



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 90 of 2013

IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA

AND

**CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
2(1), 3 (1),**

10 (1) AND (2), 19 (2), 20 (2), 27 (1), 28, 47 (1) (2) & 50 (1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE CONTRAVENTION OF THE RIGHT TO EQUAL BENEFIT OF
THE LAW, SOCIAL JUSTICE,**

**DEMOCRACY, THE RULE OF LAW, INTEGRITY, TRANSPARENCY, THE RIGHT TO
PROTECTION OF THE LAW,**

**THE RIGHT TO ADMINISTRATIVE JUSTICE, PROCEDURAL FAIRNESS AND THE RIGHT
TO ACCESS TO JUSTICE**

BETWEEN

CHARLES JOHN OTETE.....PETITIONER

VERSUS

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST
RESPONDENT**

JOHANNES BOY OKOBA.....2ND RESPONDENT

J U D G E M E N T

1. The Petition before the court is dated **8th February 2013**. It seeks to quash the decision of the 1ST Respondent, the Independent Electoral and Boundaries Commission (IEBC) decision to accept the nomination of the 2nd Respondent as the *bonafide* candidate for the Bunyala Central Ward in Budalangi Constituency on an Orange Democratic Party (ODM) Ticket.

2. The facts of the Petition are that the Petitioner is a member of the ODM Political party. He aspired to

contest for the Bunyala Central Ward, in Budalangi Constituency within the Busia Country. Accordingly the Petitioner competed for the position of County Representative for the Bunyala Central Ward, in Budalangi Constituency within the Busia Country and won the election. Having won, the Petitioner was duly nominated by the ODM political party.

Consequently, a Certificate of Nomination of Candidate for County Assembly Elections was issued by the 1st Respondent showing that the Petitioner was validly nominated for County Assembly election.

The 2nd Respondent challenged the nomination of the Petitioner in Miscellaneous Cause Number 42 of 2012 alleging that the 2nd Respondent was the rightful candidate for County Assembly Elections for the Bunyala Central Ward, in Budalangi Constituency within the Busia Country basing his allegation on the list of candidates of the ODM dated the 21st of January 2013.

The 2nd Respondent also alleged that the Petitioner had fraudulently obtained the nomination certificate, an allegation to which the Petitioner was not allowed to rebut by evidence hearing. It is alleged that the 2nd Respondent does not have a valid nomination certificate from the party.

The Petitioner came to court, but the High Court referred the application by the 2nd Respondent to the 1st Respondent for hearing and determination and the 1st Respondent made a decision cancelling the Petitioner's certificate and accepting the nomination certificate of the 2nd Respondent.

It is alleged that the 1st Respondent made its decision in absence of the Petitioner and as a result the Petitioner has had its right to a fair hearing denied and violated.

3. In support of the Petition the Petitioner has attached the following documents:-

- i.** ODM letter dated 27th January 2013 addressed to the 1st Respondent submitting an amended list of its candidates. In that the Petitioner is stated to be the ODM nominee for the Bunyala Central Ward.
- ii.** Form 21 – by IEBC which is a Certificate by the Returning Officer dated 29th January 2013 showing that the Applicant was validly nominated for the Bunyala Central Ward.
- iii.** A letter dated 8th February 2013 from ODM, signed by the Executive Director Janet Ongera and directed to the Returning Officer Budalangi Constituency, Busia Country confirming that the party nominee for the Ward was the Applicant and not the 2nd Respondent.
- iv.** A nomination certificate of the party given to the Petitioner.

4. The Petitioner alleges that the 2nd Respondent complained to the 1st Respondent about irregularities in the issuance of the nomination certificate to the Petitioner. The 1st Respondent is alleged to have determined the dispute without hearing the Petitioner, and thereafter decided to delete the Petitioner's name and replace it with that of the 2nd Respondent.

5. This action, it is submitted by the Petitioner is unconstitutional as it derogates from the right to fair hearing guaranteed under Article 50 of the Constitution.

6. The Petition is opposed by the 1st Respondent who has filed grounds of opposition on 12th February 2013 alleging *inter-a-lia* that the Petition offends Section 13 (2) and (3) of the Elections Act as the same seeks to have the list of political parties nominee to the election be amended whereas the same is in contravention of the said Act. It is also alleged that the Petition offends provisions of Rules (5) (1) (2) of the Elections Act (The Elections [General] Regulations Rules of the Procedure on Settlement of Disputes 2012) as the Petitioner has not exhausted and invoked all the jurisdiction granted to the 1st Respondent as required by the law.

7. Although the Petitioner wants this court quash the decision of the IEBC to accept the nomination of the 2nd Respondent, the proceedings before the IEBC to that effect are not annexed for my perusal. However, what is clear to me is the apparent injustice in light of available evidence attached to the application. All the attachments I have referred to herein show beyond a shadow of a doubt that the Petitioner was the nominee of the ODM. If that nomination was to be challenged, as indeed it appears to have been the case, rules of natural justice demand that the Petitioner had to be informed of the hearing, and indeed be given a chance to be heard. Articles 50 and 57 of the Constitution guarantees the rights of the Petitioner in this respect. The law is that under Section 13 (2) and (3) of the Elections Act, the list supplied to the IEBC cannot be amended and is final. However, where IEBC purports to hear a dispute, all parties to be affected by its decision must be notified of the proceedings and given a chance to state their part. This is the natural justice.

8. In light of the overwhelming evidence of injustice visited upon the Petitioner, this court finds that the decision taken by the IEBC to delete the name of the Petitioner and replace it with that of the 2nd Respondent was a reckless and unlawful act which has no basis and violated the constitutional rights of the Petitioner. The IEBC cannot purport to be a political party. It has no mandate to nominate the candidates on behalf of political parties. This mischief must stop.

9. In my judgement the decision by the IEBC to cancel the nomination certificate of the Petitioner was an unconstitutional act made in bad faith and accentuated by malice and even without giving notice to the Petitioner. I hereby quash that decision.

10. In light of the foregoing, I give Judgement to the Petitioner as prayed in the Petition dated 8th February 2013.

That is the Judgement of the court.

DATED, READ AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Ndegwa for the Petitioner

Muriuki for the 2nd Respondent

Teresia - Court Clerk