



**REPUBLIC OF KENYA**

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

**Petition 49 of 2013**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 2, 10, 19, 20, 21, 22, 23, 38, 87 AND 91 OF THE  
CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF ELECTIONS ACT NO. 24 OF 2011 LAWS OF KENYA AND THE  
RULES MADE THEREUNDER**

**AND**

**IN THE MATTER OF THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION  
ACT, 2011**

**AND**

**IN THE MATTER OF THE INTERNATIONAL CONVENTION ON CIVIL & POLITICAL  
RIGHTS**

**AND**

**IN THE MATTER OF THE DOCTRINE OF LEGITIMANTE EXPECTATION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION  
AND PROTECTION OF**

**FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL (HIGH COURT  
PRACTISE AND PROCEDURE RULES, 2006**

**AS READ WITH SECTION 19 OF THE TRANSITIONAL AND CONSEQUENTIAL  
PROVISIONS OF THE CONSTITUTION**

**BETWEEN**

**PHILEMON DONNY**

**OPAR.....PETITIONER**

VERSUS

ORANGE DEMOCRATIC MOVEMENT.....1<sup>ST</sup>  
RESPONDENT

HON. JAMES REGE.....2<sup>ND</sup>  
RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....3<sup>RD</sup>  
RESPONDENT

**REASONS FOR THE DECISION**

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

- a. That this application be certified as urgent and service thereof be dispensed with in the first instance.
- b. That an Order of injunction be issued forthwith restraining the 3<sup>rd</sup> respondent herein, either by itself, agents, servants and or persons acting under their instructions from in any way receiving any purported nomination papers relating to the Office of member of Parliament, Karachuonyo Constituency from the 1<sup>st</sup> Respondent and from in any way acting upon any Party list presented to it by the 2<sup>nd</sup> respondent and/or from acting in any manner that is prejudicial to the legitimate political interest of the Petitioner pending the hearing and determination of the Application herein inter-parties and/or until further orders of this Honourable Court.
- c. That an Order of injunction be issued forthwith restraining the 3<sup>rd</sup> respondent herein, either by itself, agents, servants and or persons acting under their instructions from in any way receiving any purported nomination papers relating to the office of member of Parliament, Karachuonyo Constituency from the 1<sup>st</sup> Respondent and from in any way acting upon any party list presented to it by the 2<sup>nd</sup> Respondent and/or from acting in any manner that is prejudicial to the legitimate political interest of the Petitioner pending the hearing and determination of the Petition herein and/or until further orders of this Honourable Court.
- d. That an Order of injunction be issued forthwith restraining the 1<sup>st</sup> and 3<sup>rd</sup> Respondent herein, either by itself, agents, servants and or persons acting under their instructions from in any way deleting and/or substituting the petitioner's name as appearing in the Orange Democratic Movement aspirants Party list as duly presented to the 3<sup>rd</sup> Respondent and/or from acting in any manner that is prejudicial to the legitimate political interest of the Petitioner pending the hearing and determination of the Application herein inter-parties, the petition herewith and/or until further orders of this Honourable Court.
- e. That an interim mandatory order of injunction to issue forthwith directing the 1<sup>st</sup> Respondent to produce and forthwith issue the petitioner/Applicant with a nomination certificate as the duly nominated member of the National Assembly, Karachuonyo Constituency.
- f. That an interim Mandatory order of injunction to issue forthwith compelling the 2<sup>nd</sup> Respondent to accept the Applicant's Application forms in the event that the 1<sup>st</sup> Respondent fails to produce and issue the Applicant with a nomination certificate as the duly nominated member of the National Assembly, Karachuonyo Constituency.
- g. That the costs of this application be in the cause.

2. On 1<sup>st</sup> 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. The grounds upon which the petition was based were in summary that despite the Petitioner having been duly nominated as member of Parliament for Karachuonyo Constituency by the 1<sup>st</sup> respondent (the party), the party has refused to issue him with a nomination certificate. Further the party has breached the electoral code of conduct by issuing the 2<sup>nd</sup> respondent with a nomination certificate despite the 2<sup>nd</sup> respondent being a member of another party in breach of the provisions of the Political Parties Act. Despite this evidence having been presented to the Commission, the same was rejected. According to the petitioner he could not invoke alternative remedies as the same were unknown to him hence has no exhausted the internal mechanism. Further there was widespread violence in the entire exercise.

4. On the part of the party it was contended that the proceedings are a duplication of what occurred before the Political Parties Tribunal. The petitioner failed to prove the double membership of the 2<sup>nd</sup> respondent and having discovered new evidence ought to have gone back for review hence the matter before the Court is in the nature of an appeal.

5. The Commission associated itself with the foregoing sentiments and was of the view that since it was not aware of what took place before the Political Parties Tribunal the petitioner could apply for review under section 41(2) of the Political Parties Act.

6. We have considered the foregoing. The contention that the petitioner on discovery of further evidence was at liberty to go back before the Tribunal has not been seriously contested. Accordingly there was an alternative procedure and remedy available to hm. The law is that where there is clear procedure for redress 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.**

7. Apart from the foregoing it was our view that the issues of the commission of election offences ought to be dealt by the criminal court since in these proceedings we are not sitting as a criminal court and such allegations are better ventilated in a different forum and if proved we are certain that the petitioner herein will have appropriate remedies.

8. On the basis of the foregoing we found the petition unmerited hence the orders made herein.

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

**D S MAJANJA**

**JUDGE**

**W KORIR**

**JUDGE**

**G V ODUNGA**

**JUDGE**