are not granted by the state, (b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law except to the extent that they are inconsistent with this chapter and (c) are subject only to the limitation contemplated in the constitution.***

27. Further, Article 20(2) is clear that ***every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.*** In Sub-Article 3, the constitution decrees that in applying a provision of the Bill of Rights, a court should develop the law to the extent that it does not give effect to a right or fundamental freedom, and adopt an interpretation that most favours the enforcement of a right or fundamental freedom and promote the values that underlie an open and democratic society based on human dignity, equality and freedom and the spirit, purpose and object of the Bill of Rights.

28. To enable citizens exercise their political rights under **Article 38, Article 88(1)** of the Constitution establishes the respondent which is responsible for conducting and supervising referenda and elections in the country including registration of voters and managing the register of voters. A registered voter whose name is in register of voters is entitled to vote during an election or referendum. This right is further amplified by **Section 3(1)** of the **Elections Act, 2011** which provides that ***an adult citizen shall exercise the right to vote specified in Article 38(3) of the constitution in accordance with the Act, and (2). a citizen shall exercise that right to vote if he is registered in the principal register of voters.***

29. There is no doubt that the petitioner is a registered voter and that his name is in the principal register. The contestation is, however, that his name was transferred from the polling station of his choice to a polling station unknown to him, thus jeopardizing his right to vote for candidate(s) of his choice.

30. With regard to transfer of registration, Section 7(1) of the Elections Act provides as follows-;

“1) whenever a voter wishes to transfer the voter’s registration to an electoral area other than the one the voter is registered in, the voter shall notify the commission, in the prescribed manner, of the intention to transfer the registration to the preferred electoral area not less than 90 days preceding an election.

2) upon receipt of the notification referred to in sub-section (1), the commission shall transfer the voter’s registration particulars to the register of the preferred constituency not later than sixty days preceding the election.”

31. From the above provision, transfer of registration from one registration area to another must be initiated by the registered voter and should be done in the **“prescribed manner”**. In its defence, the respondent’s witness admitted that a registered voter has to visit the registration office where he would like to transfer his registration to and fill form D. Only then would the transfer be effected.

32. In the present case, **DW1** admitted that as the electoral manager for Dagoretti North Constituency, he did not see the petitioner nor request for his transfer. He also told the Court that they were unable to trace an application by the petitioner for transfer to Kabiro Primary School polling station in Dagoretti Constituency, and attributed the incident to a mistake that may have been caused by registration clerks hired to assist the respondent in the voter registration exercise.

33. If the admission by the respondent’s witness is anything to go by, it is a clear manifestation that the respondent was negligent. It is inconceivable that a voter who has not requested to transfer his registration to another station, and has not filled a form as required in law, could have his vote transferred from his preferred polling station to a strange station he has no idea about. That is negligence of monumental magnitude.

34. Mr Kilonzo, in trying to explain away this anomaly, blamed the petitioner for not inspecting the

register during the verification period in order to confirm that his registration details were correct. Had he done so, Mr Kilonzo contended, the anomaly would have been rectified in time. That argument would sound plausible in the normal course of things. However, the law does not make it mandatory that voters must verify their details and as admitted by the respondent's witness, this requirement is only optional.

35. It is true that **Section 6** of the Elections Act requires the respondent to cause the register of voters to be opened for inspection by members of the public for purposes of rectifying particulars therein, and to maintain a web portal for inspection of the register by members of the public. **Section 6A** requires that thirty days before the date of a general election the respondent should open the register of voters for verification of voters' biometric data at their respective polling station for thirty days, and upon expiry of that period, revise the register of voters taking into account any changes in particulars arising out of the verification process.

36. The duty to maintain a proper register of voters is that of the respondent. I am not, therefore, persuaded by the respondent's counsel's contention that the petitioner failed to verify his details during the period allowed for verification of voters' biometric data and, therefore, should carry the blame. This is because according to the evidence, the petitioner registered as a voter in 2013 and indeed voted in that year's election at his original polling station. He did not make any changes to his voting station or particulars which he would have been required to verify. That is to say, he was not a new registered voter and his details were not expected to have changed from those of 2013. For that reason, it does not make sense to argue, as the respondent did, that the petitioner should have verified his details because it was not a mandatory requirement and therefore he had no reason to do so.

