



REPUBLIC OF KENYA

High Court of Kisii

Petition 6 of 2013

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

AND

**IN THE MATTER OF: VIOLATION AND/OR INFRINGEMENT ON THE PETITIONERS'
CONSTITUTIONAL RIGHTS**

AND

**IN THE MATTER OF: NOMINATION OF MEMBERS TO THE COUNTY ASSEMBLY
WARDS**

AND

**IN THE MATTER OF: WASWETA II, WASIMBETE, RAGANA ORUBA & WIGA COUNTY
ASSEMBLY WARDS**

AND

IN THE MATTER OF: FAIR AND JUST ADMINISTRATIVE DECISIONS

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION &
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

BETWEEN

PATRICK ARAN ARAN 1ST PETITIONER/APPLICANT

BERNARD OLUOCH MWANGA 2ND PETITIONER/APPLICANT

KIONGE NGWALLA CHARLES 3RD PETITIONER/APPLICANT

MICHAEL ODHIAMBO OKOMBO 4TH PETITIONER/APPLICANT

VERSUS

THE INDEPENDENT ELECTORAL & BOUNDARY COMMISSION1ST RESPONDENT
THE RETURNING OFFICER, SUNA WEST CONSTITUENCY 2ND RESPONDENT

AND

ORANGE DEMOCRATIC MOVEMENT 1ST INTERESTED PARTY

HILLARY OCHOLA MAERI 2ND INTERESTED PARTY

KINAP ROLAND ASIGA 3RD INTERESTED PARTY

HEZRON ODHIAMBO OKELLO 4TH INTERESTED PARTY

ALBERT AMOLO ODETE 5TH INTERESTED PARTY

JUDGMENT

1. The petitioners filed a petition dated 1st February 2010 praying for:

- a) *Declaration that the nomination Certificates allegedly issued by the 1st Interested Party and in favour of the 2nd -5th Interested Party which may be or have been presented to the Respondents were irregular, illegal, null and void.*
- b) *Declaration that the Nomination Certificate dated 18th January 2013 and issued by the 1st Interested Party and in favour of the Petitioners for Wasweta II, Wasimbete, Ragana Oruba and Wiga County Assembly Ward, respectively, within Suna West Constituency, are the only valued and lawful nomination certificate, by the 1st Interested Party.*
- c) *An order of judicial review, in the nature of certiorari to bring to court the decision of the respondents, whereby the Respondents have allowed the 2nd -5th Interested Parties to present nomination papers and thereby cleared same to contest the Wasweta II, Wasimbete, Ragana Oruba and Wiga County Assembly Wards respectively, within Suna West Constituency, albeit without a valid and authentic nomination certificates(sic) issued by the 1st 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 2nd -5th Interested Parties, issued by the 1st Interested Party, clearing and issuing certificate in favour of the 2nd -5th*

Interested Parties for purposes of contenting for Wasweta II, Wasimbete, Ragana Oruba and Wiga County Assembly Wards respectively, within Suna West Constituency, during the general election scheduled for 4th 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 the 1st Interested Party, other than the nomination certificates issued in favour of the Petitioners dated 18th January 2013 and duly signed by the authorized officers of the 1st 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 petitioners herein and thereby clear and issue certificates in favour of the petitioners, for purposes of contesting, Wasweta II, Wasimbete, Ragana Oruba and Wiga County Assembly Wards respectively, within Suna West Constituency, during the general election scheduled for the 4th day of March 2013.

2. In addition to the petition, the petitioners filed a chamber summons dated 1st February 2013 seeking orders that:-

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 Nomination papers from the 2nd – 5th Interested Parties, (sic) issued by 1st Interested Party, clearing and issuing Certificates in favour of the 2nd – 5th Interested Parties, for purposes of contesting Wasweta II, Wasimbete, Ragana Oruba & Wiga County Assembly Wards, respectively within Suna West Constituency, during the General Election scheduled for the 4th day of March 2013.

3. The Honourable Court be pleased to grant an Order of Temporary Conservatory Order of Injunction restraining the Respondents either by themselves, agents, servants and/or employees from accepting Nomination Papers from the 2nd – 5th Interested Parties, (sic) issued by the 1st Interested Party, clearing and issuing Certificates in favour of the 2nd – 5th Interested Parties, for purposes of contesting Wasweta II, Wasimbete, Ragana Oruba & Wiga County Assembly Wards, respectively, within Suna West Constituency, during the General Election scheduled for the 4th day of March 2013, pending the hearing and determination of this petition.

