



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.106 OF 2013

PATRICK MUGURO MWANGI.....1ST PETITIONER

FRANCIS MBAU MUIRURI.....2ND PETITIONER

VERSUS

ZAKARY ELIUD GICHOHI.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....2ND RESPONDENT

FRANCIS MWANGI.....3RD RESPONDENT

JUDGMENT

1. The Petitioners herein, Patrick Muguro Mwangi and Francis Mbau Muiruri filed the Petition dated 14th February 2013 on the same day and their complaint is that the 3rd Respondent, Francis Mwangi is unqualified to run for election as the Governor for Murang'a County on account of the fact that he was charged, convicted and sentenced of the offence of obtaining money by false pretence contrary to **Section 313** of the **Penal Code**. That he does not therefore meet the ethical standards set by the Constitution, 2010 and his nomination certificate should be brought forth and be quashed.
2. It is the case for the Petitioners that although the 3rd Respondent filed an Appeal in H.C. Criminal Appeal No.251 of 2012 challenging his conviction and sentence aforesaid, that alone is not a remedy to the fact that he is otherwise unqualified to run for the office of Governor aforesaid.
3. The 1st and 3rd Respondent's case is that the 3rd Respondent is qualified to be nominated and to run in the 2013 General Elections as Governor for Murang'a County by dint of **Article 193(3)** of the **Constitution**.
4. Further, that after the 3rd Respondent was nominated as a candidate aforesaid, no complaint was lodged with the 2nd Respondent under **Rule 4(1)(a)** of the **Rules of Procedure on Settlement of Disputes** (Legal Notice No.139 of 2012) made under **Regulation 99** of the **Elections (General) Regulations, 2012** (Legal Notice No.128 of 2012) as well as **Section 109** of the **Election Act, 2011** as read with **Article 82** of the **Constitution**.
5. It is their case therefore that since that avenue was never followed, a rush to the High Court

without exhausting statutory mechanisms renders the Petition akin to one overtaken by events and is consequently rendered frivolous, vexatious and an abuse of Court process and ought to be dismissed.

6. Although the advocates for the parties spent considerable time and energy on whether the Petition is spent, or not, at this point in time, that issue, important as it is, can only be dressed if the substantial question revolving around the interpretation of **Article 193(3)** is first settled. I say so because the following facts are uncontested;

- (i) *The 3rd Respondent was convicted and sentenced in Makadara CM's Court Criminal Case No.2322 of 2010. The sentence was a fine of Kshs.400,000/- and in default imprisonment for six months.*
- (ii) *He appealed against the conviction and sentence vide H.C. Criminal Appeal No.251/2012.*

7. In that context, **Article 180(1)** and **(2)** of the **Constitution** must be read together with **Article 193(2)** and **(3)** of the **Constitution**. They provide as follows;

“Article 180(1) The County Governor shall be directly elected by the voters registered in the County, on the same day as a general election of Members of Parliament , being the second Tuesday in August, in every fifth year.

Article 180(2) To be eligible for election as County Governor, a person must be eligible for election as a member of the county Assembly.

“Article 193(2) A person is disqualified from being elected a member of a County Assembly if the person;

- (a) Is a State Officer or other Public Officer, other than a member of the County Assembly;***
- (b) Has, at any time within the five years immediately before the date of election, held office as a member of the Independent Electoral and Boundaries Commission;***
- (c) Has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;***
- (d) Is of unsound mind;***
- (e) Is an undischarged bankrupt;***
- (f) Is serving a sentence of imprisonment of at least six months; or***
- (g) Has been found, in accordance with any law, to have misused or abused a State Office or public office or to have contravened Chapter Six”***

Article 193(3) - “a person is not disqualified under Clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.”

8. Is the 3rd Respondent by fact of conviction and sentence alone disqualified from running as Governor? Clearly not because **Article 193(3)** was enacted to apply to persons in his situation and for good reason. A conviction can only be final when all possibility of appeal or review thereof has been exhausted. In his case, that possibility has not been exhausted because his appeal, although filed, is yet to be determined.

9. Arguments were made that **Article 193(3)** is absurd and gives what **Article 193(2)** has taken away. The argument made in that regard may find favour in other circumstances, but in the instant case, it is logical, reasonable and in line with **Article 50(2)(q)** which grants every accused person the right *“if convicted, to appeal or apply for review, by a higher Court as prescribed by Law”*. The Constitution if

read wholistically would clearly point to the fact that **Article 193(3)** applies squarely in the 3rd Respondent's favour and not to the favour of the Petitioners.

10. **Article 193(3)** is in the same words as **Article 99(3)** which is with regard to the disqualification of persons running for elections as members of parliament. In Esposito Franco vs IEBC, Petition No.60/2012, Majanja, Ogola and Odunga, JJ found that where an Appeal is pending from a “Sentence” of imprisonment “of at least six months, as at the date of registration of a candidate”, that person is not disqualified unless his appeal has been exhausted. That finding applies to the Petition before me and I adopt it.

11. Having ruled on the one issue that I set forth to determine, it follows that the Petition is misguided and is best dismissed as I hereby do.

12. As to costs, the advocate for the Petitioners argued that his clients were pursuing a noble Constitutional Cause. I think not. They were pursuing personal interests against the personal interests of the 3rd Respondent. Costs follow the event and having lost the cause, they shall pay costs to the Respondents.

13. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 26TH DAY OF FEBRUARY, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court Clerk

Mr. Ndubi for Petitioner

Mr. Ng'ang'a for 3rd Respondent

Mr. Odhiambo for 2nd Respondent

ISAAC LENAOLA

JUDGE