



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Petition 5 of 2013**

**IN THE MATTER OF ARTICLES 20, 21, 22, 23(3), 27(1) AND 38 AND 47 OF THE  
CONSTITUTION, 2010**

**AND**

**IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT ON THE PETITIONER'S  
CONSTITUTION RIGHTS**

**AND**

**IN THE MATTER OF NOMINATION OF MEMBER OF NATIONAL ASSEMBLY**

**AND**

**IN THE MATTER OF SUNA EAST CONSTITUENCY**

**AND**

**IN THE MATTER OF FAIR AND JUST ADMINISTRATIVE DECISIONS.**

**AND**

**IN THE MATTER OF THE CONSTITUTION (SUPERVISORY JURISDICTION AND PROTECTION  
OF FUNDAMENTAL RIGHTS & FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE  
AND PROCEDURE RULES, 2006**

**AND**

**IN THE MATTER OF SECTION 19 (SIXTH SCHEDULE) OF THE CONSTITUTION, 2010**

**JOHN PESA DACHE ..... PETITIONER/APPLICANT**

**-VERSUS-**

**THE INDEPENDENT ELECTORAL & BOUNDARY COMMISSION ... 1<sup>ST</sup> RESPONDENT**

**THE RETURNING OFFICER ..... 2<sup>ND</sup> RESPONDENT**

**AND**

ORANGE DEMOCRATIC MOVEMENT ..... 1<sup>ST</sup> INTERESTED PARTY

JUNET SHEIKH NUH ..... 2<sup>ND</sup> INTERESTED PARTY

## JUDGMENT

### THE PLEADINGS

1. The petition coming up for determination is dated 31<sup>st</sup> January 2013 and seeks orders in terms of the following:-

- a) Declaration that the Nomination Certificate allegedly issued by the 1<sup>st</sup> Interested Party and in favour of the 2<sup>nd</sup> Interested Party, which **may be** and/or has (sic) been presented to the Respondents was irregular, illegal, null and void.
- b) Declaration that the Nomination Certificate dated **18<sup>th</sup> January 2013** and issued by the 1<sup>st</sup> Interested Party and in favour of the Petitioner for Suna East Constituency, National Assembly Seat, is the only valid and lawful Nomination Certificate, by the 1<sup>st</sup> Interested Party.
- c) An Order of Judicial Review, in the nature of Certiorari to issue to bring to Court the Decision of the Respondents, whereby the Respondents have (sic) allowed the 2<sup>nd</sup> Interested Party to present Nomination Papers and thereby (sic) cleared same to contest the Suna-East Constituency, National Assembly Seat, albeit without a valid and authentic Nomination Certificate issued by the 1<sup>st</sup> Interested Party, unto this Honourable Court and same be quashed.
- d) An Order of Judicial Review, in the nature of Prohibition, to issue to prohibit the Respondents either by themselves, agents, servants and/or employees from accepting Nomination Papers from the 2<sup>nd</sup> Interested Party, (sic) issued by the 1<sup>st</sup> Interested Party, clearing and issuing a certificate in favour of the 2<sup>nd</sup> Interested Party, for purposes of contesting Suna East Constituency, National Assembly Seat, during the General Election scheduled for the **4<sup>th</sup> day of March 2013**.
- e) An Order of Judicial Review, in the nature of Prohibition, to issue to prohibit the Respondents either by themselves, agents, servants and/or employees from accepting any Nomination Certificate allegedly issued by and on behalf of 1<sup>st</sup> Interested Party, other than the Nomination Certificate issued in favour of the Petitioner dated **18<sup>th</sup> January 2013** and duly signed by the authorized officers of the 1<sup>st</sup> Interested Party.
- f) An Order of Judicial Review, in the nature of Mandamus, to issue to compel the Respondents to accept the Nomination Papers, presented by and/or [on] behalf of the Petitioner herein and thereby clear and issue a Certificate in favour of the Petitioner, for purposes of contesting Suna East Constituency, National Assembly Seat, during the General Election scheduled for the **4<sup>th</sup> day of March 2013**.
- g) Costs of the Petition be borne by the Respondents and the Interested Parties jointly and/or severally.
- h) The Honourable Court be pleased to issue such orders and/or writs as the Court may deem fit and/or expedient.