4. Costs of this application be borne by the Respondents and Interested Parties jointly and/or severally.

5. Such further and/or other orders be made as the court may deem fit and expedient.

3. The application was supported by a supporting affidavit sworn by Patrick Aran Aran the 1st petitioner herein on behalf of the rest of the petitioners averring that they are registered members of the 1st Interested Party, that they were allowed to contest in the 1st Interested Party's nomination exercise for Wasweta II, Wasimbete, Ragana Oruba and Wiga County Assembly Wards respectively within Suna West Constituency (**herein referred to as the suit County Assembly Wards**). That the 1st Interested Party concluded nominations in the suit County Assembly Wards on 17th January 2013 and they emerged and were declared winners of the suit County Assembly Wards.

4. He further averred that on 15th January 2013 the 1st Interested Party prepared and issued a valid nomination certificate in line with the Political Party's Act and also issued a schedule showing the declared nominated candidates for various seats including persons who had been nominated for the suit County Assembly Wards and the names of the petitioners were shown as the valid nominees for the suit county nomination wards. That on being issued with the Party Nomination Certificates the petitioners presented themselves to the 2nd Respondent for collection of Nomination Papers over the suit County Assembly Wards, whereupon they were issued with nomination papers in readiness for clearance and were scheduled to present their nomination papers on 31st January 2013.

5. However, when the Petitioners presented themselves to the 2nd Respondent, the 2nd respondent failed/declined to accept their nomination papers for purposes of clearance on grounds that the 1st Interested Party had issued nomination certificates in favour of 2nd – 5th Interested Parties thereby preventing the petitioners from presenting their nomination papers and as a result of the actions of the

Respondents, the petitioners are bound to be denied their legitimate rights to contest or vie for the suit county assembly ward seats. That such an action amounts to a violation of their constitutional rights under **Articles 20, 27, 38 & 47 of the Constitution of Kenya, 2010.**

6. In conclusion the 1st Petitioner averred that the petition raises salient constitutional issues concerning the primary importance of the nomination exercise and the power of the people to participate in the election process and urged the court to grant conservatory orders as sought.

7. The 1st Respondent filed their memorandum of appearance and replying affidavit dated 4th February 2013 sworn by Mahamud Mohamed Jabane in his capacity as the 1st Respondent's Legal Services Manager. He contended that having received the list of nominees from the 1st Interested Party on 21st January 2013, the 1st Respondent has no option but to comply with the law governing submission of lists of nominees from the 1st Interested Party.

8. He therefore concluded that the instant petition is without merit, frivolous, vexatious and constitutes an unmitigated abuse of the court process and only lies to be dismissed with costs to 1st Respondent.

9. The 2nd – 5th Interested Parties entered appearance on 5th February 2013 through Omonde Kisera & Co. Advocates and raised a preliminary objection averring *inter alia* that:-

1. *Both the Application and the Petition are pure abuse of the process of the Honourable Court as the court lacks the requisite jurisdiction to entertain him pursuant to Articles 88 4 () of the Constitution and Section 74 of the Elections Act 2010.*

2. *Similar Petitions/matters have been dismissed by the Electoral Boundaries Commission Dispute Resolution Committee, a Constitutional Committee which is exclusively mandated to entertain such matters and no appeal or review of the said Committee's decisions have been sought and the Petitioners have deliberately concealed such material position to this Honourable Court.*

3. *The Petition and the Application are arbitrarily and unlawfully seeking Orders of Judicial Review vide a Petition a move that is fatal to both the Petition and the Application.*

4. *The Petition and the Application have been overtaken by events as the 2nd, 3rd, 4th and 5th Interested Parties were duly nominated by the 1st and 2nd Respondents on 31st January 2013.*

5. *The Petition and the Application are in clear abuse of the Political parties Act, Sections 34 and 35 of the Elections Act the Constitution and Election and Nomination Rules of Orange Democratic Movement Party and the fundamental rights of the 2nd, 3rd, 4th and 5th Interested Parties.*

10. When the Petition came up for directions on 5th February 2013, parties agreed to merge the petition and the chamber summons and to argue them together. Parties also agreed to adopt and rely on their respective submissions tendered to court in support of and/or in opposition to petition No.5 of 2013 in arguing this Petition. These submissions/arguments are deemed to form part of the record herein.

