



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO. 71 OF 2011

**IN THE MATTER OF ARTICLES 1, 2, 3, 19, 20, 21, 22, 23, 165, 258 AND 261 OF THE
CONSTITUTION AND SECTIONS 5, 17, 19, 27 AND 28 OF THE SIXTH SCHEDULE OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS SECURED AND GUARANTEED UNDER ARTICLES 27, 28, 36, 38, 47, 48 AND 50
OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE VIOLATION OF ARTICLES 38, 82 AND 88 OF THE
CONSTITUTION BY THE INTERIM INDEPENDENT ELECTORAL COMMISSION**

AND

**IN THE MATTER OF THE NOMINATION OF CANDIDATES TO CONTEST FOR THE
KAMUKUNJI PARLIAMENTARY SEAT AT THE BY-ELECTION SCHEDULED FOR 23RD
MAY, 2011**

BETWEEN

PAUL WAWERU MWANGI PETITIONER
AND

THE INTERIM INDEPENDENT

ELECTORAL COMMISSION 1ST RESPONDENT

MASINET JOSEPH LEBOO, THE RETURNING

OFFICER KAMUKUNJI CONSTITUENCY 2ND RESPONDENT

RULING

On 11th May, 2011 the petitioner filed a petition challenging, *inter alia*, the nominations that were held on 27th and 28th of April, 2011 for the parliamentary by-election for Kamukunji Constituency which is scheduled to be held on 23rd May, 2011. He alleged that the nominations were conducted in a manner that violated his constitutional rights and freedoms as secured by **Articles 27, 38, 47 and 50** of the **Constitution of Kenya, 2010** and sought a declaration to that effect. He also sought a declaration that the nomination exercise was null and void in view of the fact that the gazette notices vide which the nominations were allegedly held contravened **Article 88(4) (e)** of the **Constitution of Kenya, 2010**.

Together with the petition the petitioner also filed an application by way of Chamber Summons brought under **Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006** and **Article 22 of the Constitution of Kenya, 2010**. The prayers sought in the said application are as follows:

- “1. The honourable court be pleased to certify this application as urgent and the application be heard ex parte at the first instance.**
- 2. The honourable court be pleased to restrain the 1st respondent from holding the parliamentary by-election for Kamukunji Constituency on 23rd May, 2011 pursuant to Gazette Notice No. 2315 dated 3rd March, 2011 and published in the Kenya Gazette on 4th March, 2011 and the nomination of candidates conducted on 27th and 28th April, 2011 pending hearing and determination of the application/petition herein.**
- 3. The honourable court be pleased to issue an order of stay of the 1st respondent’s Gazette Notice No. 5123 dated 4th May, 2011 and published in the Kenya Gazette dated 6th May, 2011 pending hearing and determination of this application/petition herein.**
- 4. The honourable court be pleased to issue a conservatory order for injunction to restrain the respondents from holding, directing, conducting or otherwise supervising the parliamentary by-election for Kamukunji Constituency scheduled for 23rd May, 2011 until this application/petition is heard and determined.**
- 5. The honourable court be pleased to stay Gazette Notice No. 2325 dated 3rd March, 2011 and published in the Kenya Gazette of 4th March, 2011 specifying, inter alia, that the parliamentary election for the Kamukunji Constituency be held on 23rd May, 2011 pending the hearing and determination of this application/petition.**
- 6. The costs of this application be borne by the respondents in any event.”**

The application was made on the grounds, *inter alia*, that:

“(a) On 27th and 28th April, 2011 the Respondents conducted the nomination of candidates for the parliamentary elections for Kamukunji Constituency scheduled for 23rd May, 2011 in violation of Articles 38, 47, 81 and 88(4) of the Constitution of Kenya, 2010.

(b) The nomination of candidates for the parliamentary elections of Kamukunji constituency held on 27th and 28th April, 2011 was conducted in violation of the Petitioner’s right to be a candidate for the Kamukunji Parliamentary seat on the ticket of the National Vision Party which is enshrined in Article 38(3) of the Constitution.

(c) The Respondent conducted the nomination of candidates for the parliamentary elections of Kamukunji Constituency held on 27th and 28th April, 2011 in violation of their respective constitutional duties to hold free and fair elections which are conducted independently, transparently, impartially and accountably as stipulated in Articles 81 and 88 of the Constitution.

