



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KABARNET
CONSTITUTIONAL PETITION NO. 8 OF 2017

(FORMERLY ELDORET CONSTITUTIONAL PETITION NO. 10 OF 2017)

IN THE MATTER OF PETITION UNDER ARTICLES 19, 20, 21, 22, 23, 27, 28, 35, 47, 49 AND CHAPTER 6 (ARTICLE 73) OF THE CONSTITUTION OF KENYA 2010 AND SECTION 74 OF THE ELECTIONS ACT 2011 AND SECTION 4 OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT 2011.

AND

IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT OF THE FUNDAMENTAL FREEDOM AND RIGHTS OF THE PETITIONER

BETWEEN

KAPTUIYA CHEBOIWO..... PETITIONER

VERSUS

THE CHAIRMAN –INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE RETURNING OFFICER (IEBC) BARINGO COUNTY.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....4TH RESPONDENT

JUDGMENT

INTRODUCTION

[1] The petitioner herein is a resident of Baringo County Baringo North Sub-county who is an aspirant for Woman Representative aspiring to represent Baringo County in the National Assembly in the General Elections on 8th August, 2017 General Elections. The petitioner herein moved the court vide an application under certificate of urgency on a Notice of Motion dated 9/6/2017 supported by an affidavit. The Petitioner herein filed this application before the Eldoret High Court since this court was not sitting and the application was placed before D O Ogembo, J. in the High Court at Eldoret on 12.6.2017. The application under certificate was heard *ex parte*. The petitioner indicated that she was arrested in 31/5/2017 the day she was expected to present her papers at the I.E.B.C. Offices She remained in the police cells till the 1/6/2017 when time had already lapsed.

[2] The High Court on 12/6/2017 issued the following orders:-

- i. The application dated 9/6/17 was certified as urgent.*
- ii. The applicant was ordered to serve the respondents particularly the 1st and 2nd respondents with this application.*
- iii. The matter originating from Baringo County was transferred to High Court of Kenya Kabarnet for Hearing and disposal.*
- iv. The application be heard on 13/6/17.*
- v. Costs be in the cause.*

[3] The petitioner served the 1st and 2nd respondents herein there is an affidavit of service dated 12/6/17 and filed in court on 13/6/17. The 1st and 2nd respondents entered appearance. There is no evidence of service upon the 3rd and 4th respondents.

[4] The petitioner seeks the following orders:-

- (a) A declaration that the respondents to allow her to present her nomination papers out of time.***
- (b) A declaration that in the alternative, the 1st respondent to hear and determine the petitioner's complaint/appeal expeditiously since she risks being locked out of the 8/8/17 elections.***
- (c) Any other or further order that this honourable court may deem fit to grant and costs.***

"Hearing of the petition

[5] On 13/6/17 the petitioner and the 1st and 2nd respondents appeared before this honourable and by consent agreed to canvas the petition and abandon the application by notice of motion. The petitioner herein having served the 1st respondent, the 2nd respondent filed a replying affidavit sworn by one Hussein Gurre Mohamed who is the County Returning Officer Baringo County. The petitioner herein filed a further supplementary affidavit dated 14/6/17 in support of the petition and in response to the replying affidavit.

THE PETITIONER'S CASE

The Petition

[6] The petitioner herein is a woman Representative aspirant contesting in the Baringo County come the 8/8/17 general elections. That she states she was to present her papers to the returning officer at 2.30pm

on 31/5/17 however, she was arrested without reason by the Baringo county District Criminal Investigation Officer at Kabarnet. The petitioner was to present her papers before the 1st respondents offices at the Kenya School of Government (KSG) between 2pm and 4pm on 31/5/2017 as per the gazette notice number 2696 of 1703, 2017 which is part of the annexure in her supporting affidavit. That since she was arrested time was never extended to her by the 1st respondent. The Deputy County Returning Officer (DCRO) had tried to call and inform her of the timeline but the District Criminal Investigation Officer (DCIO) never released her till the 1/6/17. The petitioner made an appeal to the 1st respondent herein requesting to present her papers out of the gazette time since the failure to present the said papers in good time was not due to her own making but it was the mistake of the police. That the respondents have violated Articles 19, 20,21,22,23,24,27,35,47 and other articles of the constitution hence there is need for her to present papers out of time. That the arrest by the police was a violation of the petitioners fundamental rights and infringement of her constitutional freedom hence she was subjected to torture and mental anguish.

