



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 53 of 2013

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLE 23 (3) (F)

AND

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO FILE JUDICIAL REVIEW
PROCEEDINGS AGAINST THE RESPONDENTS.**

AND

**IN THE MATTER OF: THE LAW REFORM ACT CHAPTER 26 – LAWS OF KENYA
SECTIONS 8 AND 9**

AND

**IN THE MATTER OF: THE ELECTION ACT NO. 24 OF 2011 LAWS OF KENYA AND THE
RULES MADE THEREUNDER**

AND

**IN THE MATTER OF: THE POLITICAL PARTIES ACT NO. 11 OF 2011 LAWS OF KENYA
AND THE RULES MADE THEREUNDER**

AND

IN THE MATTER OF: THE INDEPENDENT ELECTIONS & BOUNDARIES COMMISSION

AND

**IN THE MATTER OF: THE NATIONAL PARTY (TNA) NOMINATIONS FOR CANDIDATE
FOR COUNTY ASSEMBLY MEMBER,**

HARAMBEE WARD, MAKADARA CONSTITUENCY

BETWEEN

ANTHONY KIMEMIA
GATHUMBI.....APPLICANT

- VERSUS -

INDEPENDENT ELECTIONS & BOUNDARIES COMMISSION.....1ST RESPONDENT

THE NATIONAL ALLIANCE PARTY (TNA).....2ND RESPONDENT

JOHNSON MAINA MWAI.....INTERESTED PARTY

R U L I N G

1. The Applicant is a member of The National Party (TNA) and has filed the Amended *ex-parte* Chamber Summons dated 15th February 2013 the seeking the following orders:-

- a)** An order of certiorari to remove into this Honourable Court and quash the decision delivered by the IEBC Nomination Disputes Resolution Committee on the 28th of January 2013 and the 7th of February 2013 dismissing the Applicant's Complaint to the Committee seeking to be declared The National Party's candidate for Harambee County Assembly Ward Representative post.
- b)** An order of mandamus compelling the 1st Respondent to immediately to receive and receipt the Applicant herein as the nominee of the 2nd Respondent (TNA) for the position of County Assembly Representative for the Harambee County Assembly ward of Nairobi County and issue him with the relevant clearance certificate.
- c)** An order of mandamus directed at the 2nd Respondent compelling it to immediately furnish the Applicant's details to the 1st Respondent to facilitate the said Applicant to vie for the Harambee County Assembly Ward member seat (Makadara Constituency) on 2nd Respondent's (The National Party 'TNA') ticket.
- d)** An order of prohibition directed at the 1st Respondent prohibiting it from issuing and/or gazetting any other candidate on the 2nd Respondent's (TNA) party ticket to vie for the Harambee County Assembly Ward member seat (Makadara Constituency) on the National Party ticket.
- e)** The Honourable court be pleased to substitute the name of John Maina Mwai or any other name in the position of County Assembly Representative for Harambee Ward of Nairobi county on a TNA party ticket and replace it with the name of Anthony Kimemia Gathumbi.
- f)** An order of mandamus compelling the 1st Respondent to immediately substitute, in its records and in the ballot papers for the 2013 general elections, the name of the 3rd Respondent, Interested Party – Johnson Maina Mwai – and replace it with Anthony Kimemia Gathumbi – the Applicant – as the TNA candidate for Harambee county assembly ward in Makadara

2. The application is premised on the grounds set out therein among them that the Applicant was duly nominated to run for the position of County Assembly Representative for the Harambee Party Assembly Ward of Nairobi County on the TNA Party ticket and was duly given the party nomination ticket which he delivered to the IEBC – the 1st Respondent herein. Before his nomination the applicant had participated in the nomination exercised in which the Interested Party – **JOHNSON MAINA MWAI also participated. The Applicant won the nominations garnering 600 votes against the Interested Party's 340 votes.**

3. The Applicant alleges that he later came to learn that a complaint against his nomination had been logged at the IEBC Disputes Resolution Committee by one **JAMES GITAU FATAH** who had also participated in the TNA nominations and had come 6th with a 56 votes.

4. In a Judgement in IEBC/NDRC/98/2013 – JAMES M.F. GITAU – VS – ANTHONY KIMEMIA the IEBC summarized its decision as follows:-

“The complaint is hereby allowed. A concession between the Complainant and TNA was entered that Mr. Maina Wa Mwai be given the nomination and the name to be included in the nomination list.”

5. The Applicant alleges that he was never privy to the said discussions and was not consulted despite being a party to the dispute.

6. TNA who is the 2nd Respondent herein supports the application and states that the Applicant is the rightful nominee for their party.

7. In opposing the application the 1st Respondent IEBC in their replying affidavit dated 15th February 2013 and sworn by PRAXEDES TOROREY, opposes the application, not on legal issues or grounds but on the facts that any positive order that may emanate from this court is impossible of being implemented because the ballot papers have already been printed. The IEBC does not mount any legal challenges as to why these prayers should not be granted except that the rights of the Applicant are outweighed by the public rights to have a free and fair general elections.

8. In my view however, the first issue is whether or not IEBC has complied with the law. Under Article 88 (4) (b) the IEBC has the first mandate to resolve any disputes. It is only after the IEBC mechanism has been exhausted that a party may come to court to challenge the process only on matters of procedure and not merit.

9. The Applicant states that despite being a party to the dispute he was neither served with the complaint nor invited to state his case or defend his position. The brief proceedings before the IEBC also do not indicate whether or not the Applicant was invited to the resolution of the dispute. But, rather telling, is the fact that the IEBC is not denying any of these allegations.

10. Under Article 50 and 57 of the Constitution the Applicant is entitled to be heard in a fair process. The process begins to be fair only after a hearing notice is given to a person who would be affected by the results. To the extent that no such process existed, the IEBC had no mandate to reach the finding they did. Their action was *ultra vires* their mandate, illegal and unconstitutional and must be reversed. The IEBC has no mandate to nominate candidates for the parties.

11. Now turning to the issues raised by the IEBC that they cannot comply with any compulsive orders from this court due to time restraint and due the fact that the ballot papers are already printed, my short answer to IEBC is that they have no right to trample on citizen's right and later on have the audacity to cheekily tell them that the IEBC cannot comply with court orders. Most of the complaints against IEBC range from negligence, theft to outright fraud and bribery of the IEBC officials. The IEBC has no right to tell the litigants that after its officials have, due to negligence or other reasons, abrogated the constitutional rights of the litigants, the IEBC cannot enforce the court orders which attempt to correct those mistakes because time is too short. This court will not accept that kind of reasoning. Where the IEBC finds that it cannot comply with an order of the court, there are remedies provided in law for such situations. It is not for the IEBC to direct the hand of the court. Both the IEBC and the court are independent institutions. I reject the self righteous position stated by the IEBC who after trampling upon the rights of the citizen have the audacity to intimate to this court that they cannot comply with certain orders that may emanate from this court.

12. Arising from the foregoing I allow the Amended *ex-parte* chamber summons dated 15th February

2013 as prayed.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Khaminwa for the Applicant

M/s Omuko H/B for Nyamodi for the 1st Respondent

Muriuki for the Interested Party

Teresia – Court Clerk