(d) In clear violation of Regulations 14 to 20 of the Presidential and National Assembly Regulations made under Section 34 of the National Assembly and Presidential Elections Act, Cap 7 read together with Articles 38 and 47 of the Constitution the 2nd Respondent with apparent collusion/acquiescence of 1st Respondent refused, neglected or otherwise failed to offer an opportunity to the petitioner to present his nomination papers on 27th and 28th April, 2011 to enable him to contest the parliamentary elections for Kamukunji Constituency scheduled for 23rd

May, 2011 on the ticket of the National Vision Party.

(e) The real reason for the unconstitutional denial of the Petitioner's right to contest the parliamentary elections of Kamukunji Constituency scheduled for 23rd May, 2011 on the ticket of the National Vision Party is to skew the electoral contest in favour of the candidate of the Party of National Unity Mr. Hassan Yusuf by locking out strong popular candidates of Kikuyu ethnic group which includes the petitioner.

(f) Invariably the holding of free and fair elections is predicated upon the respondents conducting free and fair nominations in which all persons eligible to offer their candidature are permitted to do so without unreasonable restrictions or unjustifiable disqualifications tailored to favour some candidates.

(g) Whereas the 1st respondent is enjoined under Article 88(4) of the Constitution to settle electoral disputes relating to or arising from nomination exercise it has either deprived the petitioner of an opportunity to ventilate his grievances or has carried out its duties in a manner inclined against offering any effective remedy to him.

(h) In view of Article 88(4) (e) of the Constitution the Gazette Notice No. 2325 published in the Kenya Gazette 2325 March, 2011 (sic) is invalid *inter alia* because it does not envisage how the 1st respondent would settle any dispute relating to or arising from the nomination exercise conducted by the 2nd respondent on 27th and 28th April, 2011."

The application was supported by an affidavit sworn by the petitioner where he stated that he is a duly registered voter in Kamukunji Constituency and bearer of a National Identity Card No. 27838210 and a Voters Card No.0020124000000001. Following nullification of the election of Samuel Ng'ang'a Mbugua as the Member of Parliament for Kamukunji Constituency in an election petition, the Speaker of the National Assembly declared the said parliamentary seat vacant. As a result, the 1st respondent issued **Gazette Notice No. 2315** published in the Kenya Gazette dated 4th March, 2011 and stated, *inter alia*:

· An election was to be held for a member to serve in the National Assembly for the said constituency.

· Each political party wishing to participate in the by-election must finalize the nomination of its candidate on or before the 21st April, 2011.

· The days for the nomination of the candidates for the parliamentary by-election will be 27th and 28th April, 2011 and nomination papers may be delivered by candidates to the Returning Officers of the constituency within the hours of 8 o'clock in the morning and 1 o'clock in the afternoon and between the hours of 2 o'clock and 4 o'clock in the afternoon of the said days.

· If the parliamentary elections are contested, the poll will take place on 23rd May, 2011.

The said Gazette Notice also drew the attention of candidates and persons subscribing nomination papers to the provisions of **Part IV of the Presidential and Parliamentary Elections Regulations (Cap 7 subsidiary legislation)**.

The 1st respondent, vide **Gazette Notice No. 2316** appointed the 2nd respondent as the Returning Officer for the said by-election. The petitioner averred that he is a life member of the **National Vision Party (NVP)** and on 18th April, 2011 was issued with a certificate of nomination by the said party. On the basis of having been nominated by the NVP as its candidate for the Kamukunji parliamentary by-election, on 21st April, 2011 the 2nd respondent issued the petitioner with nomination papers which he subsequently filled.

The petitioner further stated that between 21st and 26th April, 2011 he called the 1st respondent on phone to seek for allocation of time to deliver his nomination papers like other candidates who had each been allocated specific time to deliver their nomination papers on 27th and 28th April, 2011. However, no slot was allotted to the petitioner on either dates. The 2nd respondent did not give any reason for refusing to allocate specific time to the petitioner to present his nomination papers. The petitioner held numerous meetings with the officials of the 1st respondent and made frantic efforts to have his nomination papers accepted with no success. He stated that he talked to Commissioner Mwashigadi about his plight and requested him to intervene but the Commissioner declined and said that the matter was entirely within the province of the 2nd respondent. The said Commissioner was further approached by a Mr. David Kang'ethe, the petitioner's supporter, and requested to deal with the complaint but the Commissioner told the petitioner to seek redress from the court.