The supporting Affidavit

[7] In the supporting affidavit she states that she is an independent candidate vying for the position of County Woman member of national assembly in Baringo County. That she was to submit her nomination papers on 31/5/17 at the Kenya School of Government between 10.00am to 2.00pm however she was called by a returning officer by the name Stella to reschedule her appointment to between 2.00pm and 4.00pm since one aspirant Grace Jemtai Kiptui had run late in presenting her papers. The petitioner and her supporters were about to leave the hotel they had spent the night when they were stopped by the District County Investigation Officer (DCIO) in charge of Kabarnet Police Station. Later the said DCIO took the documents the petitioner and her supporters had and he told them that they were under arrest. They were told to queue in two rows of men and women and the 1st ten were asked to enter a land cruiser there after they were taken to Kabarnet police station. The Deputy County Returning officer (DCRO) and County Returning Officer (CRO) kept calling her to present her nomination papers however that was not possible. Instead the DCIO grabbed her phone and took her to the reporting room. She remained in custody together with her supporters. That she was put in police cells together with her supporters till the 1/6/2017 when she was released on cash bail. That her lawyer went to the Kenya School of Government (KSG) to meet the County Returning Officer but he was informed she was time barred as per the Gazette Notice. That she made a formal complaint vide an email which the court has gone through and seen its contents. In the email, the petitioners advocate was informed that the last day for presenting her nomination papers was 3/6/2017 and asked the 1st respondent to authorize the 2nd respondent to accept her nomination papers. That through a publication the petitioner was informed that she could present her papers to the (CRO) or to whoever she had been directed to by the committee to present to but the commission also delayed to notify her and she still made a formal complaint. to the chairperson of the 1st respondent herein and the court has also looked at the annexure therein.

The Respondents' case

[8] The 1st and 2nd respondents responded to the petition vide a replying affidavit by the County Returning Officer Mr. Humein Gurve Mohammed who stated that vide a Gazette Notice all candidates for the position of County Women Member of the National Assembly was to be done between 30/5/2017 and 31/5/2017. Out of the 5 aspirants in the position 3 candidates were party candidates and 2 independent candidates including Grace Kiptui and the petitioner herein. They had all been entered into the candidates Registration Management system (CRMS). That between the 30.5.2017 and 31/5/2017 4 candidates were cleared but the petitioner herein never submitted her nomination papers. That the 2nd respondent indicated that the Deputy Commander of the Administration police Baringo County Mr Sifuna called to inform him that IEBC forms were being signed, but he clarified to him it is the supporters who were to sign 100 signatures and not the petitioner (aspirant) herein. That he was summoned to assist investigations. A look at the documents released to him, the documents had names and signatures but others did not have the other set of documents had I E B C forms with logo, was written, supporters of Kiptuiya Cheboiwo for the County Women Member of the National Assembly, it had typed names but were not handwritten and had no signature. The documents also were not bound. He further responds by

stating that 1st respondent representative never called the petitioner to reschedule time for presentation of nomination papers and the office had called prior to her arrest to remind her to present her papers and he is aware she was arrested way after 4.00pm (the court notes that the annexures are not numbered as per what the replying affidavit states). The petitioner had presented soft copy booklet of her supporters but the signatures were not sufficient. Further to the above, the petitioner was aware that she could present her nomination papers through her agents for clearance and she dint have to be present which information was well known to her through information passed to aspirants on 23/5/2017. The 1st 2nd respondents further submit that the petitioner herein is guilty of inequitable conduct for the reason that she had earlier on been charged vide Kabarnet Criminal Case No. 368/2017 Republic Vs Kiptuya Cheboiwo and 10 others but failed to reveal the said information. The Court has looked at the charge sheet which is dated 5.06.2017 the petitioner herein has been charged together with 9 others that on 31/5/2017 at 3.00pm at Rift Hills Resort in Kabarnet, Baringo Central Sub-county of Baringo County, and knowingly forged nomination papers. That the petitioner did not exhaust all the remedies available under the I.E.B.C Act and the constitution in particular the Commissions dispute resolution mechanisms under Article 88(4) (e). The petitioner together with other aspirants had been given a check list on all the requirements to ensure strict compliance. The 1st and 2nd respondents pray that the petition be dismissed.

