



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.139 OF 2013

BETWEEN

STANLEY KILIMO KORE.....PETITIONER

AND

EDWARD KATAMA NGEYWA.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

AND

UNITED REPUBLICAN PARTY.....INTERESTED PARTY

JUDGMENT

1. This Petition challenges the nomination of the 1st Respondent, **Edward Katama Ngeywa**, as the candidate for the position of Senator of Trans-Nzoia County after a nomination exercise conducted by the 2nd Respondent between the 17th and 18th of January 2013.

2. The Petitioner, **Stanley Kilimo Kore**, in his Amended Petition dated 18th March 2013 seeks *inter alia* the following orders;

“(a) A declaration that the Petitioner is the rightful and lawfully nominated candidate for the position of Senator, Trans Nzoia County under the United Republican Party (URP) ticket

(b) A declaration that the actions of the 2nd Respondent in permitting and or receiving the 1st Respondent's purported nomination for the position of Senator Trans Nzoia County under the United Republican Party ticket are illegal, unconstitutional and null and void.

(c) That an order do issue cancelling the nomination of the 1st Respondent, Edward Katama Ngeiywa.

(d) That an order do issue compelling the 2nd Respondent to publish the applicant's name in the March 4th General Election ballot papers for the position of Senator in Tran-Nzoia County and in the alternative to postpone the said election for the position of Senator in Trans

Nzoia County unless and until the applicant's name is on the ballot paper for the same.

(e) Any other Order that the Honourable Court may deem fit to grant including compensation for loss and damage.

(f) That cost of this Petition be provided for.”

3. The Petition is supported by an affidavit sworn by the Petitioner on 26th February 2013 and a Supplementary Affidavit sworn on 18th March 2013. The Petition is opposed. The 1st Respondent filed a Replying Affidavit sworn on 11th March 2013. The 2nd Respondent filed a Replying Affidavit sworn by Praxedes Tororey, the Commission's Director of Legal and Public Affairs on 28th March 2013. All parties filed written submissions. The Petitioner's and 1st Respondent's submissions are dated 18th March 2013 while the 2nd Respondent's are dated 28th March 2013. The Interested Party did not file any response to the Petition.

Facts of the case

4. The facts relating to this Petition are highly contested. From the pleadings before me, it is however clear and undisputed that both the Petitioner and the 1st Respondent offered themselves for nomination as the Senatorial candidates for Trans-Nzoia County on the Interested Party's (URP) ticket for the March 2013 General Elections. Allegedly, both of them were nominated and were both allegedly presented with nomination certificates by their political party (URP) which they both presented to the 2nd Respondent. The 2nd Respondent raised the matter of duplicity of nomination with URP and it is allegedly claimed that the 1st Respondent was confirmed as the winner of the nomination exercise and as a result, he was cleared to contest for the position of Senator Trans-Nzoia County by the 2nd Respondent. Before that, the 1st Respondent had been apprehensive that the Petitioner would present his nomination certificate to the 2nd Respondent and he instituted a suit in the High Court being **Kitale Election Petition No. 2 of 2013, Edward Katama Ngeywa v Kilimo Kore** seeking an injunction to restrain the 2nd Respondent from receiving any nomination papers from the Petitioner on the URP ticket. This suit was later withdrawn by the Petitioner and Justice J.R Karanja made an order to that effect on 11th February 2013.
5. Thereafter, the Petitioner made a complaint to the 2nd Respondent's Dispute Resolution Committee, in complaint **No. IEBC/DRS/12/2013** which was dismissed on 7th February 2012 on the grounds that it had lacked merit and the Petitioner had presented his papers to lodge the complaint too late in time. As a result he sought judicial review orders in **JR No. 55 of 2013, R v Independent Electoral & Boundaries Commission Ex Parte Stanley Kilimo Kore** to quash the decision of the 2nd Respondent's Dispute Resolution Committee. The Application was disallowed and the Court held that it was not concerned with the merits but the process of nomination and also that the 1st Respondent had not been served.

Thereafter, the present Petition was filed.