The petitioner stated in paragraph 14 of his petition that when he asked the 2nd respondent the reason for refusing to accept the nomination papers, the 2nd respondent verbally informed him that the papers could not be accepted because the 2nd respondent **“had been informed by persons/authorities whose identity or names was not disclosed to the petitioner that the petitioner was either not eligible to contest the by-election as he was a member of the Party of National Unity (PNU) or could not be validly nominated by the NVP”**.

In paragraphs 15 and 16 of the petition, the petitioner stated:

“15. In view of the foregoing, the petitioner earnestly sought to be furnished by the respondents particulars/details of his ineligibility to contest the by-election to no avail. In addition, the respondent flatly rejected the petitioner's plea to be furnished with the written reason for his disqualification. In the premises by the close of the nomination exercise the petitioner was not able to present his nomination papers in order to contest for the Kamukunji parliamentary seat.

16. The petitioner contends that by dint of Article 38 of the Constitution which protects his political rights as a citizen of Kenya, to be a candidate for political office, the respondents are enjoined to conduct the nominations and election to elect the Kamukunji parliamentary member through a process that upholds the following values and principles:

(i) all election laws especially the National Assembly and Presidential Elections Act (Cap 7) hereinafter referred to as the “NAPEA” and the Political Parties Act, 2007, should be interpreted and applied in such a way as to ensure that the petitioner's right to be a candidate for the Kamukunji parliamentary election is not subjected to unreasonable restriction.”

The petitioner further alleged that **Article 88(4) (e) of the Constitution of Kenya, 2010** enjoins the 1st respondent to settle all electoral disputes arising from nominations but the 1st respondent failed to do so. He added that the 1st respondent should have made provision for a reasonable time after the dates of nominations for settling of any disputes arising from the nomination process. The 1st respondent's failure to do so renders Gazette Notice No. 2315 null and void *ab initio*, the petitioner contended.

The petitioner stated that in view of the respondents' breach of his constitutional rights and freedoms as provided under **Sections 27, 38, 47 and 50 of the Constitution of Kenya, 2010**, the conservatory orders sought ought to be granted failing which his petition will be rendered nugatory.

The respondents filed a replying affidavit that was sworn by **Joseph Leboo Masindet**, the 2nd respondent. He denied having wrongfully or unfairly rejected the nomination of the petitioner as a candidate for the NVP. He further denied that he was influenced by any person or party to reject the petitioner's nomination. In paragraphs 3, 4, 5, and 6 of his replying affidavit, the 2nd respondent stated as follows:

“3. That I was not influenced by any person, party or body to reject the nomination of the

petitioner but did so purely on my own upon sound legal grounds and from examination of the documents presented to me or failed to be presented to me by the petitioner as by law required.

4. That in the course of processing nominations of candidates to the election I am required to liaise with the office of the Registrar of Political Parties which is an office within the Interim Independent Electoral Commission, the 1st respondent herein.

5. That the petitioner failed to present to me documents showing that his proposer, seconder and supporters were members of the party nominating him i.e. National Vision Party (hereafter – “NVP”) as verified by the annexed documents marked “JLM 1”.

6. That further the petitioner failed to satisfy me that he himself was a member of the nominating party i.e. NVP, qualified to be nominated as a candidate within the meaning of the Political Parties Act 2007 in that records held by the Registrar of Political Parties show that:

(a) he was a member of Party of National Unity (hereafter “PNU”) up till or about 27th of April, 2011 when he purported to resign upon expressing dissatisfaction with the nomination process carried out by PNU held on or about the 21st April, 2011. I annex hereto documents verifying the petitioner’s membership to PNU, complaints on PNU nomination process and his resignation therefrom all marked as a bundle “JLM 2”.

(b) he joined the NVP on or about 28th April, 2011 and a document verifying the same is attached hereto marked “JLM 3”.

The 2nd respondent added that collection of blank nomination forms is not a clearance as a candidate for an election and if that were the case there would be no need to fix a date for the delivery and/or scrutiny of the accompanying documents by a returning officer on the nomination day. He urged the court to dismiss the application.

In his submissions, **Mr. Kibe Mungai** for the petitioner stated that under **Regulation 17(1)** of the **Presidential and Parliamentary Elections Regulations** (hereinafter referred to as “**the Regulations**”) a returning officer is required to indicate to each candidate the time fixed for the delivery of nomination papers on the nomination dates. The 2nd respondent failed to give any time indication to the petitioner yet he was aware that he had been nominated as a candidate to represent NVP. The 2nd respondent had called all the other candidates and given them specific time for delivery of the nomination papers.