Petitioner's Supplementary Affidavit

[9] Upon service of the said replying affidavit, the petitioner herein put in a supplementary affidavit sworn by her responding to the 2nd respondent's response. That as per paragraph 7 of the replying affidavit, she was not to present her papers upto 10.00am and 12.00pm on 31/5/2017. That vide Gazette Notice No. 2696 of 17/3/2017 the notice didn't state the agents could present a candidates nomination papers. That the allegation that the Deputy Commander of the Administration Police (D.C.A.P) was to swear an affidavit in regard to the 1st respondents contents of paragraph 10 on issue about who was to sign the supporter forms. That she was arrested at 2.30pm and not 3.30pm on 31.5.2017 and she could not communicate to anyone since her phone was taken by the DCIO. That the sample of booklets annexed by the 2nd respondent do not belong to her since they did not even bear her name. The petitioner states that if she were not arrested she would have presented her papers within time i.e before 4.00pm. That her agent one Mr Victor Kipsang Kimaiyo was also arrested therefore she could not present her nomination papers through him. That the 2nd respondents annexure on (the checklist) it does not indicate that the aspirants could send an agent and it was not part of the information the aspirants were informed in the meeting held on 23/5/2017. That on 31/5/2017 her personal assistant was informed by the I.E.B.C officials that the petitioner was to present herself at the I.E.B.C offices with her original National Identity card. That in response to the charge sheet the petitioner has never taken a plea and she is to be presumed innocent until proven guilty. That she followed the remedies available under the I.E.B.C Act and the Constitution since she made a formal complaint to I.E.B.C but she never recovered a response. That the petitioner had complied with all the requirements as required and she was ready to present them on 31/5/2017 at 2.30pm. That all the averments contained in the replying affidavit are false especially that he relied on information from the Deputy Commandant of Administrative Police one Mr Sifuna. On the replying affidavit itself the same is fatally defective since it is not signed by the commission for Oaths, the place of Commissioning is different from the town where the Commissioner was i.e Kabarnet and Eldoret, it is not tamped by the Commissioner for oaths hence the same be struck out with costs. That her fundamental constitutional rights have been violated by state agents that is her rights to present the nomination papers. The state officers had the duty to protect, respect, observe, promote, explain and preserve her rights but the same officers violated them with impunity as a result she has been traumatized and her dignity lowered as a Kenyan citizen and an aspirant on a Woman representative in the National assembly. The petitioner prays that her petition be allowed with costs.

The Submissions

[10] Counsel for the parties made respective oral submissions on 14th June 2017 and, in view of the urgency of the matter, judgment was reserved for following day 15th June 2017 at 2.30pm.

Points for Determination

[11] The question for determination by the Court is whether the Police in arresting and detaining the petitioner on the allegation of involvement in a criminal offence on the day that she was scheduled to present her nomination papers for the general election was a violation of the petitioner constitutional rights and consequently in the circumstances of the case whether the court will grant the relief specifically sought or any other relief as sought in the Petition.

Determination

[12] *The law* Section 13 of the Election Offences Act No. 37 of 2016 provides for election offences as follows:

“13. Offences relating to elections

A person who—

(a) prints, publishes, distributes or posts up, or causes to be printed, published, distributed or posted up, any advertisement, handbill, placard or poster which refers to any election and which does not bear upon its face the names and addresses of the printer and publisher;

(b) makes or publishes, before or during any election, for the purpose of promoting or procuring the election of any candidate, any false statement of withdrawal of any other candidate at such election;

(c) forges, defaces or destroys any nomination paper, or delivers to a returning officer any nomination paper knowing it to be forged;

(d) interferes with election material by removing destroying, concealing or mutilating or assists in the removal, destruction, concealment or mutilation of any such material save on the authority of the Commission or under the provisions of the Elections Act (No. 24 of 2011);

(e) directly or indirectly prints, manufactures or supplies or procures the printing, manufacture or supply of any election material in connection with the election save on the authority of the Commission;

(f) interferes with free political canvassing and campaigning by—

(i) using language which is threatening, abusive or insulting or engages in any kind of action which may advocate hatred, incite violence or influence the voters on grounds of ethnicity, race, religion, gender or any other ground of discrimination;

(ii) directly or indirectly, using the threat of force, violence, harassment or otherwise preventing the conduct of any political meeting, march, demonstration or other event of a political nature or any other person from attending or participating therein;

(iii) creating a material disruption with the intention of preventing a political party from holding a public political meeting;

(iv) impeding, preventing or threatening to impede or prevent the right of any representative of any political party from gaining access, in the manner and during the hours prescribed to voters in any particular area, whether public or private for the purposes of canvassing and campaigning and soliciting membership and support; or

