



**REPUBLIC OF KENYA**

**High Court at Kisumu**

**Civil Appeal 3 of 2013**

**IN THE APPLICATION BY: NICHOLAS OWINO RAJUA**

**AND**

**IN THE INDEPENDENT ELECTOROL AND BOUNDARIES COMMISSION**

**AND**

**IN THE MATTER OF ELECTION ACT NO. 24 OF 2011**

**THE INDEPENDENT ELECTOROL AND BOUNDARIES COMMISSION ACT NO. 90 OF 2011  
AND POLITICAL PARTIES ACT**

**AND**

**IN THE MATTER OF COUNTY REPRESENTATION SOUTH EAST ALEGO WARD NO. 1168**

**THE REPUBLIC .....APPLICANT**

**VERSUS**

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

**THE ORANGE DEMOCRATIC PARTY.....2ND RESPONDENT**

**JOSHUA OWITI OSURI.....INTERESTED PARTY**

**RULING**

The applicants application dated 4<sup>th</sup> February 2013 prays that:-

a) **The applicant be granted leave to apply for the following order**

1. **That this Honourable Court be pleased to certify this matter as urgent**

2. **That the Honourable Court be pleased to grant leave to the applicants to apply for Judicial Review application for the following orders:-**

a) **Certiorari to quash the decision dated 31<sup>st</sup> February 2013 by the 1<sup>st</sup> Respondent arbitrarily awarding or clearing the interested party Joshua Owiti Osuri as County Candidate for South East**

**Alego Ward No. 1168.**

- b) Prohibition to prohibit the Independent Electoral and Boundaries Commission from gazzeting Joshua Owiti Osuri as the County Candidate for South Alego Ward until the further orders of this court.**
- c) Mandamus directed at the Independent Electoral and Boundaries Commission to accept the nomination papers of the Applicant Nicholas Owino Rajula and a declaration that he is the candidate.**
- d) That if the leave sought in paragraph 2 above granted, then this court be pleased to order that the said leave do operate as a stay, stopping the respondents from gazetting and declaring the interested party as the name for county representative namely South East Alego – Ward No. 1168**
- e) That cost of this application be to the applicant.**

When this application came up under certificate of urgency on 4th February 2013 I did certify the same as urgent and ordered to be served.

On 7<sup>th</sup> February 2013 when it came up for hearing the issue that was to be determine as preliminary was whether leave if granted should operate as a stay.

The parties especially the respondent argued further that the issue of jurisdiction should be determined before considering any other aspects of the application.

Mr. Nyamogo counsel for the interested party raised this issue as a preliminary point to be determined vide the preliminary objection dated 6<sup>th</sup> February 2013.

### **Summary of the case**

A brief summary of the applicant's case is that he is a life member of the Orange Democratic Party(ODM) and is registered as a voter in **South East Alego Usonga** holding electors card No. **006835121128607**. The applicant alleges that on 17<sup>th</sup> January 2013, he attended and participated in the ODM party nominations and won the party ticket to contest for the post of county representative. That his name was forwarded to the IEBC and on **29<sup>th</sup> January 2013** he was presented with a nomination certificate but which contained the name **Nelson Owino Rajula** instead of **Nicholas Owino Rajula**. That on presenting the certificate to IEBC he was advised that his name could not be gazetted due to the said mistake. He was therefore required to rectify the mistake with his party first before presenting the certificate to IEBC. The applicant alleges that instead, the 2<sup>nd</sup> defendant issued a certificate to a different person, one Joshua Owiti Osuri, who was third in the nominations race. It was argued for the applicant that he deserved a chance to be heard before any party can be gazette.

It was submitted on behalf of the commission that the applicant's case was one that fell under Article 88 (4) (e) of the constitution and section 74 of the Election Act and as such the court lacked jurisdiction to handle the matter. **Mr. Gumbo** argued that if the court granted stay then it will have issued an order which is a nullity. He urged the court to make a finding on the issue of jurisdiction.

**Mr. Nyamogo** for the 2<sup>nd</sup> respondent echoed the submissions on behalf of the commission and stated that section 2 of the Elections Act defines the term dispute and the Act donates the power to resolve disputes arising from nominations to the commission. He also stated that the applicant waited too long before taking any step whatsoever and that he should therefore be prepared to suffer the consequences of his actions.

### **Analysis of issues**

The main issue that arises from the applicant case is one of jurisdiction. Is the court the best forum for the applicant to raise his case?

Article 88(4)(e) of the Constitution provides a way forward and answers our question adequately. It provides thus

**88(4) The commission is responsible for conducting or supervising referendum and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an act of parliament and in particular, for-**

**(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results**

Section 74 of the Elections Act obligates the commission to settle disputes arising from nominations. The issues arising herein is one between aspirants within a party. The applicant is aggrieved by the way the nominations was carried out in his party where he claims he won. From article 88(4) of the Constitution and Section 74 of the Elections Act, it is obvious that the applicant should have sought redress with the commission which is mandated with the duty of resolving nominations disputes before invoking the jurisdiction of the Court. The High Court in *Michael Wachira Nderitu vs- IEBC & 2 others Nairobi JR CAUSE NO. 25 OF 2013* has stated that:

**“We were also of the view that the dispute herein was a dispute between one political party and another which ought to have been dealt with in another forum before invoking the jurisdiction of the court. 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*

*also see: Augustine Ogaye Adhola vs- Hon. Nicholas Gumbo & 2 others*

With due respect therefore to the applicant I am incline to disallow the application for want of jurisdiction. The application is dismissed and each party shall bear their respective costs.

**Dated, signed and delivered at Kisumu this 11<sup>th</sup> day of February 2013.**

**H.K. CHEMITEI**

**JUDGE**

In the presence of:

.....for the applicant

.....for the respondent

*HKC/aao*