Counsel further cited **Regulation 18(4)** which requires a Returning Officer to state in writing the reasons for rejecting a candidate’s nomination papers. The 2nd respondent failed to do so, counsel submitted. It is important that I cite the relevant portions of the said Regulation as hereunder:

“18(1) Where an application has been made in accordance with Regulation 15 then, unless the returning officer holds a nomination paper invalid under paragraph (2) of this regulation, or the candidate withdraws his candidature under regulation 19 or proof is given to the satisfaction of the returning officer of the candidate’s death, the candidate named therein shall stand validly nominated.

(2) A returning officer shall be entitled to hold a nomination paper invalid on any of the following grounds, but not otherwise –

(a) that the particulars of the candidate or subscribers contained in the paper are not as required by these Regulations;

- (b) that the paper is not subscribed as required by these Regulations;
 - (c) that the candidate is not qualified, or is disqualified by law from being nominated, or for being elected as an elected member of the National Assembly; or
 - (d) that the proposer or seconder, or so many of the supporters as would reduce the number of qualified supporters to less than seven, are not qualified to be subscribers;
 - (e) that the nomination paper is presented after another one had been presented by another candidate sponsored by the same political party;
 - (f) that the nomination paper was presented after the prescribed period had expired; or
 - (g) that the nomination paper was not accompanied by the prescribed deposit.
- (3) A returning officer shall give his decision immediately on an objection to a nomination paper.
- (4) Where a returning officer decides that a nomination paper is invalid he shall immediately record that decision and the reason therefor on the paper and add his signature thereto and shall return the said invalid nomination paper to the candidate or its presenter.”

Mr. Mungai further submitted that the 2nd respondent’s unlawful acts of refusing to accept the petitioner’s nomination papers and refusing to state on the papers the reason thereof was not only a violation of **Regulation 18(3) and (4)** but also amounted to violation of the petitioner’s constitutional right under **Article 38(3) (c)** of the **Constitution of Kenya, 2010** which states as hereunder:

“3. Every adult citizen has the right, without unreasonable restrictions –

- (a)
- (b)
- (c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.”

Counsel further referred to **Article 88(4) (e)** of the **Constitution of Kenya, 2010** which requires the **Independent Electoral and Boundaries Commission** to settle all electoral disputes including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results. He submitted that although the Independent Electoral and Boundaries Commission has not yet been constituted, the Interim Independent Electoral Commission, the 1st respondent herein, is empowered to exercise that function. The 1st respondent failed to address the petitioner’s complaint regarding the nomination process and that is why he decided to move to court, he added.

In any event, counsel stated, **Article 22** of the **Constitution of Kenya, 2010** gives every person the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened. Under **Article 23** the High Court has jurisdiction to hear and determine such an application and may grant appropriate relief including, *inter alia*, an injunction and a conservatory order.

Regarding the reasons advanced by the 2nd respondent for refusing to accept the petitioner’s nomination papers, Mr. Mungai submitted that they were unacceptable as the returning officer had failed to comply with the mandatory provisions of **Regulation 18(4)** as quoted hereinabove.

Mr. Adere for the respondents started by pointing out that although the petition and the application herein were filed after promulgation of the new Constitution (the Constitution of Kenya, 2010), certain sections of the repealed Constitution of Kenya had been saved. He cited the **sixth schedule section 3(2)** of the new **Constitution**. Such sections include **30 to 40, 43 to 46 and 48 to 58** of the former **Constitution**. The provisions of the former constitution concerning the Executive and the **National Accord and Reconciliation Act, 2008**, also remain operative until the first general elections are held under the new Constitution. Mr. Adere submitted that the petitioner was required to satisfy all the requirements for nomination of a candidate as stipulated under **Regulation 15** and the Political Parties Act. He said that some of the nomination papers presented by the petitioner to the 2nd respondent and which required his signature had not been signed. Among the unsigned ones is **Form 10 (Statutory Declaration for purposes of nomination at a parliamentary election)** and **Form 34 (Declaration of compliance by candidates and political parties)**. He submitted that lack of the petitioner's signature on the said forms was sufficient reason to disqualify him.