Petitioner's Submissions

6. It is the Petitioner's submission that the process of nomination and registration of candidates by the 2nd Respondent is governed by the Constitution and other Acts of Parliament. He claims that **Article 22** of the **Constitution** deals with enforcement of the Bill of Rights and it gives the right to every person to institute Court proceedings claiming that a right or fundamental freedom in the Bill or Rights has been denied, violated or infringed or is threatened. He further states that **Article 23** of the **Constitution** enjoins this Court to uphold and enforce the Bill of Rights by hearing and determining every Application for redress of a denial, violation or infringement of/or threat to a right or fundamental freedom in the Bill of Rights and it is his contention that specifically his political rights under **Article 38** of the **Constitution** have been violated.

7. He also claims that **Article 88** of the **Constitution** requires the 2nd Respondent to regulate the process by which parties nominate candidates for elections, the settlement of electoral disputes including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results and the registration of candidates for election.
8. That **Section 14 (1)** of the **Election Regulations** provides that each political party shall submit a list of persons nominated as candidate indicating the elective posts which they are seeking. **Sub-section 4** provides that each political party shall submit only the name of one person as their candidate. He claims that the Interested Party submitted his name to the 2nd Respondent as the nominee for the senatorial seat in Trans-Nzoia County and that having been so nominated, he presented his papers for clearance to the 2nd Respondent's Returning Officer for Trans-Nzoia County on 31st January 2013 in accordance with **Section 26** of the **Elections Regulations** but his documents were not accepted without any valid written reasons being given thereby.
9. It is his position that under **Section 43(1)** of the **Election Regulations**, the Returning Officer of the 2nd Respondent was bound to accept the certificate of nomination bearing his name and in the event he decided that the certificate was invalid, he ought to have recorded the decision and reasons thereof on the nomination paper. It was therefore his submission that the Returning Officer acted beyond his mandate by refusing to accept the certificate of nomination and failing to give written reasons as required by law.
10. He has added that the certificate issued to the 1st Respondent was issued in error or fraud and relied on **Section 13(2)** of the **Elections Act No. 24 of 2011** which provides that a political party shall not change the name of the candidate nominated after the nomination of that person has been received by the Commission. He submitted that once the party had submitted the list of nominees to the 2nd Respondent, the same could not be substituted or amended without a Court order and the 2nd Respondent had a duty to clear the Petitioner to run for elections upon the said nomination. He therefore contends that the actions of the 2nd Respondent were irregular, unjust, unlawful, fraudulent, unconstitutional and in breach of the Petitioner's rights.
11. It is also his case that the decision of the 2nd Respondent's Dispute Resolution Committee was illogical as there was no reasonable or rational basis for that decision since the Interested Party herein had already cleared the Petitioner to contest elections.
12. It is his further submission that even if this matter has not been heard and determined before the general elections were conducted this Court still has jurisdiction to grant the declaratory orders sought and to determine with finality as to whether the Respondents' actions were legitimate or not and issue orders to rectify the situation so as to ensure that the ends of justice are not defeated. While urging me to uphold the Petition, he claims that unless the orders sought under this Petition are granted, he will miss out on his desire and dream of being part of the new Kenyan political dispensation, unjustifiably, unjustly, irregularly and unprocedurally and his fundamental rights would have been trampled upon.

1st Respondent's submissions

13. It is the 1st Respondent's submission that the certificate of nomination held by the Petitioner was a forgery because after clarification was sought, the Interested Party's Chairman, Francis Ole Kaparo, confirmed that the 1st Respondent's certificate was the genuine one and based on that fact, he was cleared to contest for the Senatorial seat in Trans-Nzoia County.
14. It is the 1st Respondent's further submission that this matter has been overtaken by events since elections were carried out on 4th March 2013 and that the Petitioner thereafter had no cause of action against him. He urges me to dismiss the Petition with costs.

