



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Civil Application 41 of 2013**

**IN THE MATTER OF ARTICLE 23 AND ARTICLE 165 (3) (b), 89(10), 258 AND 259 OF THE  
CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF AN APPLICATION BY JULIUS CHACHA MABANGA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER ARTICLE 47, 50, 90, 258 AND 259 OF THE CONSTITUTION OF KENYA,**

**BETWEEN**

**JULIUS CHACHA**

**MABANGA .....PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ..... 1<sup>ST</sup>  
RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT ..... 2<sup>ND</sup>  
RESPONDENT**

**AND**

**MARK CHACHA ..... INTERESTED  
PARTY**

**REASONS FOR THE DECISION**

1. By a Petition dated 29<sup>th</sup> January, 2013 the Petitioner, **Julius Chacha Mabanga**, sought the following orders:

a. This matter be certified as urgent and (1) service of the petition be dispensed with in the first instance (2) conservatory orders be granted forthwith;

b. A conservatory order by way of injunction directed at the 1<sup>st</sup> and 2<sup>nd</sup> respondents prohibiting them, their officers or any person acting under their instructions from implementing any and all

**decisions made on 28<sup>th</sup> January 2013 in relation to Kuria East Constituency, Migori County nominating, permitting or otherwise installing the Interested Party as the 2<sup>nd</sup> Respondent's candidate for the elections due to be held on 4<sup>th</sup> March 2013 pending the hearing and determination of this Petition;**

**c. A declaration that the said decision issued on 28<sup>th</sup> January 2013 in relation to Kuria East Constituency, Migori County nominating, permitting or otherwise installing the Interested Party as the 2<sup>nd</sup> Respondent's candidate for the elections due to be held on 4<sup>th</sup> March 2013 pending the hearing and determination of this Petition;**

**d. Costs of this Application be borne by the Respondents or otherwise provided for.**

2. On 31<sup>st</sup> January, 2013 we allowed this Petition and set aside the decision of the 1<sup>st</sup> Respondent herein, the Independent Electoral and Boundaries Commission, hereinafter referred to as the Commission in IEBC/NDC/01/2013 of 20<sup>th</sup> January 2013. We further directed the Commission to hear the matter in accordance with the law. We now give our reasons for the said decision.

3. The Petitioner's case is that he was a candidate for Member of Parliament for Kuria East Constituency on Orange Democratic Movement Party (hereinafter referred to as the Party) in which he was declared a winner and was issued with a provisional certificate. Although other parties similarly alleged to have been issued with similar certificates no challenge was taken as provided by the party internal dispute resolution mechanisms. However on 25<sup>th</sup> January 2013, he got information that his name had appeared in the local newspaper indicating that his nomination was subject of proceedings before the Commission's Nomination Dispute Resolution Committee (hereinafter referred to as the Committee). He was however not aware of the proceedings which apparently took place on 24<sup>th</sup> January 2013 in which it was determined that the Interested Party herein be awarded the Party's nomination certificate. According to him the said decision was made in breach of the rules of natural justice as well as in contravention of the provisions of Article 47 of the Constitution which guarantees the right to fair and efficient administrative action.

4. On the part of the party, it was submitted that the Party was ready to abide by any decision of the Court.

5. On the part of the Commission it was contended that the parties were notified in the newspapers of the proceedings which were public knowledge and that the Party which was represented.

6. We have considered the evidence on record. It is clear that the newspaper advertisement was published on 25<sup>th</sup> January 2012. The Petitioner's averment that the dispute was determined on 24<sup>th</sup> January, 2013, is not controverted. In the premises that Petitioner's contention that the Committee made a determination adverse to him without him being afforded an opportunity of being heard is unassailable. The right to be heard is a fundamental right and under Article 25(c) the right to fair trial is one of the rights that are not subject to limitation. In **Girado Othieno Mahaja vs. Khafulu Khatwala & Another Civil Appeal No. 19 of 1983 [1983] KLR 553; 1 KAR 265; Vol. 1 KAR 265** it was held that the object of all service is to give notice to the party on whom it is made, so that he may be aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the court may feel perfectly confident that service has reached him, everything has been done that is required. In this case the alleged service by way of advertisement was made after the determination had been made. That cannot by any stretch of imagination amount to valid service. In the said case it was held that once he embarks on hearing one side then it is his duty to hear the other and a failure to do so would amount to an error on the face of the record requiring correction by *certiorari*. It must be remembered that the court as a custodian of the rights of those under its jurisdiction the court must make sure that justice is done to those who come before it regardless of whether or not that interferes with the management of the executive arm of the Government. In **Hoggard vs. Wordsbrough U. D. C. [1962] 1 All ER 468 at 471** it was held that where two parties are in dispute, and the obligation of some person or body is to decide equitably between the competing claims, each claim must receive consideration and each claimant must

be invited, not merely left so that if he chooses the initiative he can do it, to put forward the material in the form of documents or accounts which he desires to have considered, and the opportunity must be afforded to him of making comment on material of the same character which has been put forward by rival claimants and which the council are proposing to consider.

7. Where a party has not been afforded an opportunity of being heard the process cannot be said to have been fair and the High Court has jurisdiction to reverse the decision of the Committee since that amounts to a defect in the process as opposed to the merits.

8. It was for the foregoing reasons that we allowed the petition as indicated hereinabove but with no orders as to costs.

**Dated at Nairobi this 5<sup>th</sup> day of February 2013**

**D S MAJANJA**

**JUDGE**

**W KORIR**

**JUDGE**

**G V ODUNGA**

**JUDGE**