



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 86 of 2013

**IN THE MATTER OF: ARTICLES 20, 21, 22, 23 (3) 27 (1) & 38 & 47, 99 AND 256 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: VIOLATION AND/OR INFRINGEMENT ON THE PETITIONER'S
CONSTITUTIONAL RIGHTS**

AND

IN THE MATTER OF: NOMINATIONS OF A MEMBER OF NATIONAL ASSEMBLY

AND

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

AND

IN THE MATTER OF: NYATIKE CONSTITUENCY NATIONAL ASSEMBLY SEAT

AND

IN THE MATTER OF: FAIR AND JUST ADMINISTRATIVE DECISIONS

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION
& PROTECTION OF FUNDAMENTAL**

**RIGHTS & FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND
PROCEDURE RULES, 2006**

AND

IN THE MATTER OF: SECTION 19 (SIXTH SCHEDULE) OF THE CONSTITUTION, 2010

BETWEEN

TOM MBOYA ODEGE.....PETITIONER

VERSUS

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

**MOSES DAULA – THE RETURNING OFFICER, NYATIKE CONSTITUENCY.....2ND
RESPONDENT**

AND

**ORANGE DEMOCRATIC MOVEMENT.....1ST INTERESTED
PARTY**

**EDICK PETER OMONDI ANYANGA.....2ND INTERESTED
PARTY**

RULING

1. The application before the court is a **Notice of Motion** dated **8th February 2013**. It seeks the following orders:-

- 1)** The application herein be certified urgent and the same be heard *ex-parte* in the first instance and on priority.
- 2)** Pending the hearing and determination of the instant application, the Honourable Court be pleased to grant interim conservatory Orders of injunction restraining the Respondents, IEBC, either by themselves, agents, servants and/or employees from allowing the 2nd Interested Party, Peter Edick Omondi Anyanga in respect of Nyatike National Assembly seat to contest during the General Elections scheduled for the 4th day of March 2013 purportedly on ODM Party ticket in Nyatike Constituency pending the hearing inter-partes of this application.
- 3)** The Honourable Court be pleased to grant an Order of Temporary Conservatory Order of Injunction restraining the Respondent IEBC, either by themselves, agents, servants and/or employees from allowing the 2nd Interested Party, Peter Edick Omondi Anyanga in respect of Nyatike National Assembly seat to contest during the General Elections scheduled for the 4th day of March 2013 purportedly on ODM Party ticket in Nyatike Constituency pending the hearing and determination of this Petition.
- 4)** Costs of this application be borne by the Respondents and Interested Parties jointly and/or severally.
- 5)** Such further and/or other orders be made as the court may deem fit and expedient.

2. The application is supported by the Petitioner's affidavit dated 8th February 2013 with annexures thereto. The application is opposed by the 1st Respondent, 1st and 2nd Interested Parties, both of whom have filed affidavits in opposition thereto.

3. The Applicant states that he is a registered member of the ODM. He participated as a Candidate in the ODM nomination exercise for the Nyatike Constituency National Assembly Seat, and won the nomination. He was subsequently given the ODM nomination certificate for the seat. It is alleged that his opponent – the 2nd Interested Party, upon losing the nomination dashed to court vide Petition Number 45 of 2013 where he admitted that as per IEBC decision the winner of the nomination was not him – the 2nd Interested Party.

4. However, it is alleged that despite not winning the ODM nominations for that seat, the ODM list of

21st January 2013 given to the IEBC bore the name of the 2nd Interested Party and not the Petitioner's name.

5. The ODM party later sought to correct that anomaly by going to court through Petition Number 48 of 2013. This Petition was filed by the Petitioner to compel the IEBC to accept the ODM's amended list. The same was dismissed on grounds that it was not served upon all the parties. The Petitioner then came to court again and was directed to first exhaust the IEBC Dispute Resolution proceedings. When the Petitioner went back to the IEBC, the IEBC dismissed the complaint based on the Ruling of Petition Number 48 which had been dismissed. However, the Petitioner states that Petition Number 48 of 2010 was filed by the Party and not the Petitioner, and that the Petitioner was not granted a hearing on merit, and that the Petitioner is being locked out without being given a hearing.

6. I have considered this application and the following appear to be the proper facts of the matter:-

i. The ODM party issued the 2nd Interested Party with the nomination certificate and submitted his name to the IEBC on 21st January 2013.

ii. Section 13 (2) of the Elections Act bars the changing of names submitted by parties to the IEBC except in stated exceptional circumstances.

iii. The IEBC decided the appeals filed with it and upheld the 2nd Respondent's position.

iv. The mandate of the IEBC to resolve disputes is found under Article 88 (4) (b) of the Constitution and Section 77 of the Elections Act.

v. This court has very limited jurisdiction over the IEBC decisions. Certainly, this court cannot reverse the IEBC decisions except where the same is faulty on due process.

vi. In order for this court to exercise its jurisdiction over IEBC the proceedings before IEBC must be brought to the court for scrutiny.

vii. As it is, those proceedings are not before the court. This court cannot investigate the merits of the IEBC decisions. Neither can this court purport to review the orders already granted in Petitions Number 45 and 48 of 2013.

viii. The ODM party is very clear that the 2nd Interested Party is their only nominated candidate.

7. For this foregoing reasons I dismiss the Notice of Motion application dated 8th February 2013 with no orders as to costs.

It is so ordered.

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

E. K. O. OGOLA

JUDGE
PRESENT:

M/s Ashioya for the Petitioner

Mbugu for the Respondent

Teresia – Court Clerk