



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 54 of 2013

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT

AND

IN THE MATTER OF THE ORANGE DEMOCRATIC MOVEMENT

AND

IN THE MATTER OF TAITA-TAVETA COUNTY WOMEN REPRESENTATIVE

AND

IN THE MATTER OF NOMINATION OF HOPE SANGULI MWAKIO

BETWEEN

HOPE SANGULI MWAKIO..... PETITIONER

VERSUS

ORANGE DEMOCRATIC MOVEMENT..... 1ST RESPONDENT

JOYCE WANJALA LAY.....2ND RESPONDENT

MOVEMENTINDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC).....3RD RESPONDENT

REASONS FOR THE DECISION

1. The Petitioner herein, **Hope Sanguli Mwakio**, vide his Petition dated 31st January 2013 sought the following orders:

(1) **THAT** the name of Joyce Wanjala Lay and/or any other person other than the Petitioner's name be expunged from the list to The IEBC of Orange Democratic Movement Party of Kenya (ODM) as an aspirant for Member of Women Representative Seat in Taita-Taveta

County and the same be replaced with Hope Sanguli Mwakio as the validly nominated ODM aspirant for the said position.

(2) THAT each party bears their own costs

2. On 1st February, 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. According to the Petitioner, being a Life Member of ODM Party she participated in the nomination exercise for the party held on 17th January 2013 for the position of Women Representative for Taita-Taveta County on the said Party ticket. According to her the election in the entire county was conducted without following the Party Election and Nomination Rules. Further due to the delay in delivery of election materials in her strongholds a large number of eligible voters failed to vote. According to her the foregoing occasioned serious fundamental errors. Further the exercise was riddled with corrupt and illegal practices. It is further alleged that the Constituency Returning Officers and Presiding Officer acted with bias, partisanship and in bad faith by not affording the Petitioner a reasonable opportunity to put forward her case, while some none members were permitted to vote more than once. It is further contended that there was open favouritism and nepotism in appointment of election officials to her detriment. Although the Tribunal heard the matter, it dismissed the same for insufficient evidence though the evidence that was presented before the Tribunal was that the same was a sham and that the same was uncontroverted.

4. The party opposed the petition by contending that the matter before the Court is in the nature of an appeal since the Tribunal dealt with the matter and decided the issue on the basis of lack of evidence. No rule has been alleged to have been infringed hence the nomination was in accordance with the rules and the 2nd respondent had been declared the candidate.

5. Similarly the Commission's position was that the matter before the Court was in the nature of an appeal since the Tribunal determined the matter and no error was shown to have been committed.

6. We considered the material on record. From the record it is clear that the Petitioner's main complaint was against the process of the conduct of the nomination process by the Party. The Complaint against the Commission seemed to be centred around the "error" in finding that there was no sufficient evidence before it. That may be so. However, there was no allegation of breach of the petitioner's fundamental rights or that she was not accorded a fair hearing. What was complained of was the finding of the Tribunal which was contrary to the evidence which according to the Petitioner was uncontroverted.

7. Having considered the foregoing we were of the view that the complaint was on the merits of the decision rather than the process hence does not meet the threshold for interference by a Court investigating breach of fundamental rights and freedoms.

8. 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. See **Kamlesh Mansuklal Damji Pattni & Another vs. R. Nairobi HCMA No. 322 of 1999; Maharaj vs. A.G. Trinidad and Tobago (1978) 2 WLR 902 At 912.**

9. We further agree that the issue herein was a party issue that ought to have been dealt with at the party level.

10. In the premises and based on the material before us we found no merit in the petition which we dismissed in terms of the orders mentioned hereinabove.

Dated at Nairobi this 5th day of February 2013

D S MAJANJA

JUDGE

W KORIR

JUDGE

G V ODUNGA

JUDGE