2nd Respondent's Submissions

15. It is the 2nd Respondent's position that this matter is *res judicata* since the issue forming the subject of this Petition was resolved and dismissed by the IEBC Dispute Resolution Committee in its Complaint No. IEBC/DRC/12/2013 on the grounds that the Petitioner had not been cleared by the Interested Party and by the time he had, it was past the deadline stipulated by the 2nd Respondent. And also that because *JR Misc Application No.55 of 2013* was fully determined, this Petition does not raise any new issue that has not already been determined and is thus an abuse of Court process.
16. It is its further submissions that under **Article 88 (4) (e)** of the **Constitution**, the 2nd Respondent is responsible for settlement of electoral disputes including disputes relating to or arising from nominations but excluding election Petitions and disputes that arise subsequent to the declaration of election results. That in adherence to this provision, Parliament enacted the **Elections Act** which at **Section 74(2)** provides that electoral disputes are to be determined within seven days of lodging with the Commission. The Commission then enacted the Elections (General) Regulations 2012, and **Rule 99(1)** mandates it to develop and publish in the gazette, rules of procedure including timelines applicable for the settlement of electoral disputes.
17. It is the 2nd Respondents submission that the effect of the orders sought in this matter is to set aside the decision of the Commission, and this Court does not have the jurisdiction to substitute its decision with that of the Commission. It also claims that the Commission is an independent body and cannot be faulted in its decision making which has been conducted in an independent manner. The 2nd Respondent relies on the decision in *Jeanne Gacheche & 6 Others v The Judges and Magistrates Vetting Board & 2 Others (2012) e KLR* in support of that position and argues that this Court can only audit the process leading to the decision of the Dispute Resolution Committee but not do anything more. That therefore the Petition is devoid of merit and should be dismissed with costs.

Determination

18. I will start by taking judicial notice of the fact that political parties nominated their candidates for various elective positions to participate in the 4th March 2013 general election, by 31st January 2013 as was stipulated by the 2nd Respondent. Following these nominations, various disputes arose and complainants lodged their complaints with the Returning Officer of their respective Counties who made a determination at the first instance. Individuals who were aggrieved with that determination lodged a review to the 2nd Respondent in line with **Regulation 13 of the Elections Regulations**. The complaints so lodged were heard and determined, and one such complaint is the one lodged by the Petitioner with respect to matters that form the subject of this Petition. The 2nd Respondent's Dispute Resolution Committee dismissed the complaint and thereafter, the country held its first general election under the new Constitution on 4th March 2013.
19. The law with regard to resolution of nomination disputes is well articulated and under **Article 88 (4) (e)** of the **Constitution**, the IEBC is vested with *inter-alia* the following powers:

“the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.”

This is reiterated in **Section 4(e) of the IEBC Act** which recognises the statutory function of the IEBC in settling electoral disputes relating to nominations before elections. **Section 74(1)** of the **Elections Act** further provides as follows:

“Pursuant to Article 88 (4) (e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.”

20. The law as set out above is undisputed by the Petitioner. He has actually invoked it in addressing what he now terms as a breach of his constitutional rights. What in my view the Petitioner has

however done is to invite this Court to examine the conduct of the Interested Party in handing over the nomination certificate to the 1st Respondent and his clearance to contest the senatorial position for Trans-Nzoia County by the 2nd Respondent. It is his contention that this Court has the jurisdiction to determine the issue conclusively due to the failure of the 2nd Respondent to do so.

21. It is clear to my mind that under **Article 165 (3) of the Constitution**, this Court has original and unlimited jurisdiction to determine civil and criminal matters. It also has jurisdiction to determine the question whether the right or a freedom under the Bill of Rights has been limited. The question therefore is whether it can exercise its original and unlimited jurisdiction in respect to the matter now placed before it. I do not think so and for the following reasons;

22. Firstly, I am in agreement with the sentiments expressed by the this Court in **International Centre for Policy and Conflict & 4 Others v The Hon. Uhuru Kenyatta and Others, Petition No. 552 of 2012** where it held that the unlimited original jurisdiction of this Court could not be invoked where Parliament has specifically and expressly prescribed procedures for handling grievances raised by parties. This reasoning has also been the subject of decisions by the Court of Appeal in various cases including in **Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425**, where it held that;

“In our view there is considerable merit....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

23. In my view therefore, the 2nd Respondent submitted correctly that this Court cannot determine the issue before it as that mandate is a preserve of the Dispute Resolution Committee established under **Article 88 (4) (e) of the Constitution** and **Section 74 (1) of the Elections Act** as read with **Section 4(e) of the IEBC Act**. It is therefore clear from these provisions that, prior to declaration of election results, it is the 2nd Respondent which has the mandate to resolve election disputes, with the jurisdiction of the court arising only after the declaration of results and in limited cases.

24. Secondly, the above notwithstanding, it is the submission of the Petitioner that this Court has jurisdiction to intervene in matters where it has been alleged and proved that the 2nd Respondent acted unreasonably or illogically. Is that the case here?

