



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 47 OF 2017

OKIYA OMTATAH OKOITIPETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC)

DIRECTORATE OF IMMIGRATION AND REGISTRATION OF PERSON

HON ATTORNEY GENERAL.....RESPONDENTS

RULING

On 13th February 2017, Okiya Omtata Okoiti filed a petition dated the same day and sought a number of declarations as well as orders. Simultaneous with the petition, he took out a motion on notice filed the same day and sought in principle an order prohibiting the 1st respondent Independent Electoral and Boundaries Commission or its agents acting under its authority from closing voter registration exercise slated for closure 14/2/2017. The petition and application were filed under urgency.

The file was placed before me and after considering it ex parte, I granted an order on interim basis pending hearing of the application today 16/2/2017 and ordered that the respondent be served.

When the matter came up for hearing this morning, all parties were present and ready to urge the motion. There was an application by BADO MAPA MBANDO seeking to be enjoined in the proceedings as an interested party and I duly allowed them into the proceedings as requested.

Looking at the nature of the motion the prayers sought therein and the petition, asked parties whether they could go for the petition rather than the motion. Although they agreed that it would have been appropriate, they did not agree on any orders to record. The motion had to proceed but only in respect of prayer 2, that is whether the order stopping closure of voter registration should remain pending hearing and determination of the petition.

The petitioner, Okiya Omtatah Okoiti, acting in person submitted in favour of grant of the orders sought in the motion until the petition is heard and determined. According to the petitioner the constitution is clear that there should be continuous voter registration and, that voter registration is a constitutional right under article 38(3)(a). He also submitted that the 1st respondent has a mandate to carry out continuous voter registration as provided for under article 88(4)(a) of the constitution as read with section 5(1) of the Elections Act, 2011.

The substance of Omtatah's submissions was that the directive to close voter registration by 14/2/2017 is arbitrary and violates the would be voters right to register and participate in the fourth coming general

election. He also referred to various articles of the constitution to buttress his argument that failure to grant the orders would disenfranchise the voters. He made his case that the 1st respondent has been carrying out voter registration at the constituency level which is sometimes far from voters and that has had an effect in the non registration of citizens as voters. He was of the view that since there is voter registration at the ward level, the exercise should continue and only close sixty days to the election as provided for in section 5(1)(a) of the election Act. Anything, else he submitted, would be a denial of the citizen's rights.

Mr Asembo, learned counsel for the interested party, supported Omtata's application. He referred to article 88(4)(a) which requires that there be continuous voter registration. He also referred to Article 83(3) saying that any administrative arrangements should not deny a prospective voter from registering.

Learned counsel further submitted that the right to vote is a constitutional right that should not be taken away in any manner that seems to violate the Bill of Rights. Counsel emphasized the fact that the 1st respondent has a constitutional mandate to continuously register voters and cannot abdicate that duty.

Mr Gumbo learned counsel for the 1st respondent opposed the application through a replying affidavit filed on 16/2/2017. He submitted at length on why the orders should not be granted of significance to the motion, Counsel submitted that the prayers sought cannot be granted since the 1st respondent has not stopped voter registration. According to counsel, what was to terminate on 14/2/2017 was "Mass voter" registration an exercise that was initiated to allow many citizens register as voters. According to counsel, voter registration is a continuous exercise and has been going on as required by Article 88(4)(a) and will only close sixty days to the election as required by Section 5 of the Elections Act.

Counsel submitted that although there is continuous voter registration in every constituency, the 1st respondent cannot force people to register. Due to strict time lines and budgetary constraints, learned, counsel submitted it would impact negatively on the 1st respondent if the orders sought in the motion were granted, since the 1st respondent has a duty to prepare and conduct a fair and credible election.