Mr. Adere further submitted that the petitioner as well as his proposers did not satisfy the returning officer that they were indeed members of NVP in terms of the requirements of the Political Parties Act. He referred to various documents annexed to the 2nd respondent's replying affidavit – "**JLM 1**", "**JLM 2**" and "**JLM 3**". One of the proposers, **Maria Nderi**, was said to be a member of PNU while the other one, **Pauline Njoki**, is not a member of any party according to the records of the 1st respondent. Further, the petitioner had been a member of PNU until 27th April, 2011 when he resigned.

Counsel cited **Section 17(2)** of the **Political Parties Act** which requires a member of a political party who wants to resign from the party to give a 14 days' written notice prior to his resignation. He submitted that the petitioner had breached that section of the law. In the circumstances, NVP did not lawfully nominate the petitioner on 18th April, 2011 since he was not a member of the party as at that date.

Regarding the provisions of **Section 88(4) (e)**, counsel submitted that the 1st respondent has no power to resolve disputes relating to nominations of candidates. That section refers to the Independent Electoral and Boundaries Commission which is yet to be constituted.

For all those reasons, Mr. Adere concluded, the petitioner was not qualified to present nomination papers to the 2nd respondent on 27th and 28th April, 2011 and the petitioner's rights as alleged had not been violated by the respondents.

In reply Mr. Mungai stated that the respondents' explanation for refusal to accept the petitioner's nomination papers was no more than subterfuge in view of the fact that there was no denial that the 2nd respondent failed to comply with the requirements of **Regulation 18(3) and (4)**.

He further submitted that the provisions of the Political Parties Act cited by the 2nd respondent do not apply to the procedure of nomination of candidates under the National Assembly and Presidential Elections Act and the Regulations made thereunder.

Counsel reiterated that the provisions of **Article 88(4) (e)** are applicable in this matter.

As regards the two forms which were not signed by the petitioner, Mr. Mungai submitted that those were curable errors as they were not among the requirements specified under **Regulation 18(2)** which would entitle a returning officer to hold a nomination paper invalid. He added that the 2nd respondent could have directed the petitioner to sign the documents and thus validate them.

I have carefully considered the application, the affidavits sworn by parties and counsels' submissions.

The Interim Independent Electoral Commission was created vide **Section 41** of the repealed **Constitution**. Its mandate is set out under **Section 41(A)** thereof. It is as follows:

“The Interim Independent Electoral Commission shall be responsible for the –

- (a) **reform of the electoral process and the management of elections in order to institutionalize free and fair elections;**
- (b) **establishment of an efficient and effective secretariat;**
- (c) **promotion of free and fair elections;**
- (d) **fresh registration of voters and the creation of a new voter register;**
- (e) **efficient conduct and supervision of elections and referenda;**
- (f) **development of a modern system for the collection, collation, transmission and tallying of electoral data;**
- (g) **facilitation of the observation, monitoring and evaluation of elections and referenda;**
- (h) **promotion of voter education and the culture of democracy;**
- (i) **settlement of minor electoral disputes during an election as may be provided by law; and**
- (j) **performance of such other functions as may be prescribed by law.”**

That mandate is equally bestowed upon the 1st respondent’s officials including persons who are appointed as returning officers during elections. There is no gainsaying that prior to the creation of the 1st respondent there was real need for reform of the electoral process which in many instances brought about unfair competition among parties and their candidates. Some of the electoral malpractices started right from the nomination process. The 1st respondent was therefore required to reform the entire electoral process in order to institutionalize free and fair elections.

The petitioner’s chief complaint is that the 2nd respondent failed to conduct proper nominations as required under **Regulation 18** aforesaid. The petitioner said that the two respondents did not resolve his complaint regarding the nomination process as required under **Article 88(4) (e)** of the **Constitution of Kenya, 2010**. It is therefore important to first consider whether the respondents breached the provisions of the said article.

As earlier stated, **Article 88(4) (e)** requires the Independent Electoral and Boundaries Commission to be responsible for settlement of electoral disputes including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of the election results. The **sixth schedule section 2(1)** lists various provisions of the new Constitution which are suspended until the final announcement of all the results of the first elections for parliament under the Constitution. They include **Chapter Seven**, except that the provisions of the chapter shall apply to the first general elections under the new constitution. **Section 88(4) (e)** thereof falls within Chapter Seven.

That means that the provisions of that Article cannot apply to the conduct of Kamukunji by-election since it is not a by-election arising after the first general elections after promulgation of the new Constitution. In any event, that mandate specified under **Article 88(4) (e)** can only be exercised by the Independent Electoral and Boundaries Commission and not the Interim Independent Electoral Commission. To that extent, reliance on the provisions of the same cannot be of any assistance to the petitioner.

