

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURT

CONSTITUTIONAL DIVISION

PETITION NO. 195 OF 2017

IN THE MATTER OF ARTICLES 22 (1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF; ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2 (10, 3 1), 10 (10, (2), 19 (2), 20 (2), 27 (1), 27 (1), 35 (1), 38 (1), (2) & (30, 47 (1), (2), 48, 50 (1), (20, 259 (1), (5) AND (9) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: NOMINATION AS AN INDEPENDENT CANDIDATE FOR THE 8TH AUGUST 2017 GENERAL ELECTION

BETWEEN

CAROLI OMONDI.....PETITIONER

VERSUS

REGISTRAR OF POLITICAL PARTIES.....1ST RESPONDENT

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....2ND RESPONDENT

JUDGEMENT

Petitioners case

The background information relevant to this case is that the petitioner resigned from the Orange Democratic Movement on 8th May 2017 so as to vie for Suba Constituency Parliamentary seat in the General Elections scheduled for 8th August 2017 as an independent candidate. The petitioner, who was hitherto the said date a member of the Orange Democratic Movement unsuccessfully participated in the party's primaries held 24th April 2017.

The petitioner challenged the results of the said nominations at the Orange Democratic Party National Appeals. Aggrieved by its decision rendered on 28th April 2017 the petitioner appealed at the Political Parties Disputes Tribunal, but again, dissatisfied with the Tribunals decision, the petitioner filed an appeal in the High Court.

On 8th May 2017, one day before the High court rendered its decision on 9th May 2017, the petitioner in exercise of his rights under Article 38 (3) (c) of the constitution submitted his application for clearance by

the Registrar of Political Parties to the effect that he was not a member of any political party, having resigned as aforesaid which is a prerequisite for independent candidates for clearance by the second Respondent to view in the general elections scheduled for 8th August 2017.

Counsel for the first Respondent confirmed that the first Respondent had no objection to issuing the petitioner with the requisite clearance, rendering it unnecessary for the court to determine prayers **(a)**, **(b)** & **(c)** of the petition.

However, the second Respondent vehemently opposed the petition on grounds that the petitioner seeks to alter the constitutional timelines in blatant contravention of Article **85 (a)** of the constitution which provides that:-

Eligibility to stand as an independent candidate.

85. Any person is eligible to stand as an independent candidate for election if the person—

(a) is not a member of a registered political party and has not been a member for **at least three months immediately** before the date of the election;

The above position is echoed by section **33** of the Elections Act^[1] on nomination of independent candidates which provides that:-

A person qualifies to be nominated as an independent candidate for presidential, parliamentary and county elections for the purposes of Articles 97, 98, 137, 177, and 180 of the Constitution if that person—

(a) has not been a member of any political party for at least three months preceding the date of the election;

(b) has submitted to the Commission on the day appointed by the Commission as the nomination day, a duly filled nomination paper as the Commission may prescribe;

(c) has submitted the symbol that the person intends to use during the election; and

(d) is selected in the manner provided for in the Constitution and by this Act.

Article **165 (3) (d) (i) & (ii)** of the Constitution vests power in the High Court to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the constitution and also the question whether anything said to be done under the authority of the constitution or of any law is in consistent with, or in contravention of, the constitution. The judiciary has a special role in our system with respect to constitutional interpretation. Courts are bound by the Constitution and must interpret it when a dispute so requires.^[2]

A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid the ‘austerity of tabulated legalism’ and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.^[3]

This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and, where rights and freedoms are conferred on persons, derogations there from, as far as the language permits, should be narrowly or strictly construed.^[4]

In my view, the above provisions are clear and require no more than a literal interpretation. **Section 14(3)** in effect demands a member of a political party who intends to resign from the Political Party must, and is obliged, to give a written notice of his resignation to his Political Party. That resignation according to the provisions of **Section 14(2)** takes effects upon the same being received by the Political Party. Upon receiving that notice, the Political Party shall then notify the Registrar within seven days of the receipt of the resignation.