Learned counsel maintained that the 1st respondent has mandate to carry out the registration, but wondered who has complained over failure to register because the petition does not include a single person who has complained of not being able to register. Learned counsel referred to a number of decisions including **Hassan Shabaan Mohamed 1 & 2 Others Diana Kethi Kilonzo v IEBC** – to support his case. He submitted that the petitioners has not failed to carry out its mandate as required by the constitution.

In Mr Gumbo's view, any steps taken to extend mass voter registration will have a serious implication in the timelines for preparing elections for 8th August 2017.

He urged that the motion be dismissed.

Mr Mutinda learned counsel for the 2nd and 3rd respondents opposed the motion and supported Mr Gumbo's position on the matter. According to learned counsel, there is no evidence that the petitioner or anyone else will suffer prejudice. He also submitted that the petitioner has not established a prima facie case to warrant grant of the order sought. He asked that the motion be dismissed.

I have perused the motion, affidavit on support, the replying affidavit and authorities cited. The applicant has sought this courts discretion to stop the 1st respondent from closing voter registration which was due to close on 14th February 2017 until the petition is heard and determined or until sixty days to the election. However, according to the 1st respondent voter's registration will continue until sixty days to the election, that is sometime in May 2017

Voter registration is a constitutional right, it is clearly provided for in the constitution. Every citizen has a right to vote and be voted for. He/she can only do so that, is exercise the inalienable right to vote by

registering. Voter registration is continuing even as this case goes on, only that it will be scaled down to the constituency level.

The 1st respondent has argued that extending voters' registration any time after today will have serious implications to the 1st respondent.

This court is aware that the 1st respondent has a constitutional mandate to perform and will only interfere in exercise of its jurisdiction under article 165(3) if there is evidence that the 1st respondent has acted unlawfully or irrationally.

From the submissions tendered on behalf of the 1st respondent, there is no evidence that voter registration will be closed anytime soon. What was to end was the initiative rolled out to reach many voters called "Mass Voter" registration.

To conduct such an exercise involves mobilization of personnel and equipment and has financial implications. The 1st respondent has power to extend mass voter registration on assessment the need and resources available

To my mind, the issues for determination are not in the motion but in the petition. The petition raises substantial issues that would have been addressed in order to conclusively determine this matter, for instance even if I granted the orders, there is still the question of what documents potential voters will present during registration. There is also the question of whether passports should be valid or not or whether birth certificates should be used or not.

From that perspective, allowing mass voter registration to continue, which is at the discretion of the 1st respondent, will not be the solution. Which document will be used even during continuous voter registration is critical without resolving that issues will not conclude this matter. That is where the petitioner's main concern is.

I am alive to the provisions of Article 83(3) which provides that **administrative arrangements for registration of voters and conduct of elections should be designed to facilitate, and should not deny, a citizen the right to vote or stand for election.**

The question is whether the arrangement to continuously register voters at the constituency level has in anyway negated the provisions of Article 83(3)and therefore violated voters rights.

The petitioner has argued passionately that it has. He has given examples of some areas in this county where the ward may be as big as a constituency, and that people may have difficulties accessing the constituency headquarters for purpose of registration, as voters,

That argument is not without merit. That perhaps informs why the 1st respondent has to conduct periodic mass voter registration,

The 1st respondent has not shown any sign of extending the period for mass registration to allow those who have not registered to register.

Although this court should not get involved in administrative matters of the 1st respondent, taking into account the fact that this exercise has been going on for the one month and was due to end on 14th February 2017 and in order to give any would be potential voter to register, and taking into account the logistical and financial implication of extending the period for mass voter registration as the petitioner has urged, I will make the following orders.

1. The Notice of Motion dated 13th February 2017 is allowed in part.

2. The 1st respondent, the Independent Electoral and Boundaries Commission is hereby directed to continue with mass voter registration up to 19th February 2017 at 6.00p.m after which it shall stand closed.

3. Each party do bear their own costs.

Dated Signed and Delivered at Nairobi this 16th Day of February, 2017.

E C MWITA

JUDGE