37. The respondent's further argument that the transfer could have occurred by mistake is to compound the problem further and show how negligent the respondent's officers were. Under the law, a voter has to formerly apply for transfer from one polling station to another. He probably has to write his name, his identification number and the station he wants to transfer to. His name and identification details must match otherwise such a transfer may not be effected.

38. This incident is a serious indictment on the respondent's inability to come up with a proper register of voters devoid of mistakes and give citizens an opportunity to exercise their democratic right to elect leaders of their choice. That is the essence of **Article 1(2)** of the **Constitution** which decrees that the people may exercise their sovereign power through their democratically elected representatives. So that when one casts his vote, he does so to choose the person wants to represent him in the management of the affairs of state, and that is why one elects where to vote which also determines who he votes for as his representative. This is a right that cannot be taken away or abrogated in any other way not least by transferring his vote to a polling station he has not I requested. This, no doubt, violates the voter's right to vote for a representative of his choice.

39. The Court of Appeal captured the value of rights in the case of ***Attorney General v Kituo cha Sheria & 7 others*** [2017] eKLR thus;

Quite beyond argument then, the Bill of Rights in Kenya's constitutional framework is not a minor peripheral or alien thing removed from the definition, essence and character of the nation. Rather, it is said to be integral to the country's democratic state and is the framework of all the policies touching on the populace. It is the foundation on which the nation state is built. There is a duty to recognize, enhance and protect the human rights and fundamental freedoms found in the Bill of Rights with a view to the preservation of the dignity of individuals and communities. The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.

40. The constitution binds all persons and state organs including the respondent to respect, protect and uphold people's rights. This can only be achieved if everyone performs their respective duties in

accordance with the values and principles set out in the constitution. One of these principles is in Article 38 which citizens a right to exercise their political rights and vote for representatives of their choice. They do that by choosing where to register, vote and most importantly, who to vote for.

41. In that regard, I am satisfied that the respondent violated the petitioner's right by transferring his registration status from Ngere primary school polling station to Kabiro Primary School in Dagoretti North constituency without his knowledge or request. It is also clear that that decision was taken without according the petitioner an opportunity to decide whether or not he wanted to vote at Kabiro or Ngere Primary School polling stations.

42. This negated the petitioner's right to register as a voter as he did at Ngere primary school, his preferred polling station and vote. He had exercised his constitutional right that was neither granted to him by the respondent nor the state. The transfer of his name from his preferred polling station to Kabiro primary School polling station was not only arbitrary but also negligent and inexcusable.

43. The respondent cannot shift its duty of ensuring that voters vote where they desired and registered to vote to make it mandatory for voters to check their registration status without reasonable basis. It would be understandable had the petitioner's details been wrongly captured after he had made an application for whatever changes, than being transferred to a completely new and unknown polling station to him without his prompting. How many other voters were affected by this kind of inexplicable mistake and were unable to cast their vote? The respondent has a duty to protect the voters' right to vote for their representatives and should never whimsically tamper with voters' registration details or move them to other polling stations without their request or knowledge.

44. Rights will not have meaning if the respondent is not reminded that it has a constitutional and legal obligation to manage the register of voters and respect citizens' right to vote for their representatives. This calls on the Courts to be vigilant and protect peoples' rights against indiscriminate violation by those who have a duty to respect, protect and enhance those rights.

45. The Court of Appeal was clear on this in the case of Attorney General v Kituo cha Sheria & 7 others (supra) when it stated;

“On the application of the Bill of Rights, Article 20 is couched in wide and all-pervasive terms, declaring the Bill of Rights to apply to all law and to bind all state organs and all persons. None is exempt from the dictates and commands of the Bill of Rights and it is not open for anyone to exclude them when dealing with all matters legal. It is the ubiquitous theme unspoken that inspires, colours and weighs all law and action for validity. It is provided for in expansive terms declaring that its rights and fundamental freedoms are to be enjoyed by every person to the greatest extent possible. The theme is maximization and not minimization; expansion, not constriction; when it comes to enjoyment and, concomitantly facilitation and interpretation. What is more, courts, all courts, are required to apply the provisions of the Bill of Rights in a bold and robust manner that speaks to the organic essence of them ever-speaking, ever-growing, invasive, throbbing, thrilling, thriving and disruptive to the end that no aspect of social, economic or political life should be an enclave insulated from the bold sweep of the Bill of Rights. Thus Courts are commanded to be creative and proactive so that the Bill of Rights may have the broadest sweep, the deepest reach and the highest claims they are enjoined in their interpretive role to adopt a pro-rights realization and enforcement attitude and mind-set calculated to the attainment as opposed to the curtailment of rights and fundamental freedoms... they must aim at promoting through their interpretation of the Bill of Rights the ethos and credo, the values and principles that underlie and therefore mark us out as an open and democratic society whose foundation and basis is humanity, equality, equity and freedom.”

