



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 43 of 2013

**IN THE MATTER OF ARTICLES 29, 33(1)(a), 3, 36(1), 37, 38, 39, 47(1)(2)(3), 48, 50, 84 & 88 OF
THE CONSTITUTION OF KENYA**

AND

THE HIGH COURT PRACTICE & PROCEDURE RULES 2006

AND

**IN THE MATTER OF SECTIONS 58, 60, 61, 63, 64, 65, 67, 72, 73 & 74 OF THE ELECTION
ACT, 2011**

AND

**IN THE MATTER OF S. 41, 45 & 47 OF THE POLITICAL PARTIES ACT (CHAPTER 11 OF
2011)**

AND

IN THE MATTER OF THE POLITICAL PARTIES CODE OF CONDUCT

BETWEEN

AUGUSTINE OGAYE ADHOLA..... PETITIONER

VERSUS

HON NICHOLAS GUMBO..... 1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY OF KENYA.....3RD RESPONDENT

REASONS FOR THE DECISION

1. The Petitioner herein, **Augustine Ogaye Adhola**, vide his Petition dated 30th January 2013 sought the following orders:

a. That this Application/Petition be certified urgent and heard ex-parte at the first instance.

- b. An injunction restraining the 1st Respondent by himself, agent, servant, body or howsoever, whosoever acting on his instructions from presenting the 1st Respondent's Orange Democratic Movement party nomination documents to the 2nd Respondent for publication, gazettelement and printing of ballot papers for the forthcoming general elections pending the hearing and determination of this Application/Petition.**
- c. An injunction restraining the 2nd Respondent by itself, official(s), servants, agents or whosoever whatsoever acting on its instructions from accepting the 1st Respondents' Orange Democratic Movement party nomination documents for publication, gazettelement and printing of ballot papers for the forthcoming general elections pending the hearing and determination of this Application/Petition.**
- d. An injunction restraining the 3rd Respondent's by itself, official(s), servants, agents or whosoever whatsoever acting on its instructions from issuing a nomination certificate, presenting the name of the 1st Respondent to the 2nd Respondent as the lawful party nominated candidate for Rarieda Constituency member of parliament pending the hearing and determination of this Application/Petition.**
- e. An mandatory injunction directed at the 2nd Respondent by itself, official(s), servants, agents or whosoever whatsoever acting on its instructions to stop and/or suspend all further preparations, detail, supervision in electing a member of parliament for Rarieda Constituency in the forth coming general election of 4th March, 2013 pending the hearing and determination of this Application and Petition.**
- f. The costs and incidental to this Application and Petition.**
- g. Such other or incidental orders, reliefs and/or remedies as the Honourable Court shall deem just and expedient.**

2. On 31st January, 2013, after hearing the parties, we dismissed the said Petition with no order as to costs. We now give our reasons for the said decision.

3. The grounds upon which the petition was based were in summary that during the course of the Party nominations for Rarieda Constituency Parliamentary seat for the Orange Democratic Movement Party (the Party) massive irregularities and election malpractices were perpetrated by the 1st respondent by way of electoral fraud, thuggery and irregularities in conjunction with hired youths and police officers. Due to the limited time and deadlines placed by the 2nd and the 3rd respondents in regard to party nominations, dispute resolution and submission of nominated party members for various elective posts, rules of natural justice were curtailed thereby leaving the only option of moving this Court available for the Petitioner. It was further contended that the Commission's Tribunal refused to accept evidence and therefore the right to fair hearing and fair administrative action as well as access to justice was violated.

4. On behalf of the 1st respondent it was argued that the Court must be guided by Article 165(3)(d) of the Constitution under which the Court's jurisdiction is supervisory. In this case it was contended that the matter ought not to have been brought by way of judicial review. Further the petitioner's argument was a departure from the pleadings. According to the 1st respondent a full hearing was given and the finding was that there was no conclusive evidence. The issues raised according to the 1st respondent amount to allegation of commission of election offences which are outside this Court's jurisdiction. Since the matters can be the subject of an election petition no prejudice would be suffered by disallowing the petition.

5. The Party similarly was of the view that the allegations made against the process were dealt with by the Tribunal and a determination thereon made hence the party acted in accordance with the decision of the Tribunal.

6. According to the Commission, the case was duly heard and determined based on the evidence that was before the Tribunal hence the matter is in effect an appeal.
7. After considering the material placed before us we agreed with the 1st respondent's position that the submissions made before us with respect to the failure to accord the Petitioner the opportunity to adduce evidence before the Tribunal was a departure from the pleadings. According to the pleadings, the only complaint was with respect to the irregularities that took place during the Party Nomination process. There was no allegation at alleged levelled against the party in either the petition or the affidavits filed. Accordingly we agree that the belated attempt to introduce the issue of denial of opportunity to present the petitioner's case was an afterthought.
8. As there was no allegation that the petitioner was not heard we associate ourselves with the decision in **Kamlesh Mansuklal Damji Pattni & Another vs. R. Nairobi HCMA No. 322 of 1999** that A fair trial in the Constitutional context does not refer to the merits or *bona fides* of the process case but deals with trial process; the decision making process sometimes referred to as "due process". No recognised human right or fundamental freedom is contravened by a Judgement or order that is wrong and liable to set aside on appeal for an error of fact or substantive law. The remedy for errors of this kind is to appeal to a higher court and where there are no higher courts to appeal to, then none can say that there was an error. The fundamental right is not a legal system that is infallible but one that is fair. It is only errors of procedure that are capable of constituting infringement to the rights protection and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to failure to observe one of the fundamental rules of natural justice. The concept of fair trial is not an abstraction; it is contextual. Whether or not there has been a breach of right to fair trial will ultimately depend on the circumstances of each case.
9. With respect to commission of offences, the same ought to be dealt by the criminal court, it is true that we are not in these proceedings sitting as a criminal court and such allegation are better ventilated in a different forum and if proved we are certain that the petitioner herein will have appropriate remedies.
10. We were also of the view that the dispute herein was a dispute between members of a political party and the party 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.**
11. On the basis of the foregoing we found the petition unmerited thus the orders made herein

Dated at Nairobi this 5th day of February 2013

D S MAJANJA

JUDGE

W KORIR

JUDGE

G V ODUNGA

JUDGE