Although the 1st respondent is required to settle minor electoral disputes during an election, it is not clear whether such disputes include those which may arise during the nomination process.

The petitioner’s argument that since Gazette Notices No. 2315 and 5123 did not stipulate any time for resolution of disputes arising from nomination process does not hold any water in view of the finding

that the provisions of **Article 88(4) (e)** cannot be implemented by the 1st respondent.

The petitioner deposed that the 1st respondent told him to refer his dispute to court. That was not denied by the respondents in their replying affidavit. The petitioner believed that his constitutional right to be a candidate in the said by-election had been violated by the respondents and that is why he moved to the court. **Article 22** of the Constitution gives every person a right to institute court proceedings to enforce his constitutional rights. This court is granted jurisdiction to determine such matters by the provisions of **Article 23**. The petitioner rightly came to court when the respondents failed to address his complaint.

Article 4(2) of the Constitution states that the Republic of Kenya shall be a multiparty democratic state founded on the national values and principles of governance referred to in **Article 10**. Under **Article 10(1)** the said values and principles bind all state organs, state officers and public officers and they must be enforced whenever any of them applies or interprets the constitution or any law. **Article 10(2)** provides, *inter alia*, that the national values and principles of governance include the rule of law, democracy and participation of the people, human dignity, equality, human rights, non-discrimination, integrity, transparency and accountability. It is therefore important to consider whether in the conduct of the nomination exercise for the Kamukunji by-election these values were observed and respected by the respondents.

Regulation 15 sets out the requirements for nomination of candidates. The relevant ones are as follows:

“15(1) For the purposes of nomination of candidates at a parliamentary election every candidate shall be –

(a) proposed and seconded and supported by not less than seven and not more than eighteen persons other than the proposer and seconder; and

(b) nominated by the delivery by the candidate or his duly appointed agent to the returning officer of the constituency between the hours of eight o’clock in the morning and one o’clock in the afternoon and between the hours of two o’clock and four o’clock in the afternoon of the nomination dates for election of a nomination paper in Form 9.

(2) There shall be delivered to the returning officer together with the nomination paper statutory declaration in Form 10 made not earlier than one month before the nomination day.

(3) The subscriber to a nomination paper shall all be persons who are registered as electors for the constituency concerned and who are members of the political party whose endorsement the candidate is seeking.”

It is the petitioner’s contention that these are the only relevant requirements for nomination and reference to the provisions of the Political Parties Act by the respondents is irrelevant.

For purposes of this application, I need not make specific findings regarding the applicability of the Political Parties Act to the nomination process as stipulated in the aforesaid election regulations. What the court is called upon to determine is whether the 2nd respondent complied with the mandatory provisions of **Regulation 18(4)** which required him, upon deciding that the petitioner’s nomination papers were invalid, to immediately record that decision and the reasons therefor on the nomination papers, append his signature thereto and return the papers to the petitioner.

When the court posed that question to **Mr. Jabane**, a **Legal Officer** working for the 1st respondent and who appeared together with Mr. Adere for the respondents in this matter, Mr. Jabane candidly responded in the negative. He said that he interviewed the returning officer and he informed him that he did not endorse his reasons for refusal to accept the petitioner’s nomination papers.

In my view, failure to do so was a very serious omission and which removed transparency in the

nomination process. The petitioner, his party and his supporters could not tell with any certainty the exact reason that caused the petitioner's disqualification.

Parliament had a noble intention in approving the election regulations. These regulations are important in promoting a free, fair and transparent electoral process.

In conducting the nomination process, the 2nd respondent was not exercising his discretion as to whether to accept or reject nomination papers of the various candidates. He was performing a statutory duty and therefore under an obligation to follow the requirements of **Regulation 18** to the letter.

Even assuming that the reasons advanced by the 2nd respondent were sufficient to warrant disqualification of the petitioner as the NVP candidate in the by-election, he was by law required to receive the nomination papers from the petitioner, scrutinize them and if he found them wanting in any of the mandatory requirements as set out under **Regulation 18(2)**, record the decision thereon, append his signature thereto and return them to the petitioner. That way there would be no room for speculation as to the reason for rejecting the same.

The 2nd respondent's failure to comply with **Regulation 18(4)** fortifies the petitioner's contention that the returning officer had refused and/or failed to fix a specific time for delivery of his nomination papers which is also violation of **Regulation 17(1)**.