2. Contemporaneously with the Petition, the Petitioner filed a Chamber Summons seeking the following orders:-

1. The application herein be certified urgent and the same be heard ex-parte in the first instance.

2. *Pending the hearing and determination of the instant Application, the Honourable Court be pleased to grant an Interim Conservatory Orders of Injunction restraining the Respondents either by themselves, agents, servants and/or employees from accepting*
  3. *Nomination Papers from the 2<sup>nd</sup> Interested Party, (sic) issued by the 1<sup>st</sup> Interested Party clearing and issuing a Certificate in favour of the 2<sup>nd</sup> Interested Party, for purposes of contesting Suna East Constituency, National Assembly Seat, during the General Election scheduled for the **4<sup>th</sup> day of March 2013**.*
  4. *The Honourable Court be pleased to grant an Order of Temporary and Conservatory Order of Injunction restraining the Respondents either by themselves, agents, servants and/or employees from accepting Nomination Papers from the 2<sup>nd</sup> Interested Party, (sic) issued by the 1<sup>st</sup> Interested Party, clearing and issuing a Certificate in favour of the 2<sup>nd</sup> Interested Party, for purposes of contesting Suna East Constituency, National Assembly Seat, during the General Election scheduled for the **4<sup>th</sup> day of March 2013**, pending the hearing and determination of this Petition.*
  5. *Costs of this Application be borne by the Respondents and Interested Parties jointly and/or severally.*
  6. *Such further and/or other orders be made as the court may deem fit and expedient.*
3. Both the Petition and the Chamber summons are supported by grounds set out on the face of the Chamber Summons and in the Affidavits in support sworn by the Petitioner herein on 31<sup>st</sup> January 2013.
4. When the Petition came up for directions on 5<sup>th</sup> February 2013, after due service upon all the parties, it was agreed to merge the petition and the chamber summons in an effort to fast track the hearing and determination of the matter. In opposition to the Petition, the Respondents filed a Replying Affidavit dated 4<sup>th</sup> February 2013 and sworn by Mohamod Mohamed Jabane, Manager Legal Services with the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Interested Party also filed a Replying Affidavit dated 4<sup>th</sup> February 2013 and sworn by Judith Pareno, Secretary, NEB, of 2<sup>nd</sup> Interested Party. Copy of the said affidavit was not on the court file. The 2<sup>nd</sup> Interested Party also filed a Replying Affidavit dated 4<sup>th</sup> February 2013. The same is sworn by the 2<sup>nd</sup> Interested Party himself.

### **Facts**

5. The petitioner is a resident of Otacho sub-location Suna Central Location within Suba Division Migori District in the county of Migori. He is eligible for nomination as a member of the National Assembly in Suna East Constituency and is a former Member of Parliament for Migori Constituency. On the 17<sup>th</sup> January 2013 1<sup>st</sup> Interested Party held the party nomination exercise for all counties, with a view to determining a candidate for the Suna East Parliamentary seat. The petitioner claims to have won the said nomination after which he was issued with a nomination certificate as the duly nominated candidate for the 1<sup>st</sup> respondent in respect of the General elections to be held on 4<sup>th</sup> March 2013. Annexure "JPD2" to the Supporting Affidavit is a copy of the nomination certificate. The Petitioner thereafter presented himself to the 2<sup>nd</sup> respondent who issued him with an assortment of nomination papers and booked him for presentation of the same on the 31<sup>st</sup> January 2013 between 8.00-9.00 O'clock.
6. On 31<sup>st</sup> January 2013 the Petitioner presented himself before the 2<sup>nd</sup> respondent with the nomination papers duly issued by the respondents and the 1<sup>st</sup> Interested Party for purposes of being cleared but the 2<sup>nd</sup> respondent refused to accept the nomination papers contending that the petitioner had not been validly nominated by the 1<sup>st</sup> Interested Party. The Petitioner was informed that it was the 2<sup>nd</sup> Interested Party who had been validly nominated for the seat.

### **THE PETITIONER'S CASE**

7. The Petitioner contends that having been duly nominated and issued with a nomination certificate, neither the 1<sup>ST</sup> Interested Party nor the 1<sup>st</sup> Respondent could substitute his name with the name of the 2<sup>nd</sup> Interested Party, without recourse to the provisions of **section 74** of the **Elections Act** or without recourse to this court. The Petitioner further contends that the said substitution is a violation of his constitutional rights as enshrined under **Articles 21 and 99** of the **Constitution and section 31** of the **Elections Act, NO.24 of 2011 (the Act)**.

