



REPUBLIC OF KENYA

High Court at Kisumu

Civil Suit 4 of 2013

NICHOLAS OYOO OMOLO.....APPLICANT

VERSUS

LEONARD OTIENO ORIARO.....1ST DEFENDANT

JULIUS AGUTU OCHAM.....2ND DEFENDANT

TOM OLUNGA OKUMU.....3RD DEFENDANT

INDEPENDENT BOUNDARIES & ELECTORAL COMMISSION.....4TH DEFENDANT

RULING

The applicant's application dated 1-2-2013 prayed for the following reliefs:-

- i. That this application be certified as urgent and deserving to be heard ex-parte in the first instance.**
- ii. That pending the hearing and determination hereof the Independent Boundaries and Electoral Commission be restrained from publishing the names of the 1st and 2nd defendants in the ballot paper for the Central Alego ward in the general elections 2013.**
- iii. That service of summons and of any orders herein be by way of advertisement in the print media, in a newspaper enjoying countrywide circulation.**
- iv. That at the hearing hereof the 1st, 2nd and 3rd defendants each be compelled to exhibit to court a copy each of:-**
 - a) Their Orange Democratic Movement party cards/certificates.**
 - b) Their letters by which they notified Orange Democratic movement party of the ceasure of membership if any.**

c) A letter from Orange Democratic Movement party acknowledging receipt of the letters of resignation.

v. That at the hearing hereof the 4th defendant be compelled to exhibit a copy of the list of members submitted to it under section 28 of the Elections Act, 2011, in respect of the 1st, 2nd and 3rd defendants to verify their membership to their new parties.

vi. That upon hearing and determination of this application inter-parties the 4th defendant be enjoined from listing the 1st, 2nd and 3rd defendants as contestants in the 2013 general elections.

vii. Costs of this application be provided.

When this application came up for hearing counsels for the parties herein argued that this was to be a test suit in respect to the other similar cases namely Kisumu as HCC No. 5, 6, and 8 of 2013.

Apparently, by the time of retiring to write the same suit No. 8 had been withdrawn and therefore this decision shall only affect No. 5 and 6.

Summary Of The Case

The applicants case in a nutshell is that the 1st, 2nd and 3rd defendants were aspirants who participated in the ODM party nominations in Central Alego. That the applicant was present during the whole nomination exercise and even during the tallying process and witnessed the three defendants participate in the same. It is the applicant's case that the ODM party did not give nomination to either of the three defendants and that subsequently they approached the offices of the 4th Defendant in Siaya where they presented certificates purportedly issued by United Democratic Party and Ford Kenya. The applicant alleges that the presentation by the defendants of Certificates from different parties whereas they participated in the ODM was fraudulent as the period allowed to defect from one party to another had lapsed by the time they presented certificates to the IEBC.

It was argued for the applicant that the IEBC did not have jurisdiction to deal with the question as it is also party to the dispute. The dispute did not therefore fall within the IEBC rules.

On behalf of the 2nd defendant it was argued that, Article 88 of the Constitution was mandatory. Counsel stated that a lot of the issues that were raised were hearsay. There was no list to show that the defendants moved from one party to the other. He urged the court to make an order for security for costs in the event that the said application is allowed

Mr. Gumbo for the applicant argued that the principles in the case of **Giella -VS- Cassman Brown & Co. Limited** must apply and the rights of the applicant must be weighed against the rights of the entire citizenry.

An order for injunction?

In deciding whether or not to grant orders of injunction, I do agree with counsel for the defendant that the court must be guided by the laid down principles in **Giella -VS- Cassman Brown & Co. Ltd [1973] E.A 358** and that the applicant's case must meet the threshold therein if he is to succeed. The question that we must ask ourselves is: does the applicants case meet the threshold?

The principles laid down in the Giella case are that:-

- (a) an applicant must show a prima facie case with probability of success**
- (b) an injunction will not normally be granted unless the applicant might otherwise suffer**

irreparable injury, which would not be adequately compensated by an award of damages.

(c) when the court is in doubt, it will decide the application on the balance of convenience .(EA Industries -VS- Trufoods [1972]EA 420.)

The court of Appeal in Mrao Ltd -VS- First American Bank of Kenya Ltd & 2 others [2003] KLR 125 clearly defined what a prima facie case in law. Bosire JA stated thus :- "so what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or a rebuttal from the latter.....a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

Can the applicant case be said to be *prima facie*? From the evidence presented by the applicant by way of supporting affidavit to his application one cannot be comfortably convinced that he has made out a prima facie case. All the applicant has done in support of his case is to annex copies of his voters registration card and National Identity Card. All the other allegations stated in his affidavit save for his registration as a voter are unsupported. The applicant has not annexed any documents to actually show that the defendants contested for nomination under the ODM ticket. As stated by the court of appeal in the *Mrao* case it is not sufficient to raise issues. The same must be supported by evidence showing that there is an infringement of a right. The applicant has failed to show that there is an imminent infringement of a right and that his case has a high probability of success. On that alone the applicant's case must fail.

The second requirement for such an application to succeed is that the applicant must demonstrate that he is likely to suffer irreparable loss which cannot be adequately compensated. This also the applicant has failed to demonstrate. What the applicant has done is to put together allegations of what transpired but he fails to demonstrate what injury the actions of the defendants are likely to cause. The balance of convenience therefore fails shift in the applicant's favour.

It merits to add that the matter herein is a grievance arising out of nominations involving members of different parties which would have been better handled in a different forum .The court in the recent case of Augustine Ogaye Adhola -VS- Hon. Nicholas Gumbo & 2 others has stated:- **It has been said time and again that there is considerable merit in the submission that where there is clear procedure for re-dress of any particular grievance prescribed by the Constitution or an Act of parliament that procedure should be strictly followed. See National Assembly -VS- Njenga Karume Civil Application No. 92 of 1992**

Equally, and as clearly alluded by the respondents the Orange Democratic party (O.D.M) is not a party to these proceedings. The issues raised by the applicants touches on that party and therefore if any demand was to be made in favour of the applicant the O.D.M as a party may be affected.

The sub total of my findings are that the said application ought to fail. It does not meet the threshold of a temporary injunction. I shall thus dismiss the same with no orders as to costs.

As stated at the beginning this shall apply to cases No. **Kisumu HCC Nos. 5 and 6 of 2013.**

Orders accordingly.

Dated, signed and delivered at Kisumu this 11th day of February, 2013.

H.K.CHEMITEI

JUDGE

In the presence of:

.....for the plaintiff

.....for the defendants

HKC/va