No evidence has been tendered to demonstrate that the Orange Democratic Movement notified the Registrar of the petitioners resignation as required by the above provisions to enable the Registrar to invoke the provisions of section 14 (3A). Clearly, as at the time of filing this petition, it is not clear that the petitioners name had been removed from the list of membership of the Orange Democratic Movement.

This petition was filed on 11th May 2017, outside the constitutionally stipulated period of ninety days. In my view, an order directing the second Respondent to receive and gazette the petitioners name and symbols as an independent candidate outside the stipulated ninety days, if granted will fly on the face of article 85(a) of the constitution and section 33 (1) of the Elections Act.[8]

In fact the second Respondent has no constitutional mandate to extent the above constitutionally and statutory stipulated period, hence the argument that the second Respondent discriminated independent candidates when it extended the deadline for political parties and failed to extend the deadline for independent candidates is totally erroneous. Article 85 (a) of the constitution and section 33 (1) of the Elections Act[9] leaves no room at all for the second Respondent to extent the period and this court cannot issue an order compelling the second Respondent to violate the clear provisions of the constitution and the statute, because such an order would be a nullity.

The values enunciated in of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. The relief sought against the second Respondent is in my view truly extraordinary. Effectively, it amounts to requesting this Court to suspend or disregard a constitutional and a statutory provision on stipulated time frames.

In an illuminating declaration of legal principle (which I accept), the Court of Appeal in *Ferdinand Waititu vs. Independent Electoral and Boundaries Commission, (IEBC) & Others*,[10] cited by counsel for the second Respondent, discussing the above provisions, stated as follows:-

“...These timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any Court for whatever reason. It is indeed the tyranny of time, if we may call it so. That means a trial Court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously. It was therefore imperative that the Elections Petition Rules be amended to bring about mechanisms of expediting trials...”

In *Patrick Ngeta Kimanzi vs Marcus Mutua Muluvi &2 Others*,[11]the Court of Appeal[12] was again categorical, that the provisions of Section 85A of the Elections Act, setting out timelines for the filing and determination of election petitions, were peremptory and non-negotiable. The learned Judges of Appeal had the following to say:-

“.....this Court[13] held that s.23(4) A of the National Assembly and Presidential Elections Act, which like s.85 A of the Elections Act stipulated the period within which an appeal from the decision of the election court should be filed, was mandatory and that upon the lapse of the stipulated time, the right of appeal automatically lapsed...”

Time in principle and applicability, is a vital element in the electoral process set by the Constitution and this is an important consideration which ought to guide this court. The court takes into account the fact that the issue in question involves imperatives of timelines demanded by the Constitution in helping the second Respondent to prepare and manage the electoral process and that Article 85(a) of the constitution and section 33 (1) of the Elections Act,[14] are in my view a careful product of a

constitutional scheme requiring a proper mechanism aimed at ensuring adequate preparation for the electoral process which does not begin and end on the polling day but embraces wider and deliberate systems aimed at promoting democratic values and practices that are consistent with the spirit and intent of the constitution in ensuring preparation for a fair, free, credible, transparent and accountable elections and a purely ethical system of elections.

The above view was expressed by the supreme court in *Fredrick Otieno Outa vs. Jared Odoyo Okello & 4 others*,^[15] (paragraph 55) in which the court stated

“In adopting this view, we would observe that the Elections Act, 2011 enacts in substantive form the constitutional principle of securing for the Kenyan people a representative democracy, in which the mandate of leadership is attained through popular elective politics, based on the ideals of free and fair election.”

The Constitution’s paradigm of democratic governance entrusts to this Court the charge of assuring sanctity to its declared principles. The Court’s mandate in respect of such principles cannot, by its inherent character, be defined in restrictive terms. Thus, if an individual is not able to meet the set deadline, like in the present case, his inability to present his papers within the set time frame cannot be said to be a limitation of his rights. Individual rights must where circumstances so permit, give way to public interests. It is also important to point out that the above provisions are clear and unambiguous.

