



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 52 of 2013

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE INDEPENDENT ELECTIONS

& BOUNDARIES COMMISSION ACT NO. 90 OF 2011

AND

IN THE MATTER OF THE ELECTIONS ACT NO. 24 OF 2011

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS

BETWEEN

REPUBLIC.....APPLICANT

- VERSUS -

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC) RETURNING

OFFICER - RANGWE CONSTITUENCY.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION...2ND RESPONDENT

PATRICK OUMA ODWALO.....INTERESTED PARTY

RULING

1. By a Notice of Motion application dated **13th February 2013** the Applicant moved this court for the orders namely:-

1) An order of Judicial Review by way of prohibition be granted to the Applicant prohibiting the 2nd Respondent from gazetting and/or publishing the name of PATRICK OUMA ODWALO as the nominee of ODM to vie for Kagan Ward as County Assembly Representative.

2) An order for Judicial Review by way of Mandamus to compel the 2nd Respondent to receive the nomination certificate of the Applicant and clear him as the sole nominee of Orange Democratic Movement (ODM) to vie for Kagan Ward as County Assembly Representative.

3) Costs of this suit be provided for.

2. The Applicant MR. PIUS ODERO OKECH claims the he is a life member of the ODM party holding Membership number 001938, and that he participated in the 17th January 2013 Party Primaries Nominations for the ODM Party for Country Assembly Reprehensive for Kagan Ward, Rangwe Constituency Home-Bay County. The Applicant alleges that he emerged the winner and was issued with the party's nomination certificate dated 18th January 2013. It is annexed to his affidavit "**POO-1**". The party then forwarded his name to IEBC vide a list also annexed to his affidavit as "**POO-2**".

Amongst the aspirants for the Kagan Ward seat was the Interested Party PATRICK OUMA ODWALO, who it is alleged, lost to the Applicant and immediately defected to the United Democratic November (UDM) where he was received as a member and issued with UDM's nomination certificate to vie for Kagan Ward on a UDM ticket and his name was subsequently forwarded to the IEBC on 24th January 2013 as the UDM party for Kagan Ward.

The Applicant then travelled to Rangwe Constituency to present his nomination certificate to IEBC but was shocked to discover that the Interested Party had also been issued with an ODM nomination certificate as the Kagan County Assembly Representative.

The Applicant protested the actions of the ODM party by writing a letter to the National Elections Board (NEB) to clarify its position on the double issuance of certificates and/or correct the anomalies but all was in vain. The Applicant then lodged a complaint and/protest letter with the IEBC Returning Officer Rangwe of the decision by the ODM party in collusion with the IEBC office to deprive him of the victory.

That further to the above,

(a) There was a dispute filed at the IEBC Dispute Resolution Committee/Tribunal as **IEBC/NDRC/70/2013 TOM ODERO OCHANDA – VS – ODM** in which the Applicant was the Interested Party.

(b) Tom Odero Ochanda, the complainant was disputing the Applicant's nomination as the ODM party nominee for Kagan ward and was seeking the nullification of his nomination by the Committee.

It is alleged that in its Ruling dated the 28th January 2013, the Committee upheld the decision of ODM party to nominate the Applicant and presented his name to the IEBC as its sole nominee to vie for Kagan Ward as the county Representative Assembly.

3. The Interested Party PATRICK OUMA OWALO opposed the application through his affidavit in reply filed in court on 14th February 2013 with annextures. He asserts that he was the winner of the ODM Party's nomination for the said seat and that the IEBC has already accepted his nomination. He denied being a member of the UDF Party.

4. The application before the court has nothing to do with the competing interests between the Applicant and the Interested Party. The party under scrutiny in this application is the IEBC.

5. The facts as narrated by the Applicant and supported by annextures is compelling, convincing and I believe them. Under Section 13 (2) of the Election Act, the IEBC is obligated to accept a list of candidates as provided by the party. The party forwarded that list which contained the name of the Applicant. The Party also nominated the Applicant vide a nomination certificate dated 18th January 2013. There is no evidence that the list forwarded to IEBC was ever amended to remove the name of the Applicant. The Interested Party was also issued with a nomination certificate of the same date i.e. 18th

January 2013. However, the Interested Party's name does not appear on the list submitted to the IEBC under Section 13 (2) of the Elections Act.

6. Indeed, the Interested Party's name appears on the United Democratic Movement (UDM) Party list submitted to the IEBC by that party on 21st January 2013. This document is annexed to the Applicant's affidavit. "POO -3" and was received in the IEBC offices on 24th January 2013.

7. What is clear is that the Interested Party was a member of ODM on 18th January 2013 but for some reason was also a member of UDM on 21st January 2013. This narrative proves to me that the Interested Party is not telling the whole truth and I believe and hold that the person who was properly nominated by the ODM party was the Applicant.

8. The issue then for me to consider is whether the court can revoke and quash the nomination of the Interested Party. The proceedings or conduct of the IEBC is protected under Article 88 (4) of the Constitution. However this court has the power to supervise the actions of IEBC under Article 165 (6). All complaints which arise between contestants are to be firstly arbitrated by the parties by IEBC. So before a party can come to this court the party must show that the IEBC Disputes Tribunal has decided on the matter, or has refused to decide on the matter, necessitating the move to court.

9. It is clear that a dispute was filed with IEBC Dispute Resolution Tribunal as IEBC/NDRC/79 2013 – TOM ODERO OCHANDA – VS – ODM in which the Applicant was the Interested Party. In that dispute Mr. Tom Odero Ochanda was disputing the nomination of the Applicant herein as the ODM Party nominee for Kagan Ward and was seeking the nullification thereof.

10. In its Ruling dated 28th January 2013, the Committee upheld the decision of the ODM Party to nominate the Applicant. The Ruling of the court is attached to the application at page 47 of the Decisions of the IEBC Committee Hearings, 2013. In its Ruling the Committee stated:-

“The complaint is dismissed for insufficient evidence. The Party position is upheld.”

11. Having upheld the party position – which was that the Applicant is the ODM nominee – the IEBC had no option but to honour its own Ruling.

12. The act of IEBC to accept nomination papers from the Interested Party is an illegal act, fraudulent and done with impunity to the law and to its own rules. That decision cannot stand. It stinks.

13. In the upshot I hereby find for the Applicant and make the following orders:-

a. I quash the decision of the IEBC accepting the nomination papers of the Interested Party PATRICK OUMA ODWALO.

b. I order direct and compel the 1st Responded IEBC to forthwith receive and accept the nomination certificate of the Applicant MR. PIUS ODERO OKECH as the sole nominee of the Orange Democratic Movement (ODM) to vie for Kagan Ward as Country Assembly Representative and to print ballot paper in his name.

c. Since the act of IEBC in this matter is accentuated by flagrant illegality, bad faith, malice and fraud, I order the costs of this application to be paid by the IEBC – the 1st Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 15TH DAY OF FEBRUARY 2013

E. K. O. OGOLA
JUDGE

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PRESENT:

Munoko for the Applicant

Nyamodo for the Respondents

Isoe for the Interested Party

Teresia – Court Clerk