



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**PETITION 9 OF 2013**

**JEFFERS MIRUKA**

**JOHN OCHOLA**

**ISIAIAH ONDUKO (Chairman, Secretary and Treasurer Respectively of the Rongai**

**Environmental Action Initiative, suing for an on behalf of RENACTI)..... PETITIONERS**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1<sup>ST</sup>  
RESPONDENT**

**COUNTY COUNCIL OF OLKEJUADO.....2<sup>ND</sup>  
RESPONDENT**

**CITY COUNCIL OF NAIROBI.....3<sup>RD</sup>  
RESPONDENT**

**JUDGMENT**

1. This petition has been lodged by the petitioners, who are the officials of a non-governmental organization, in the public interest. The organization conducts programs and activities related to promoting the integration of environment in development policies, plans, programs and projects. By the petition dated 14<sup>th</sup> January 2013, the petitioners seek the following reliefs;

*(1) There be a declaration that the respondent conduct amount to a violation the petitioners fundamental rights and freedoms as enshrined in Article 42, 43, 47, 69, 73 and 88 of the Constitution of Kenya 2010.*

*(2) A Declaration that the Respondents conduct amount to a clear contravention of the three fold statutory and international acknowledged principles on protection and conservation of environment namely:-*

- i) The Sustainable Development Principle.*
- ii) The Polluter Pays Principle.*
- iii) The Precautionary Principle.*

*(3) A Conservatory order be issued restraining the 1<sup>st</sup> respondent from receiving nominations from candidates and political parties and further conducting the General Elections on 4<sup>th</sup> March 2013 before*

issuing regulations, guidelines, and/or appropriate notices on:-

- (i) *The provisions of guidelines for places, manner and period within which candidates and political parties may exhibit posters and other campaign material prior to the Election Day.*
- (ii) *The provision of an ascertainable period within which candidate and political parties ought to remove campaign posters and publicity material after the election day.*
- (iii) *The provision for depositing of a financial bond or security with the 1<sup>st</sup> respondent by candidates and political parties to secure performance of the obligations enumerated in paragraph 5 of the Electoral Code of Conduct.*
- (4) *A Declaration that the provisions of section 59 of the Elections Act (Act No. 24 of 2011) is unconstitutional in so far as it prohibits any payment, contract for payment or other consideration of any kind for the purposes of promoting or procuring the election of a candidate at any election to or with a voter on account of the use of any house, land, building, or promise for the exhibits of any address, bill or notice, or no account of the exhibition of any address of any bill or notice.*
- (5) *That the petitioner be awarded general and/or other damages and/or compensation for violation of their fundamental rights for violation and contravention of their fundamental rights by the respondents.*
- (6) *The Court to assess the quantum of damages and compensation to be paid by the respondents in paragraph 5 above.*
- (7) *The court do make, issue and give such further, other and consequential orders, writs and directions as it may consider appropriate for purposes of enforcing or securing the enforcement of any of the provisions of Articles 10, 42, 43, 47, 69, 73 and 88 of the Constitution.*
- (8) *That the respondents do bear the costs of this petition.*

2. Although this petition raises important issues of environmental law and their intersection with the election, I am of the firm view that the issue to be resolved within the context of the ***Elections Act (Act No. 24 of 2011) (“the Elections Act”)*** and ***Election Code of Conduct, 2<sup>nd</sup> Schedule to the Elections Act (“Code of Conduct”)***.

3. According to the petitioners candidates aspiring for elective office have been popularizing themselves through the publication, distribution and exhibition of fliers, posters and handbills, placards and other campaign material in public and private premises. **Regulation 5(j)(ix) of the Code of Conduct** which obliges parties, referendum committees to remove all banners, placards and posters erected during the election period.

4. In addition, the petitioners aver that **sections 67(1)(b) and 69** of the ***Elections Act*** are being violated with impunity. **Section 67** of the ***Elections Act*** prescribes certain offences. **Section 67(a)** makes it an offence for any person who;

***67(b) prints, publishes, distributes or posts up, or causes to be printed, published, distributed or posted up, any advertisement, handbill, placard or poster which refers to any election and which does not bear upon its face the names and addresses of the printer and publisher.***

The provisions of **section 69(1)** prohibit certain expenditures which are deemed illegal;

***69. (1) A payment, contract for payment or any other consideration of any kind shall, for the purpose of promoting or procuring the election of a candidate at any election, not be made—***

***(a) on account of the conveyance of voters to or from the poll, whether for the hiring of vehicles, vessels or animals of transport of any kind whatsoever, or for railway fares, or otherwise; or***

**(b) to or with a voter on account of the use of any house, land, building, or premises for the exhibition of any address, bill or notice, or no account of the exhibition of any address bill or notice.**

5. It is, as I understand, the petitioners' case that these provisions relate to and impact the environment and it is the petitioners' complaint that they have received numerous complaints from members of the community about the deleterious effects of campaign material on the environment. The petitioners also complain that the IEBC has failed to provide sufficient standards for the regulation of campaign material prior to the election consistent with the standard practices in many progressive countries and in accordance with international environmental practice such as those contained in the Rio declaration.

