



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Judicial Review 49 of 2013**

IN THE MATTER OF AN APPLICATION BY YUSSUF OORO ODONGO FOR LEAVE TO APPLY FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI

**AND**

IN THE MATTER OF ARTICLES 98 (3) AND 99 OF THE CONSTITUTION OF KENYA

**AND**

IN THE MATTER OF THE INDEPENDENT ELECTIONS

& BOUNDARIES COMMISSION

**BETWEEN**

**REPUBLIC** .....  
: : : : : **APPLICANT**

**- VERSUS -**

**INDEPENDENT ELECTIONS & BOUNDARIES COMMISSION** .....  
**1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTIONS & BOUNDARIES COMMISSION DISPUTES TRIBUNAL** .....  
**2<sup>ND</sup> RESPONDENT**

**AND**

**EX-PARTE - YUSSUF OORO ODONGO**

**RULING**

1. By a Notice of Motion dated **12<sup>th</sup> February 2013** the Applicant seeks among other orders of Mandamus to issue compelling IEBC to put the name of the Applicant in the ballot papers as an aspirant for the Senate seat for Siaya County for the **4<sup>th</sup> March 2013** general elections.
2. The Applicant **YUSSUF OORO ODONGO**, a member of The National Alliance Party (TNA) alleges that he was nominated to vie for the seat of Senator by TNA party in Siaya County on the **18<sup>th</sup> January 2013**. The IEBC declined to give the Applicant Form 16 which was the form required to be filed as

Nomination Form for a Senator.

3. When the Applicant lodged a complaint with the IEBC, the IEBC mandated the same Commissioners who had earlier on refused to provide the Applicant with Form 16 to resolve the issue.

4. The IEBC Commissioners considered the complaint and reached the decision as follows:-

**“The complaint is hereby dismissed for failure by the complainant to lodge the correct Nomination Form for the Senate position.”**

5. The IEBC Tribunal did not consider the dispute within the mandate of the law. The proceedings are scanty, if any or at all. The decision is spurious, heavy handed and arrogant.

6. The issue to ask is how can a Tribunal who is expected to provide Form 16, refuse to do that and then penalize the Applicant for failure to lodge the correct Nomination Form for the Senate Position? In any event, the Applicant does not need to lodge a particular form. The Applicant’s duty as a layman is to state his case the way he may understand it. It is then the business of the IEBC Tribunal to fit the complaints to a particular technical form. A technical procedure should not be used to deny a contestant his rights under the Constitution.

7. The IEBC team cannot purport to hold brief for some party or particular contestants by removing or limiting political competition. In my view the IEBC Disputes Tribunal showed bias. The process of resolving the dispute was intentionally intended to intimidate the Applicant. The procedure was faulty and biased, and the decision reached was pre-meditated. If that is so, as I hold it to be, that decision cannot stand.

8. Having considered the material on record and the decision reached by the Tribunal, I am of the view that the complaint was on the process leading to the decision rather than on the merits thereof and so it meets the interference threshold by a court investigating breach of fundamental rights and freedoms. Due process was not followed. There can be no due process when the Tribunal’s first act was to deny the Applicant Form 16 which initiates the process. Whether or not there has been a breach of a right to fair trial depends on the circumstances of each case. See **KAMLESH MANSUKLAL PATTNI & ANOTHER – VS – REPUBLIC NAIROBI HCMA NO. 322 OF 1999**. I am satisfied that in this case there was unfair process and denial of the due process.

9. In the upshot, I make orders as follows:-

a. I quash the decision of the IEBC Disputes Tribunal aforesaid and order direct and compel the IEBC to put the name of the Petitioner/Applicant in the ballot papers as an aspirant for the Senate seat for Siaya County on a TANA Ticket for the 4<sup>th</sup> march General Elections.

b. No order on costs.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 15<sup>TH</sup> DAY OF FEBRUARY 2013**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mutungu for the Applicant

Nyamodi for the Respondents

Teresia – Court Clerk