11. Counsel for the 2nd -5th Interested Parties argued that the Petitioners:-

a) *Have not demonstrated that their nomination certificates were superior to those issued to the 2nd – 5th Interested Parties;*

b) *Have not proved that there was forgery on the part of the 1st Interested Party in issuing the nomination certificates to the 2nd – 5th Interested Parties.*

c) *Have not proved their allegations of breach of their fundamental rights.*

12. It was argued further that once the list of nominees submitted by the 1st Interested Party was received by the 1st Respondent, there is no turning back on the said list and by dint of the provisions of **Article 88 (4) (e)** of the **Constitution** and **Section 74** of the **Elections Act**, and therefore that this court has no jurisdiction to issue the reliefs sought by the Petitioners herein.

13. Thirdly it was contended that the Petitioners having had their complaints filed with the Electoral Boundaries Dispute Resolution Committee dismissed, they should have preferred an appeal instead of moving this court for writs of certiorari, prohibition and mandamus.

That accordingly, this petition is res judicata the decisions referred to herein above.

14. It was also contended that the prayers sought by the Petitioners have all been overtaken by events, the 2nd -5th Interested Parties having been duly issued with nomination certificates and that if there are any disputes, the same should have been resolved through the party's internal dispute resolution mechanism.

15. **Article 88 (4) (e)** and **(f)** of the **Constitution** and **Section 74** of the **Elections Act** provide that the IEBC shall be responsible for the settlement of disputes, including disputes relating to or arising from nomination but excluding election petitions and disputes subsequent to the declaration of election results.

16. In the case of **Francis Sitau Parsima & 2 others –vs- National Alliance Party & 4 others [2012] e KLR**, Majanja J. persuasively held:

“At the core is whether this court should intervene to stop the electoral

process so that a party who claims that his or her rights have been infringed can agitate his rights before the court. To determine this issue, the constitution must be read a whole. On the one hand there is the Bill of Rights which protects inter alia the political rights of the petitioner. These rights are enforceable under the provisions of Articles 22. Article 22 offers the petitioners direct access to the High Court to enforce fundamental rights and freedoms. There is also Article 258 which entitles any person to move the court where the constitution is contravened or is threatened with contravention. The petitioners have exercised the option to invoke these provisions to move the court.

On the other hand, it must be clear that political rights are exercised through a political process involving many actors; the citizens and institutions. This is the process provided for and the counsel for the 1st respondent argued that the petitioner had not exhausted all channels before coming to this court for redress. I therefore uphold the preliminary objection and dismiss petition No.6 of 2013 with no order as to costs.

Provisions of Chapter Seven of the Constitution titled: “Representation of the people: These provisions are operationalized by the Independent Electoral and Boundaries Commission Act 2011, the Elections Act, 2011 and the Political Parties Act, 2011. In individual political rights and the electoral process cannot be divorced from one another but must go hand in hand. It is therefore proper that political rights are realized within a structured process that takes into account the larger interests of the society and the need for a free and fair election which is enhanced by self contained statutes enacted to give effect to its provisions.

It is against this background that the Court of Appeal established the principle that where the Constitution and or statute establish a dispute resolution procedure, then that procedure must be used. Within the rubric of the electoral process, this principle has been emphasized time and again in a long line of cases, The Speaker of the National Assembly –vs- the Hon. James Njenga Karume, Civil application NO.92 of 1992 (unreported) Kipkalya Kiprono Kones –vs- Republic & Another Ex parte Kimani Wanyoike & 4 others, [2008] 2 KLR (EP) 43.

In my view, this incidence of a specific procedure is not

inconsistent with the Bill of Rights. It is recognition that election disputes require special rules for determination. These rules are justifiable in a democratic society and the constitution itself contemplates that the electoral process is a special process.'

17. Applying the above principle to the instant Petition, I am of the considered view that the Petitioners had not exhausted all dispute resolution channels before coming to this court for redress. I therefore uphold the preliminary objection and dismiss Petition NO.6 of 2013 with no order as to costs.

Dated and delivered at Kisii this 8th day of February, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Kerosi Ondieki HB for Oguttu-Mboya for Petitioners

Mr. Odhiambo (present) for 1st and 2nd Respondents

Mr. Kerosi (present) for 1st Interested Party

Mr. Omnde Kasera (not in court) for 2nd – 5th Interested Parties

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.