46. In the case of *Tinyefuze v Attorney General of Uganda* [1997] UGCC3 the Constitutional Court of Uganda stated;

“Constitutional provisions should be given liberal construction, unfettered with technicalities

because while the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed may give rise to new and fuller import to its meaning. A Constitutional provision containing a fundamental right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such a provision, the approach of the Court should be dynamic, progressive and liberal or flexible, keeping in view ideals of the people, socio-economic and politico-cultural values so as to extend the benefit of the same to the maximum possible. In other words, the role of the Court should be to expand the scope of such a provision and not to extenuate it. Therefore, the provisions in the Constitution touching on fundamental rights ought to be construed broadly and liberally in favour of those on whom the rights have been conferred by the Constitution. If a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course.”

47. The petitioner has succeeded to show, that he was denied the right to vote for candidates of his choice and the respondent appreciated this when counsel for the parties entered into a preliminary consent to allow the petitioner vote at Kabiro primary school polling station in exercise his right though in a limited manner. The limitation counsel had in mind was, as had been submitted on behalf of the petitioner, that the petitioner did not know the candidates for the various elective posts in Dagoretti North constituency. That meant he could only vote for a presidential candidate of his choice that being the only national elective post. That obviously limited the petitioner’s enjoyment of the right to vote to the fullest by making his political choices.

48. From what I have stated above, I am satisfied that the petitioner has proved his case against the respondent. However, looking at the prayers in the petition and bearing in mind the preliminary consent entered into at the conclusion of the hearing of this petition, obviously some prayers have been overtaken by events and granting them would only be of sentimental value to the petitioner. Overall the petitioner is entitled to some limited prayers in his petition.

49. Regarding the prayer for an order directing the respondent to restore the petitioner’s name in the register of voters at Ngere primary school polling station, it would be necessary for the petitioner to visit his preferred polling station and request for transfer in the prescribed manner as require by law.

50. The petitioner has also prayed for general damages for violation of his fundamental rights. Counsel for the respondent admitted that the petitioner’s right to vote for candidates of his choice had been limited due to this incident and asked the petitioner to exercise the right though in a limited manner. The petitioner lost the chance to vote for candidates he may have wished to vote for except one.

51. This is a violation of his right and even if some form of compensation is given, it cannot restore a right that has already been violated. It will, however, restore hope and confidence in the knowledge that rights are granted, valued, and protected by the **Constitution**. Even with this, the Court should take into account the fact that the respondent is a public institution funded by the public including the petitioner. It does not have finances of its own. That does not however mean it cannot be condemned to pay damages where it has violated a citizen’s rights. Taking that into account, I am of the view that an award of Kenya shillings three hundred thousand (Kshs.300,000/=) in general damages for breach of the petitioner’s rights would be fair and reasonable compensation in the circumstances.

52. The upshot is that the petition dated 24th July 2017 is allowed and the following orders shall issue;

1. A declaration is hereby issued that the respondent is obliged to act lawfully, fairly and reasonably in the exercise of its respective Constitutional and statutory mandate including acting only when the petitioner in his notification in a prescribed manner wishes to transfer his voter registration to another electoral area.

2. A declaration is hereby issued that the respondent’s decision against the petitioner was unjust as it violated his rights to fair administrative action under Article 47 of the Constitution, Article 83 (3) of the Constitution and section 7(1) of the Elections Act, 2011.

3. The respondent shall pay the petitioner general damages of Kenya shilling three hundred thousand (Kshs.300,000/=) for violating his constitutional rights and fundamental freedoms.

4. The respondent will also pay costs of this petition.

Dated Signed and Delivered at Nairobi this 29th September 2017

E C MWITA

JUDGE