Article 47 (1) (2) provides as hereunder:

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

The 2nd respondent's failure to state the reasons for rejecting the petitioner's nomination papers also violated the aforesaid provisions of the Constitution.

In view of the foregoing, I find and hold that the respondents violated the petitioner's right to be a candidate in the scheduled Kamukunji by-election.

What is the legal effect of the above finding with regard to the scheduled by-election? Mr. Mungai referred to the finding of the Court of Appeal in **RICHARD CHIRCHIR & ANOTHER v HENRY CHEBOIWO & ANOTHER, Civil Application No. NAI 253 OF 1992 (unreported)**. In that matter, the court dismissed an application by the returning officer and the Electoral Commission of Kenya which sought an order of stay of an injunction granted by the High Court to restrain the electoral body from publishing in the Kenya Gazette or otherwise acting on or giving effect to the declaration by the 1st respondent that the 3rd respondent had been nominated as the sole parliamentary candidate for Baringo North Constituency. In declining to stay the said order for injunction, the court held that:

“The law of Kenya contemplates that a Kenyan seeking nomination as a candidate in a parliamentary election shall be entitled to unimpeded access to the returning office of the constituency of his choice.

If this application is refused, the only possible prejudice Mr. Kamuren will suffer, if you can call it prejudice, is that his purported election as the member of parliament for Baringo North Constituency will be slightly delayed but he can take some consolation from the fact that such a temporary set back is not too heavy a price to pay for democracy. Soon after the general election the Speaker will issue the necessary writ for an election to be held according to the law.

On the other hand, if we allow this application, we shall be giving a seal of approval to unbridled use of violence and strong arm tactics in the election process. That cannot be the function of a court

of law.”

I am entirely in agreement with their Lordships’ holding as quoted hereinabove. On my part, I would add that the court cannot trivialise breach of a mandatory requirement relating to the nomination process of candidates. Without transparent nomination of candidates there cannot be transparent elections. If the court were to sanction the conduct of the 2nd respondent, it would mean that a returning officer can be influenced by a party or other candidates to reject the nomination papers of a candidate for whatever fanciful reason he may have in his mind. That is a recipe for election chaos and can easily lead to violence as was witnessed in the recent past. Returning officers must be held to account for their actions in discharge of their lawful duties.

If the court, having found that the nomination exercise was seriously flawed, fails to grant an order of injunction to restrain the respondents from holding the by-election, it will be frustrating all the gains that have so far been made in our electoral process towards a free, fair and transparent elections based on universal suffrage and the free expression of the will of the electors to choose a candidate of their choice. The petitioner’s right to be a candidate in the proposed by election will be lost for good.

In **CHRISTOPHER N. MURUNGARU v KENYA ANTI-CORRUPTION COMMISSION & ANOTHER**, Civil Application No. NAI 43 OF 2006 (unreported), the Court of Appeal stated:

“We recognize and are aware of the fact that the public has legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished. But in our view, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public. The only institution charged with the duty to interpret the provisions of the Constitution and to enforce those provisions is the High Court and where it is permissible, with an appeal to the Court of Appeal. We have said before and we will repeat it. The Kenyan nation has chosen the path of democracy; our constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times a messy system. A dictatorship, on the other hand, might be quite efficient and less messy. That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implies due process. The courts must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the courts decisions.”

While the court appreciates that a lot of effort has been made by the respondents, various parties, candidates and the people of Kamukunji Constituency, toward the intended by-election, this court must discharge its constitutional mandate in terms of **Article 23(1) and (3) of the Constitution of Kenya, 2010** to grant appropriate relief to the petitioner that is intended to promote the values of the rule of law, democracy, participation of the people, good governance, integrity, transparency and accountability as spelt out under **Article 10** of our **Constitution**.

In conclusion therefore, I grant an order of injunction restraining the respondents from holding, directing, conducting or otherwise supervising the parliamentary by-election for Kamukunji Constituency scheduled for 23rd May, 2011 until the petition is heard and determined. I have already made a determination regarding Gazette Notices No. 2315 and 5123. But for the sake of clarity, I may add that the said Gazette Notices are proper in law and were rightly issued by the 1st respondent. The respondents shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MAY, 2011.

D. MUSINGA
JUDGE

In the presence of:
Nazi – Court Clerk

Mr. Kibe Mungai for the Petitioner
Mr. Adere for the Respondents