



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 85 of 2013

**IN THE MATTER OF ARTICLE 20, AND ARTICLE 165 (3), 88 (5), 258 & 259 OF THE
CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER AN APPLICATION BY JULIUS CHACHA MABANGA

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS**

**UNDERARTICLES 38, 47, 50, 88 (4) (e), 90, 258 & 259 OF THE CONSTITUTION OF KENYA,
2010**

BETWEEN

JULIUS CHACHA MABANGA.....PETITIONER

-VERSUS

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

AND

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

MARK CHACHA.....2ND INTERESTED PARTY

J U D G E M E N T

1. The Applicant, Julius Chacha Mabanga is a candidate for representation of Kuria East Constituency in Migori County and was allegedly announced as the winner for the 1st Interested Party's nominations to contents for the said seat in the forthcoming general elections due to be held on 4th March 2013 in accordance with the rules and regulations of the said party.

Pursuant to the announcement of the said elections, the Petitioner was allegedly granted a provisional certificate for the said constituency pending the issuance of a proper and final certificate by the 1st Interested Party which was duly issued to the Petitioner.

The Petitioner was, in accordance with the 1st Interested Party's rules and regulations, notified to the Respondent as the 1st Interested Party's candidate for the said constituency.

On the morning of 25th January 2013, the Respondent published a newspaper advertisement in which the Petitioner's name appeared as being a nomination that was subject to the dispute resolution mechanisms by the 1st INTERESTED party in connection with the said nominations.

By a Ruling delivered by the Respondent at or about 5.30 p.m. on the evening of 28th January 2013, the Respondent made a determination that the 2nd Interested Party to these proceedings should be awarded with the nomination papers for the 1st Interested Party and the Respondent has allegedly issued a direction to the 1st Interested Party's to that effect.

Aggrieved by the said decision, which was made contrary to:- **(1)** the clear and unequivocal requirements for fair administrative action, **(2)** the application of the rule of natural justice as to the right to be heard and **(3)** the clearly stated mechanisms put in place by the 1st Interested Party and the Respondent respectively in their execution of their statutory and constitutional duties and obligations, the Petitioner filed Petition Number 41 of 2013 which was heard and determined by this Honourable Court on 31st January 2013. This Honourable Court recognized that the Petitioner's rights had been violated and issued a Ruling in which the Respondent was directed to re-hear the complaint afresh.

In blatant disregard of the court Ruling aforesaid as well as numerous constitutional provisions, the Respondent, by a Ruling delivered on 1st February 2013 at 1.00 p.m. sustained their previous decision and declared the 2nd Interested Party as a nominee of the 1st Interested Party.

Aggrieved by the Respondent's actions and decision delivered on 1st February 2013, the Petitioner filed a further Petition before this Honourable Court, being petition No. 62 of 2013, which was heard at 10.00 a.m., 12.30 p.m. and 4.00 p.m. respectively on 6th February 2013 by a three Judge bench, constituting of the Honourable Mr. Justice Majanja, the Honourable Mr. Justice Ogola and the Honourable Mr. Justice Odunga. By a Ruling delivered on the same day, the Honourable court directed that the Respondent re-hears the dispute and affords the Petitioner a fair hearing.

On the very same day, 6th February 2013, the Petitioner appeared before the Respondent and tendered documentary evidence confirming *inter-a-alia*, that:-

- (a)** The 2nd Interested Party was implicated in serious nomination malpractices that led to the issuance to him of a provisional certificate that he was alleging entitled him to be declared the 1st Interested Party's nominee for the subject elective seat;
- (b)** The 1st Interested Party's Returning Officer had confirmed that there was widespread violence and other nomination malpractices by the 2nd Interested Party which rendered provisional nomination certificate issued to him null and void;
- (c)** The 1st Interested Party had thus designated the Petitioner as its sole nominee for the subject elective seat; and
- (d)** The Petitioner's nomination was never challenged by the 2nd Interested Party, or anyone else for that manner, before the 1st Interested Party's internal dispute resolution mechanism.

Notwithstanding the evidence aforesaid, the Respondent proceeded to deliver an oral Ruling on 7th February 2013 in which the Respondent maintained and declared the 2nd Interested Party as the Nominee for the 1st Interested Party.

The grounds of this petition

The Petitioner avers that the oral Ruling delivered by the Respondent at or about 11.30 a.m. on the morning of 7th February 2013 in which the Respondent made a determination that the 2nd Interested Party to these proceedings should be awarded with the nomination papers for the 2nd Interested Party violates clear and unequivocal requirements for:- **(1)** fair administrative action, **(2)** a fair hearing, **(3)** the application of the rule of natural justice as to the right to be heard, **(4)** the clearly stated mechanisms put in place by both the Respondent and the 1st Interested Party in their execution of their statutory and Constitution duties and obligations, and **(5)** the Petitioner's rights, the 1st Interested Party's rights, and those of the people of Kuria East.

The Petitioner avers that in the context of applicable laws and the compelling evidence placed before the Respondent by the Petitioner and the 1st Interested Party in relation to the issues in dispute, the Respondent's decision made on 7th February 2013 was arrived at in a manner which no reasonable tribunal properly applying its mind to the specific facts and law could have.

Further, and in the context of **(1)** the Respondent's previous actions that led to the filing of petition number 41 of 2013 and petition No. 62 of 2013, and **(2)** compelling evidence placed before the Respondent by the Petitioner and the 1st Interested Party in relation to the issues in dispute, the Respondent's decision of 7th February 2013 demonstrably exhibits bias, unreasonableness, illegality and is blatantly *ultra vires*.