25. The extent to which this Court can intervene in the decisions of independent bodies like the 2nd Respondent was correctly stated in **Jeanne Gacheche & Others v Judges and Magistrates Vetting Board (Supra)** where the Court held that;

“the Court only intervenes to the extent permissible by law and by the dictates of justice. The balance will have been created if this court is able to ensure that the Vetting Board shall retain its place as the constitutionally mandated body to authoritatively, impartially and independently adjudicate upon matters relating to the removal or the process leading to the removal of Judges as contemplated by Section 23 (2) of the Sixth Schedule of the Constitution, with the only caveat that no aspect of the exercise of its function shall drift beyond the four corners of its mandate.”

The Court of Appeal in **Narok County Council v Trans Mara County Council [2000] 1 EA 161** at page 164 also stated that;

“It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister... refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter case his decision Page 15 of 24 can be challenged by an application to the High Court for a writ of certiorari because under the relevant section, the decision is to be made on a fair and equitable basis.”

The 2nd Respondent is an independent Constitutional Commission under **Article 249 of the Constitution** and in performance of its functions, is not subject to direction or control of any

person or authority including this Court. Similarly, **Section 26** of the **IEBC Act**, reinforces the Commission's independence. This Court can therefore only exercise its jurisdiction over IEBC under **Article 165(6) and (7)** of the Constitution in instances where the IEBC demonstrates either expressly or constructively that it has failed to carry out its constitutional mandate or in carrying out the mandate, it does so in a manner which results in a grossly unfair or perverse decision. It is thus clear that the jurisdiction of this Court can only be invoked in instances where the 2nd Respondent has failed to perform its duties and this Court has held so in various decisions. See for instance **Francis Gitau Parsimei & 2 Others v The National Alliance Party & 4 Others (2012) e KLR, Michael Wachira Nderitu and Others v Mary Wambui Munene & Others Petition No. 459 of 2012** and **Janet Ndago Ekumbo v Hon. Attorney General & Others Petition No. 39 of 2013.**

26. The position articulated above cannot be true in the instant proceedings. The Petitioner in my view has followed the mechanisms known in law to have his grievances addressed. He lodged a complaint in **No. IEBC/DRS/12/2013** which was dismissed for having been lodged out of the stipulated timelines and also for failure to obtain clearance from his political party. To that extent, I agree with the 2nd Respondent that this Court has jurisdiction to audit the decision making process of the Commission and the Petitioner in my view invoked that jurisdiction in **JR No. 55 of 2013, R v Independent Electoral & Boundaries Commission Ex Parte Stanley Kilimo Kore** where he sought an order of *certiorari*, among others, to quash the decision of the 2nd Respondent's Dispute Resolution Committee. That application was dismissed and I am in agreement with Ogolla J. in that case when he held that;

“the jurisdiction of this Court over IEBC is restricted to looking at the process, and not the merit of IEBC decisions. In the particular case there are two reasons militating against interference by this Court in IEBC decision. Firstly,the Applicant is not complaining of any IEBC decision which has caused him injury and needs to be reviewed...”

27. Thirdly, the Petitioner has now filed this Petition touching on the same issues as were also raised in **Kitale Petition No. 2 of 2013**, IEBC Dispute Resolution Committee **No. IEBC/DRS/12/2013** and **JR No. 55 of 2013**. It is a cardinal principle of law that litigation must come to an end and again I agree with the 2nd Respondent this matter barred by the doctrine of *res judicata*. Although this matter is purportedly filed under the Constitution, **Section 7** of the **Civil Procedure Act** provides as follows;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

28. This well established and known principle of law was well articulated in the case of **Karia and Another v the Attorney General and Others (2005) 1EA 83** where the Court of Appeal set the conditions to be satisfied for *res judicata* to be invoked in a matter. The court stated that the issue in the present suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim or are litigating under the same title.

29. It is obvious to me that the Petitioner is involved in forum shopping and is abusing the court process which this Court cannot condon.

30. Fourthly and in any event, it is crystal clear to me that this Court cannot issue the orders sought by the Petitioner as his prayers have been undertaken by events. It is trite law that a Court of law does not issue orders in vain. It is a fact Senatorial Elections have since been held and the person elected as Senator for Trans-Nzoia County is **Henry Tiolo Ndiema** who is not a party to this

Petition.

31. Any orders to be issued will touch on his position and it is obvious why no Prayer in the Petition can be granted as prayed.

32. For all the reasons above, the Petition herein is dismissed with costs to the Respondents only.

33. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 12TH DAY OF JULY, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Ndegwa for Petitioner

No appearance for Interested Party and Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE