



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 88 of 2013

**IN THE MATTER OF ARTICLE 22, 23, 27, 38 (2), 47, 78 (2) AND 99 OF THE CONSTITUTION
OF KENYA, 2010**

AND

IN THE MATTER THE ELECTION ACT NO. 24 OF 2011

AND

IN THE MATTER OF THE POLITICAL PARTIES ACTN O. 11 OF 2011

OMAR SHEIKH ALI.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....RESPONDENT

NASSIR MOHAMED DOLAL.....1ST INTERESTED PARTY

ORANGE DEMOCRATIC MOVEMENT.....2ND INTERESTED PARTY

J U D G E M E N T

1. The Petitioner filed this Petition and **Chamber Summons** attached thereto on **7th February 2013** seeking the following orders:-

- 1)** This matter be certified as urgent and service of this application be dispensed with in the first instance.
- 2)** This Petition be certified as urgent and direction for hearing of the same be issued forthwith.
- 3)** The costs of this application be in the cause.

2. The brief history of the application as alleged by the Petitioner are that he is a Parliamentary Aspirant in Garissa Township Constituency of Garissa County duly nominated on Orange Democratic Movement party ticket. He presented his nomination papers to the Respondent on the Friday the 1st February 2013 but was not cleared on the grounds that there was pending, **Petition No. 44 of 2013; Nassir Mohammed Dolal – Vs – The IEBC & others** in which the nomination results were in dispute.

3. The Respondent has cleared the 1st Interested Party to vie for the position of Member of Parliament for Garissa Township Constituency on an Orange Democratic Movement notwithstanding the fact that the 1st

Respondent has admitted to having dual citizenship and not having been a citizen of Kenya for at least ten (10) years immediately preceding the date of election in terms of Articles 78 (2) and 99 of the Constitution respectively.

4. The Petitioner is apprehensive that if the 1st Interested Party is allowed to vie for the position of Member of Parliament for Garissa Township he will have been discriminated against, his constitutional right to free and fair elections based on universal suffrage and the will of the electors and his right to fair administrative action will have been breached. Further, the tenets of the Constitution will have been breached by the Respondent with impunity.
5. The application is opposed by the Respondent and the 1st Interested Party who have filed affidavits in response thereto.
6. The complaints by the Petitioner are twofold. One that he was the duly nominated candidate for the ODM party for the Garissa Township Constituency, and that the ODM party also gave direct nomination to the 1st Interested Party thereby creating two aspirants for the Party. Secondly, the Petitioner states that the IEBC refused to accept his nomination on grounds that there was pending Petition Number 44 of 2013 on the citizenship status of the 1st Interested Party and that the IEBC discriminated against him by accepting the nomination of the 2nd Interested Party and that this was in breach of his constitutional rights. He also questions the citizenship status of the 1st Interested Party and submits that the 1st Interested Party is disqualified from contesting the seat on grounds of dual citizenship.

On these grounds he seeks orders of this court to quash the decision of the IEBC in accepting the nomination of the 1st Interested Party to vie for Garissa Township seat.

7. Mr. Anzala counsel for the Petitioner urged the court to grant the prayers sought.
8. Mr. Nyamodi for the Respondent and Mr. Kilonzo Junior for the 1st Interested Party objected to the application. They submitted that the decision in Petition Number 44 was that the 1st Interested Party was indeed qualified to run for the said seat, and directed IEBC to receive electoral papers of the 1st Interested Party. They submitted that to try to get this court to arrive at a different decision is an appeal through the back door.
9. I have considered the application in light of opposing submissions. I take the following position. Firstly, the court has dealt with the issue of Article 78 for the Constitution and declared that the 1st Interested Party is qualified to contest the seat. Any contrary decision on that issue cannot come from this court, and I need not say more.
10. Secondly, this court has limited jurisdiction over the decisions of the IEBC. It is limited to looking at the process leading to those decisions, and not the merits thereof. There are no proceedings of IEBC put before me to enable me determine the fairness of the process.

Thirdly, the application is severely defective as there is no substantive prayer sought. The Applicant has not stated what he wants from this court.

11. For the foregoing reason, I dismiss the Chamber Summons application dated 7th February 2012 with costs to the Respondent and the 1st Interested Party.

That is the Judgement of the court.

DATED, READ AND DELIVERED AT NAIROBI THIS 19TH DAY OF FEBRUARY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Havi H/B for Anzala for the Petitioner

Nyamodi for the Respondent

Kilonzo Junior for the 1st Interested Party

Teresia – Court Clerk