8. Lastly, Petitioner contends that the 1<sup>st</sup> Interested Party's allegation of fraud and forgery in respect of the Nomination certificate issued to the 2<sup>nd</sup> Interested Party has not been proved and that such allegation should not be used to deny the Petitioner his legitimate expectation of vying for the Suna East Parliamentary Seat during the forthcoming General Elections.

9. It is to be noted that after the 1<sup>st</sup> Interested Party submitted its list of nominees to the 1<sup>st</sup> Respondent as can be seen from annexure marked "JSN3", the 2<sup>nd</sup> Interested Party was subsequently cleared as the validly nominated candidate to run for Member of Parliament for Suna East.

#### THE RESPONDENTS' CASE

10. It is contended on behalf of the 1<sup>st</sup> Respondent that:-

(a) *It has no mandate to oversee nomination by political parties.*

(b) *Section 35 of the Act requires political parties to submit list of nominees once the nomination exercise is complete, and that the 1<sup>st</sup> Interested Party duly complied by submitting its nomination list on 21<sup>st</sup> January 2013 on which list the name of the 2<sup>nd</sup> Interested Party appeared as the duly nominated candidate for the Suna East Parliamentary Seat.*

(c) *The purported list of party nominees as submitted by the Petitioner is not signed nor does it have the rubber stamps of either the Respondents or the 1<sup>st</sup> Interested Party.*

(d) *Pursuant to Rule 43 (2) (f) of Legal Notice No.128 of 2012, the 2<sup>nd</sup> Respondent was under a duty to hold as duly nominated only the person whose name appeared on the forwarded nomination list, and in this case, that person is the 2<sup>nd</sup> Interested Party.*

(e) *Pursuant to Rules 9, 10, 13, 14 and 99 of Legal Notice No.139 of 2012, any dispute regarding the nomination should be by way of appeal to the 1<sup>st</sup> Respondent and that in the present circumstances, the Petitioner did not follow the laid down procedure for his complaint.*

(f) *The prayers of Judicial Review sought by Petitioner have since been overtaken by events and any orders issued by the court in this regard would be orders issued in vain.*

(g) *The petitioner has not demonstrated that the process of nomination by which the 2<sup>nd</sup> Interested Party was nominated was flawed in any way whatsoever.*

11. Counsel for Respondents has urged this court to dismiss the petition with costs.

#### THE 1<sup>ST</sup> INTERESTED PARTY'S CASE

12. The 1<sup>st</sup> Interested Party contends that it has its own internal dispute resolution machinery. That the 1<sup>st</sup> Interested Party never issued any nomination certificate to the 2<sup>nd</sup> Interested Party and that the only validly issued nomination certificate is the one that was issued to the Petitioner. It was also contended that this court should ignore any affidavit sworn by the 2<sup>nd</sup> Respondent who is an employee of the 1<sup>st</sup> Interested Party.

## CASE FOR THE 2<sup>ND</sup> INTERESTED PARTY

13. That the fact that the 2<sup>nd</sup> Interested Party was duly nominated by the 1<sup>st</sup> Interested Party for Suna Parliamentary seat is not disputed, and that there is no proof of fraud as alleged by the 1<sup>st</sup> Interested Party, nor is there any evidence that such fraud was ever reported to the police.

14. The 2<sup>nd</sup> Interested Party also contends that the Petitioner's case is res judicata the decision in **Nairobi High Court Petition No.48 of 2013** between the 1<sup>st</sup> Interested Party herein as Petitioner and the 1<sup>st</sup> Respondent as Respondent. Reference was made to **section 13 (2)** of the **Act** which provides:-

**“A political party shall not change the candidate nominated after the nomination of that person has been received by the Commission.”**

15. Further, it is the 2<sup>nd</sup> Interested Party's contention that the prayers sought by the Petitioner are all overtaken by events and that the nomination of the 2<sup>nd</sup> Interested Party remains unchallenged by dint of the provisions of **Regulations 4, 9, 10, 11 and 13** of **Legal Notice Number 139 of 2012**. That the Petitioner having failed to object to the 2<sup>nd</sup> Interested Party's nomination as by law provided cannot now be heard to say that the 2<sup>nd</sup> Interested Party was not validly nominated.

