



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 61 of 2013

DR. BILLY ELIAS NYONJE.....APPLICANT

VERSUS

THE NATIONAL ALLIANCE PARTY OF KENYA.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

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

AND

JULIUS ANJIMBI.....INTERESTED PARTY

JUDGMENT

1. On 14th February 2013, Dr. Billy Elias Nyonje, the Applicant, filed a Chamber Summons dated the same day. Subsequently, he was granted leave by Ogola J to amend the Chamber Summons and the Amended Chamber Summons Application dated 19th February 2013, seeks the following Orders;

(i) That this Application be certified as urgent and service thereof be dispensed with for reasons of urgency.

(ii) The Honourable Court be pleased to issue the following Orders:

(a) An order of Certiorari to remove into this Honourable Court and quash the decision delivered by the IEBC Dispute Resolution Committee issued and dated 12th February 2013 dismissing the Applicant's Complaint to the Committee seeking to be declared the National Alliance Party's parliamentary candidate for Luanda Constituency.

(b) An order of Mandamus compelling the 2nd Respondent to immediately to receive and effect changes confirming the Applicant herein as the nominee of TNA and to contest on the Party's ticket for the position member of Parliament for Luanda Constituency.

(c) An order of Prohibition directed at the 1st Respondent prohibiting it from issuing and or gazetting any other candidate on the 1st Respondent's TNA party ticket to vie for Member of Parliament for Luanda Constituency.

(iii) That the Honourable Court be pleased to substitute the name of Julius Akolo Anjimbi or any other name from the list submitted to I. E.B.C by TNA in the position of National Assembly representative

for Luanda Constituency and replace it with the name of Dr. Billy Elias Anyonje.

(iv) The costs of this application be provided for.

2. The Amended Chamber Summons Application is premised on the grounds stated in the Statutory Statement dated 19th February 2013 and the Affidavit of the Applicant sworn on 13th February 2013.
3. When the Application came up for hearing before me on 19th February 2013, the parties conceded that Prayer (ii) (c) has already been spent and so the judgment shall be limited to the remaining Prayers.
4. The Applicant contends that he took part in the TNA nominations that were held on 17th January 2013 in Luanda Constituency and allegedly won with the highest number of votes. Subsequently, he was duly issued with an interim nomination certificate and thereafter the 2nd Respondent issued him with the certificate to contest the Parliamentary position on its ticket in the 2013 general election. However, he was shortlisted by the 1st Respondent as a Parliamentary candidate for another constituency rather than Luanda. The 1st and 2nd Respondent conceded the anomaly but the 2nd Respondent's Dispute Resolution Committee dismissed the complaint and it is his contention that IEBC Dispute Resolution Committee acted unreasonably and unproportionally.
5. The Applicant further claims that the IEBC Dispute Resolution Committee infringed on the fundamental human rights of the Applicant to wit, right to vie for public office and hold the same if elected as enshrined under **Article 38** of the **Constitution**. It is his submission in that regard that the decision denying him the ticket to be the 1st Respondent's flag bearer and candidate for the position of National Assembly Representative for Luanda Constituency in 2013 General Elections, lacks legal and constitutional legitimacy as it was in breach of the Constitution 2010, the 1st Respondent's Constitution and Party Election and Nomination Rules. It was thus his contention that the 1st Respondent violated the provisions of the Constitution particularly **Articles 10, 28, 38** and **91** thereof.
6. The Applicant further avers that the actions by the Respondents demonstrate a failure on the constitutional test of the electoral system as set out under **Article 81** of the **Constitution** which provides *inter alia* that elections shall be free from violence, intimidation, improper influence, corruption, and shall be transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.
7. The 1st Respondent supported the Application.
8. In opposing the Application, the 2nd Respondent filed grounds of opposition dated 19th February 2013. It is its position that the Applicant having lodged complaint No. IEBC/DRC/27/2013 with the IEBC Dispute Resolution Committee, and that Committee having dismissed the said complaint on grounds that the interested party herein was not served with hearing notice for the proceedings before the Committee, this Court cannot quash that Committee's decision and may only edit the process employed by it.
9. I have taken into account the Submissions by advocates appearing for the Parties and I should say this from the outset.
10. The Chamber Summons Application would not otherwise meet the test of an originating pleading but on the hearing date, all advocates agreed that time being of the essence, I should proceed and determine the issues in contest, the inelegance of pleadings notwithstanding. I acceded to that proposition and will treat the inelegance as no more than a technicality of form.
11. Having so said from pleadings and submissions before me, I take the view that there is no dispute on facts. The Applicant in essence is seeking this court to quash the decision delivered by the IEBC Dispute Resolution Committee dismissing the Applicant's complaint to the Committee wherein he sought to be declared the National Alliance Party Parliamentary candidate. He has also sought an order from this court to substitute the names of the Interested Party from the list submitted to IEBC and replace it with his (Dr. Billy Elias Anyonje) in the position of Luanda constituency.

12. As argued by the advocate for the Respondent the single issue for determination is whether this Court can issue the Orders sought. It is clear to my mind that it cannot for reasons to be seen shortly.

13. The starting point would be **Section 13 (1) and (2)** of the **Elections Act** which stipulate that;

(1) A political party shall nominate its candidate for an election under this Act at least forty five days before a general election under this Act in accordance with its constitution and nominations rules.

(2) A political party shall not change the candidate nominated after the nomination of that person has been received by the Commission. (Emphasis mine.)

14. It is crystal clear that **Section 13** does not permit the re-opening of the list forwarded to the 2nd Respondent and I believe that the matter of preparation of the list contemplated by that Section is a matter within the exclusive jurisdiction of the political party. It is my view that this Court cannot now nominate a candidate for a party or determine which candidate should be on the nomination list.

15. I must also state that under the Provisions of **Article 88 (4) (b)** of the **Constitution** the IEBC has the mandate to resolve any disputes arising from the nomination process. It is only after IEBC mechanism has been exhausted that a party may come to this Court to challenge the process and only on matters of procedure and not the merit of each dispute. The Applicant invoked the jurisdiction of the IEBC and in that regard the Dispute Resolution Committee rendered its decision. Whether this decision is right or not is not for this court to determine. This Court cannot now review the merit of that decision unless the Applicant is alleging that the decision was made without or in excess of jurisdiction or rules of natural justice, which is not the case here. See **Kenya National Examinational Council v Republic Civil Appeal No. 266 of 1996.**

16. In the event, I see no merit in the Petition and will instead dismiss it. As to costs, let each party bear its own costs.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 25TH DAY OF FEBRUARY, 2013

**ISAAC LENAOLA
JUDGE**

In the presence of:

Kosgei – Court Cler

Dr. Khaminwa for Petitioner's

No appearance for Respondents

Order

Judgment duly delivered.

Copies to be supplied to parties.

**ISAAC LENAOLA
JUDGE**