6. I have considered that the petitions, depositions and submissions by the parties and I take the following view of the matter. The **Code of Conduct** enacted pursuant to **section 110** of the **Elections Act**. **Section 110** requires every political party that is eligible to nominate candidates contest elections to subscribe to the code of conduct. **Regulation 7** provides that where the **Code of Conduct** is infringed, the Independent Electoral and Boundaries Commission ("IEBC") may give specific orders to enforce the provisions of the code. Furthermore, any person who has subscribed and violated the **Code of Conduct** commits an offence.

7. I take the position that where a statute or legislation has provided a means of enforcement the procedure should generally be used. This principle is firmly founded in our Constitution and legal system (See **Thande v Montgomery and Others** [1970] EA 341, **The Speaker of The National Assembly v The Hon James Njenga Karume**, Civil Application No 92 of 1992 (Unreported), **Kipkalya Kiprono Kones v Republic & Another ex-parte Kimani Wanyoike & 4 Others**, (2008) 3 KLR (EP) 291, **Wanyoike v Electoral Commission of Kenya (No. 2)** (2008) 2 KLR (EP) 43 and more recently in the case of **Bernard Kasingu v Attorney General and Others Nairobi Petition No. 4012 of 2012 (Unreported)**). In so far as this matter concerns the **Code of Conduct**, then it is proper for the petitioner to invoke the necessary procedure. In this respect I note that two letters of complaint have been forwarded to the IEBC namely the letters dated 7<sup>th</sup> January 2013 and 10<sup>th</sup> January 2013. There is no evidence before the Court that these letters have been acted upon by the IEBC. I stated in **Kituo Cha Sheria v IEBC, Nairobi Petition No. 574 of 2012 (Unreported)** that, "*In an era where the Constitution obliges public institutions to be accountable and transparent, it is important that public institutions respond to queries raised by civic minded citizens.*"

8. **Sections 67 and 69** of the **Elections Act, 2011** creates specific offences which are to be dealt with in a similar fashion. It is for the petitioner to lodge specific complaints with the relevant authorities and the authorities to deal with them in accordance with the law. I also note that under the provisions of **section 107** of the **Elections Act**, the IEBC has the power to prosecute offences under the Act in line with **Article 157(12)**.

9. The petitioners implicate IEBC for the failure to promulgate specific rules or set standards that will provide for the enforcement and realization of the right of a clean and safe environment protected under **Article 42** and in compliance with the State obligations under **Article 69**. I have considered the prayers 2 and 3 of the petition and I hold that rule making in the context of an election cycle is a continuous process and this Court cannot issue conservatory orders to stop a constitutionally mandated election process that is subject to specific timelines to enable the IEBC promulgate the necessary regulations. The making of rules and standards recommended or suggested by the petitioners is a process that involves other bodies like the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and other institutions and it is proper for the Court to defer to these institutions to carry out their responsibilities. The court is required to balance the public's right to a clean environment which can be dealt with in the context of rules and the rights to a free and fair election and in the circumstances of this case the balance tilts in favour of the election process which must proceed to its conclusion.

10. In view of what I have stated, I decline to grant the prayers in the petition and I direct the IEBC to deal with the complaints raised by the petitioner in accordance with the established procedures. My orders are as follows;

(1) I decline to grant the prayers sought in the petition.

(2) I direct the Independent Electoral and Boundaries Commission to deal with the issues contained in the petitioners' letters dated 7<sup>th</sup> January 2013 and 10<sup>th</sup> January 2013 in accordance with its procedures forthwith.

(3) There shall be no order as to costs.

**DATED and DELIVERED at NAIROBI** this 21<sup>st</sup> day of January 2013

**D.S. MAJANJA**  
**JUDGE**

Mr Ochola instructed by Soita and Saende Advocates for the petitioner.

Mr Kilonzo with him Ms Jemutai instructed by Sisule Munyi Kilonzo and Associates Advocates.

Mr Opiyo instructed by Nyandoro and Company Advocates for the 2<sup>nd</sup> respondent.

Mr Amadi instructed by Koceyo and Company Advocates for the 3<sup>rd</sup> respondent.