I am aware of the decision by Lenaola J in *William Omondi vs Independent Electoral & Boundaries Commission & 2 others*^[16] in which he held *inter alia* that the provisions of Section 14(3) of the Political Parties Act^[17] to the extent only that it purports to grant the Registrar of Political Parties the right to bar an independent candidate from vying for an election by reason of non-notification of resignation from a political party is inconsistent with Article 85 of the Constitution and is invalid and unconstitutional. But in the present case the issue for determination is whether this court can compel the second Respondent to receive and gazette the petitioners name and symbol as an independent candidate for a member of Parliament outside the ninety days.

Alternatively, this court is being invited to issue the said order before the Orange Democratic Movement issues the notification required under section 14 (3) cited above and since the Orange Democratic Movement is not a party in this case, the court is not able to determine whether or not the party will comply with the said provision nor can the court compel the party to do so in absence of a prayer to that effect.

The electoral process is fundamental to democracy and an integral part of it. The provisions in question advance a compelling public interest to manage the electoral process efficiently as opposed to private interests. Article 85 (a) and section 33 (1) cited above are aimed at promoting the legitimate public interest in ensuring early preparation to ensure a fair, honest, and orderly elections which is consistent with the provisions of the constitution that require elections to be credible.^[18] The provisions of the constitution must be read and interpreted in a wholesome manner. The rights to contest in an election either as an independent candidate or as a member of a political party must be read and appreciated with the constitutional rights that guarantee a free, fair, credible and transparent elections and the provisions that mandate the IEBC to manage elections in accordance with the constitution and best practices possible. Thus, the constitutional and statutory time frames in question ought to be construed as part of the IEBC's constitutional mandate to prepare for the electoral process sufficiently in time which is absolutely necessary.

It is also important to mention that the petition does not disclose any reasonable cause of action against the second Respondent to warrant this court to issue any prayer(s) against the second Respondent. Since the first Respondent stated that it no objection to issuing the clearance sought by the petitioner, I find no need to issue orders compelling it to do so.

In view of my findings hereinabove, I find that this petition against the second Respondent fails. The upshot is that this petition against the second Respondent has no merits at all and I hereby dismiss it with

costs to the second Respondent.

Orders accordingly

Signed, Dated at Nairobi this 15th day of May 2017

John M. Mativo

Judge

[1] Cap 7, Laws of Kenya

[2] *Marbury vs. Madison*, 5 U.S. 137 (1803), was a landmark United States Supreme Court case in which the Court formed the basis for the exercise of judicial review

[3] *The Namibian Supreme Court in Government of the Republic of Namibia & Anor v Cultura 2000 & Anor*, 1994 (1) SA 407 (Nm SC) at 418 F-G, Mahomed CJ

[4] *Rattigan & Ors v Chief Immigration Officer & Anor* 1994 (2) ZLR 54 (S) at 57 F-H, 1995 (2) SA 182 (ZSC) at 185 E-F, GUBBAY CJ

[5] *Das, J., in Keshava Menon v. State of Bombay*[1951] S.C.R. 228

[6] {1994} 182 CLR 104 at 1 201197–198.

[7] Act No. 11 of

[8] *Supra*

[9] *Ibid*

[10] Civil Appeal No. 137 of 2013, *Mwera, Musinga and Kiage JJA*

[11] Nairobi C.A No.191 of 2013 [2014] eKLR

[12] *Kariuki, Kiage and M’Inoti JJA*

[13] *In Maitha vs. Said and Another*, (1999) 2 E.A 181

[14] *Supra*

[15] *S.C. No. 10 of 2014*

[16] {2014} eKLR

[17] *Supra*

[18] *Marchioro v. Chaney*, 442 U.S. 191 (1979).