



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

PETITION NO. 356 OF 2012

BETWEEN

FRANCIS GITAU PARSIMEI ..... PETITIONER

VERSUS

THE NATIONAL ALLIANCE PARTY ..... 1<sup>ST</sup> RESPONDENT

MOSES OLE SAKUDA ..... 2<sup>ND</sup> RESPONDENT

AND

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION ..... INTERESTED PARTY

CONSOLIDATED WITH

PETITION NO. 359 OF 2012

BETWEEN

JAMES WAMBUGU GAKUNJI ..... 1<sup>ST</sup> PETITIONER

HARRISON MWANGI ..... 2<sup>ND</sup> PETITIONER

VERSUS

THE NATIONAL ALLIANCE PARTY ..... 1<sup>ST</sup> RESPONDENT

TIRAS NYINGE NGAHU ..... 2<sup>ND</sup> RESPONDENT

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION ..... 3<sup>RD</sup> RESPONDENT

THE RETURNING OFFICER KANGEMA CONSTITUTENCY

BY ELECTION ..... 4<sup>TH</sup> RESPONDENT

## RULING

1. The applications before me concern allegations of rigging in political party nominations for the presentation of candidates to the Independent Electoral and Boundaries Commission (“IEBC”) for the Kangema and Kajiado North By-election.
2. I have consolidated the two matters as the issue of jurisdiction is raised in both matters and the parties have agreed that the issue be determined first. The question for consideration is whether the High Court, can entertain applications seeking conservatory orders to stop the nomination of candidates in light of the provisions of **Article 88(4)(e)** and **section 74** of the **Elections Act, 2011**.
3. The two provisions provide that the IEBC shall be responsible for settlement of disputes, including disputes relating to or arising from nomination but excluding election petitions and disputed subsequent to the declaration of election results.
4. At the core is whether this court should intervene to stop the electoral process so that a party who claims that his or her rights have been infringed can agitate his rights before the court. To determine this issue, the Constitution must be read a whole. On the one hand there is the Bill of Rights which protects, inter alia, the political rights of the petitioners. These rights are enforceable under the provisions of **Article 22**. **Article 22** offers the petitioners direct access to the High Court to enforce fundamental rights and freedoms. There is also **Article 258** which entitles any person to move the court where the Constitution is contravened or is threatened with contravention. The petitioners have exercised the option to invoke these provisions to move the court.
5. On the other hand, it must be clear that political rights are exercised through a political process involving many actors; the citizens and institutions. This is the process provided for under the provisions of **Chapter Seven** of the Constitution titled, “**Representation of the People.**” These provisions are operationalized by the **Independent Electoral and Boundaries Commission Act, 2011**, **the Elections Act, 2011** and **the Political Parties Act, 2011**. Individual political rights and the electoral process cannot be divorced from one another but must go hand in hand. It is therefore proper that political rights are realized within a structured process that takes into account the larger interests of the society and the need for a free and fair election which is enhanced by a self-contained dispute resolution mechanism underpinned by the Constitution itself and statutes enacted to give effect to its provisions.
6. It is against this background that the Court of Appeal established the principle that where the Constitution and or statute establish a dispute resolution procedure, then that procedure must be used. Within the rubric of the electoral process, this principle has been emphasized time and again in a long line of cases; **The Speaker of The National Assembly v The Hon James Njenga Karume, Civil Application No 92 of 1992 (Unreported)**, **Kipkalya Kiprono Kones v Republic & Another ex-parte Kimani Wanyoike & 4 Others, (2008) 3 KLR (EP) 291**, **Wanyoike vs Electoral Commission of Kenya (No. 2) (2008) 2 KLR (EP) 43**.
7. A reading of these cases will demonstrate that the circumstances of the petitioners are hardly novel. More recently, we have a controlling precedent from the Court of Appeal. In the case of **Interim Independent Electoral Commission and Another v Paul Waweru Mwangi CA Civil Application No. 130 of 2011 (Unreported)**, the Court of Appeal discharged an injunction issued by the High Court restraining the then Commission from conducting of the Kamkunji by-election on account of allegations of the breach of fundamental rights and freedoms during the nomination stage.
8. In my view, this insistence of a specific procedure is not inconsistent with the Bill of Rights; it is recognition that election disputes require special rules for determination. These rules are justifiable in a democratic society and the Constitution itself contemplates that the electoral process is a special process.
9. In light of what I have stated, I hereby discharge the orders issued on 17<sup>th</sup> August 2012 in **Nairobi Petition No. 356 of 2012** which had the effect of restraining the 1<sup>st</sup> respondent from forwarding or

submitting the 2<sup>nd</sup> respondent's name to the IEBC for nomination for the Kajiado North Parliamentary election.

10. Similarly, I reject the application in **Nairobi Petition No. 359 of 2012** seeking to restrain the 3<sup>rd</sup> respondent from presenting the 2<sup>nd</sup> respondent to the IEBC for nomination as a candidate for the Kangema Parliamentary election.

11. It is also my view that **Article 88(4)(e)** and **section 74(1)** of the **Elections Act, 2011** provide for alternative modes of dispute resolution specific to the nomination process. This court cannot entertain nomination disputes where such a process has not been invoked or where it has been demonstrated that the process has failed.

12. It must follow that the two petitions filed are incompetent and are hereby struck out but with no order as to costs.

**DATED** and **DELIVERED** at **NAIROBI** this 22<sup>nd</sup> August 2012.

**D. S. MAJANJA**

**JUDGE**

Mr G. Mureithi instructed by R. M. Mbanya and Company Advocates for the Petitioner in Petition No. 356 of 2012

Mr J. Kounah instructed by Kounah and Company Advocates for Petitioners in Petition No. Petition No. 359 of 2012

Mr M. Thiankolu with him Mr J. Mbiuki instructed by Muthomi Karanja and Company Advocates for the National Alliance Party

Mr Kilonzo with him Ms Ndegwa instructed by Sisule, Munyi, Kilonzo and Associates Advocates for the Independent Electoral and Boundaries Commission.