16. Counsel appearing urged this court to dismiss the Petition with costs to the 2<sup>nd</sup> Interested Party as this court has no jurisdiction to grant the orders sought.

## PETITIONER'S REPLY

17. The Petitioner maintained that the doctrine of res judicata does not apply in this case, as the Petitioner has not moved any other court in connection with this case. Secondly that this court has jurisdiction to hear the petition.

## THE APPLICABLE LAW

18. **Article 88** of the **Constitution of Kenya** establishes the 1<sup>st</sup> Respondent as an independent body responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of parliament and in particular **Article 88 (4) (d), (e) and (k)** give power to the 1<sup>st</sup> respondent over:

***“88(d) The regulation of the process by which parties nominate***

***candidates for elections.***

***(e) The settlement of electoral disputes, including disputes***

***relating to or arising from nominations but excluding***

***election petitions and disputes arising subsequent to the***

***declaration of election results;***

***(k) The monitoring of compliance with the legislation required***

***by article 82(1)(b) relating to nomination of candidates by***

***parties***

19. On the other hand, Parliament is mandated under Article 82 of the Constitution to enact

legislation to provide for the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda including the nomination of candidates for elections. Parliament enacted the Elections Act No.24 of 2011 for this purpose.

20. **Section 35(1)** of the said **Act** provides that a political party shall submit its party list to the commission on the same day as the day designated for submission to the commission by political parties of nomination of candidates for an election before the nomination of candidates under **Article 97(1) (a)** and **(b)**, **98(1) (a)** and **177(1) (a)** of the **Constitution**.

21. Under **Section 109** of the same **Act (no.24 of 2011)** 1<sup>st</sup> respondent is mandated to make regulations generally for the better carrying out of the purposes and provisions of the Act Regulation 14 of the Elections (general) Regulation 2012 (Legal Notice no.128/12) provides thus: ***“each political party intending to present a candidate in an election shall, after its nominations and on such date or within such period as the commission may designate, submit a list of persons nominated as candidates indicating the elective posts of which they are seeking election”***.

22. **Section 13(1)** of the **Elections Act No. 24 of 2011**, provides that a political party shall nominate its candidates for an election under the Act at least 45 days before the General Elections in accordance with its constitution and nomination rules. Legal Notice 139 of 2012 provides for the rules of procedure on settlement of election disputes, the appeal process to the commission among other matters.

#### FINDINGS AND CONCLUSION

23. Having carefully considered the petition, the oral arguments by all counsel appearing and after reading through the affidavits the following questions arise for determination. Did the Petitioner herein exhaust the internal party mechanism before filing the instant petition? If not, what is the consequence of such omission? From the submissions and arguments I find that the petitioner herein did not exhaust the internal party dispute resolution mechanism. Legal Notice Number 139 of 2009 is very clear on this. I therefore find and hold that the instant petition was brought prematurely before this court.

24. The law is very clear as regards the list of nominees submitted by a political party. In the instant petition the name forwarded by the 1<sup>st</sup> interested party to the 1<sup>st</sup> Respondent was that of the 2<sup>nd</sup> interested party, and by dint of the provisions of **Section 13** of the **Election Act** the 1<sup>st</sup> Interested Party cannot purport to run away from the submitted list. Because the name of the 2<sup>nd</sup> Interested Party was submitted to and received by the 1<sup>st</sup> Respondent, a change of the same can only be made if there is death, resignation or incapacitation of the nominated candidate or a violation of the electoral conduct by the nominated candidate. The Petitioner herein has not demonstrated that the 2<sup>nd</sup> Interested Party has died, resigned or become incapacitated as to warrant the removal of his name from the submitted list. For the above reasons, the petition herein is dismissed but with no order as to costs. A similar outcome has been reached in Petition NO.6 of 2013.

**Dated and Delivered at Kisii** this 08<sup>th</sup> day of February, 2013

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. Kerosi h/b for Oguttu-Mboya for Petitioners

Mr. Odhiambo (present) for Respondents

Mr. Muganda for 1<sup>st</sup> & 2<sup>nd</sup> Interested Party

Mr. Bibu – Court Clerk

**RUTH NEKOYE SITATI**  
**JUDGE.**