It is in the interest of justice and a fundamental principle of strict adherence to the letter and spirit of the Constitution 2010, that the said decision of the Respondent be quashed by this court and that the 1st Interested Party be prohibited by way of a conservatory order from acting upon or taking any steps in purported compliance with or implementation of to the said decision prior to the hearing and determination of this petition.

2. The Respondent has opposed the Petition vide a replying affidavit dated 7th February 2013. The Respondent states that pursuant to an order of this court, the Dispute Resolution Committee of the Respondent heard for the third time the Petitioner's complaint in respect of ODM's party nominations in Kuria East Constituency and dismissed the claim. The Respondent further avers that the ballot papers in respect of Kuria East Constituency have already been printed and that any change to the said ballot papers would occasion tremendous prejudice of the General Election.

Further the Respondent opposes the Petition on the grounds that the Petition challenges the merits of the decision and not the procedure and that the Petition is in the nature of an appeal since this matter was determined by the Respondent's Dispute Resolution Committee. The Respondent relies on the Replying affidavit of MOSES KIPKOGEI and IMMACULATE NJENGE KASSAIT of 7th February 2013 and 12th February 2013 respectively and on the further affidavit of MOSES KIPKOGEI of 13th February 2013.

Secondly the Respondent submits that this matter is in the nature of an Appeal. This matter was determined by the Commission three times. The last time it was determined was 6th February 2013 pursuant to a court order. There was no error shown to have been committed in the proceedings of the Respondent's Dispute Resolution Committee of 6th February 2013. The proceedings were in accordance with the rules of the Committee and the rules of natural justice.

Thirdly, the Respondent submits that this matter has been overtaken by events. If this Court grants the Orders sought, it will affect the General Elections slated for 4th March 2013. The ballot papers in respect of Kuria East Constituency have already been prepared by the firm of Smith & Ouzman which was contracted by the Commission to print ballot papers. A sample of the same, "**INK 1**" has already been approved and sent for printing. The same firm has further informed the Respondent vide a letter "**INK 2**" that the production of the 290 National Assembly and 47 Woman Member ballot papers is in progress. In

the same letter, the firm informs the Respondent that any changes in the candidates would incur reprint cost resulting to a double charge and it cannot guarantee delivery of the reprints in time for the general elections. The orders sought, if granted, would affect persons not party to these proceedings, including the people of Kuria East Constituency and the general public since the ballot papers will not be ready in time for the general elections.

3. I have perused the proceedings of the Respondent dated 6th February 2013 and in my view those proceedings do not amount to an enquiry which would determine a matter such as what is at hand. The proceedings constitute a one page interrogation.

The alleged inquiry does not even set out the agenda or issues to be determined. Its very perfunctorily done, and at the end of it the panel stated that they would give their decision at 11.00 a.m. There is no indication of the decision that was reached. There is no relationship between the proceedings and the decision reached. The process was a sham. It is instructive that the same panel had reached the same decision 3 times. This gives the impression that the panel had a pre-conceived decision from which they did not want to depart.

The proceedings also do not explain why IEBC was determined to ignore the wishes of the ODM party when the entire party organs stood by the Petitioner as their candidate.

4. The cardinal duty of this court is to perform justice. When this court referred the matter back to the IEBC to reconsider, this court by that act was indicating to the Respondent that there could be a valid reason to have a re-look on the matter. If at any time this court is satisfied that the Respondent is incapable or unable or unwilling to arrive at a just and constitutional decision, this court has a right to direct that the proceedings before the Respondent be brought before the court for scrutiny and where necessary for quashing under this court's supervisory and discretionary powers under Article 165 (6) of the Constitution.

The jurisdiction of the court is expressly drawn from the provisions of Article 165 (6) in the terms of which the High Court is expressly permitted to exercise supervisory powers over a judicial or *quasi* judicial body, such as the 1st Respondent. In addition the 1st Respondent failed to adhere to the strict rule of law and apply Article 10 which bind the Respondent to strictly observe “ . . . **(a) the rule of law; (b) equity; (c) integrity, transparency and accountability; and (d) sustainable development**”. The failure renders the decision made on 7th February 2013 subject to the jurisdiction of the court under Articles 22, 23, 165, 258 and 259.

The Petitioner submits that the responsibility of the Respondent is heightened by the fact that it is in charge with what is possibly the most significant event for the renewal of the people's faith in the birth of a new order, and accordingly the Respondent must not only conduct itself in a manner beyond reproach but must also ensure that justice is seen to be done.

It is the Petitioner's submission that the evidence on record, looked at as a whole, shows that the Respondent has gone beyond acting *ultra vires*; the Respondent has acted in a despicable manner by consistently insisting upon delivering an unlawful decision tainted with illegality, which decision is clearly unreasonable.

5. Having looked at those proceedings I am satisfied that:-

(i) The IEBC cannot nominate a candidate for the party, and with impunity disregard the position and views of the party.

(ii) The totality of the matters before the court disclose that this court must exercise supervisory jurisdiction to uphold Article 10 of the Constitution, the rule of law and the integrity of the electoral process. In that regard I hereby quash the decision of the Independent Electoral and Boundaries Commission delivered on 7th February 2013 nominating, permitting or otherwise installing the 2nd

Interested Party as the ODM's Candidate for the elections due to be held on 4th March 2013, together with all consequences emanating therefrom in terms of the prayers of the Petition which are all hereby allowed with costs.

That is the Judgement of the court.

DATED, READ AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2013

E. K. O. OGOLA
JUDGE

PRESENT:

Mugambi for the Petitioner

Nyamodi for the Respondent

Teresia – Court Clerk