(v) impeding, preventing or threatening to impede or prevent a member of the Commission, a representative of the Commission or any other authorised person or organisation engaged in voter education from gaining access, in the refuses or fails to effect a direction, instruction or lawful order issued by or on behalf of the Commission;

(g) refuses or fails to leave an election counting centre or any area designated by the Commission for electoral purposes when so ordered in accordance with the Elections Act;

(h) enters or remains in an election centre or in any area designated by the Commission for electoral purposes in contravention of Elections Act;

(i) obstructs or hinders any elections officer, candidate or agent in the execution of their lawful duties;

(j) makes a false statement or furnishes false particulars in any statement which is required under Elections Act knowing the statement or particulars to be false or without reasonable grounds for believing the same to be true; or

(k) publishes, repeats or disseminates in any manner whatsoever, information with the intention of—

(i) disrupting or preventing the election;

(ii) creating hostility or fear in order to influence the process or outcome of the election; or

(iii) otherwise unlawfully influencing the process or outcome of the election, or aids, abets counsels or procures the commission of or attempts to commit any such offence; or

(l) forges, defaces or destroys any campaign or promotional material of an opposing candidate or political party,

commits an offence and is liable, on conviction, **to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years or to both.**”

[13] Article 245 of the Constitution provides for Police mandate as follows:

“245. (4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, **but no person may give**

a direction to the Inspector-General with respect to—

(a) the investigation of any particular offence or offences;

(b) the enforcement of the law against any particular person or persons; or

(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.”

[14] The police had a constitutional mandate to investigate the petitioner for the alleged crime of forgery of nomination papers and to enforce the Elections Act against her by arrest and prosecution for the

alleged offences. For the performance and discharge of this constitutional mandate the police cannot be held to have acted unconstitutionally. Yet the petitioner has equally with every citizen protection of the law right to pursue her voting rights with regard to offering herself as a candidate pursuant to Article 38 (3) of the Constitution which entrenches a person's voting rights of an elector and candidature as follows:

“38. (3) Every adult citizen has the right, without unreasonable restrictions—

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(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.”

[15] With regard to independent candidates, Article 85 of the Constitution gives every person a right to offer herself for election as follows:

“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; and

(b) satisfies the requirements of—

(i) Article 99 (1) (c) (i) or (ii), in the case of a candidate for election to the National Assembly or the Senate,

respectively; or

(ii) Article 193 (1) (c) (ii), in the case of a candidate for election to a county assembly.”

[16] The Court has duty under Article 20 (3) of the Constitution to promote and uphold constitutional rights by adopting the interpretation that most favours the enjoyment of a constitution right and develop the law to fill any gap in enforcement, as follows:

“20. (3) In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”

[17] Where giving effect to different constitutional provisions would give conflicting outcomes, it is the duty of the court to look for a harmonious interpretation thereof to ensure that the objects of the Constitution are achieved. Such must be the case in the present petition where the police are entitled to arrest and detain a suspect of crime and where such suspect seeks to exercise her voting right to offer herself as a candidate, the Court must strike a balance that permits the enjoyment of the right and at the same time enables the execution of the prevention of crime mandate of the police.

On the merits of the Petition

[18] Upon considering the pleadings and the affidavits filed in the case and the respective submissions made by the counsel for the parties, I have determined that the police did not violate the petitioner's rights

in any way in arresting her and detaining her pending investigations and arraignment in court for the alleged election offences of forgery of nomination papers and making false particulars in nomination papers under relevant paragraphs of section 13 of the Election Offences Act.

[19] There was no evidence of requests to particular police officer for the petitioner's release to enable her make her presentation of nomination papers, and in any event, the Police were acting within their constitutional mandate to apprehend suspects and investigate crime.

[20] I am therefore unable to find that in arresting the petitioner for the alleged offence of forgery and making false particulars in nomination papers, the police had violated the petitioner's constitutional rights.

[21] No allegations were made against the IEBC and its officers the 1st and 2nd respondents with regard to the inability of the petitioner to present the nomination papers. It was conceded that although a slot of time between 10.00-12.00 on the material day had been allocated to the Petitioner to present her papers, she could have presented her papers at any time before the end of the gazetted time and that she was simply unable because of her circumstances to make the presentation. It was further agreed that the Regulation 22 of the Nomination Regulations allowed presentation of nomination papers by agents but the Counsel for the Petitioner contended that her agents were among the nine people who were arrested and detained alongside the Petitioner.

[22] The IEBC has a mandate to settle disputes in accordance with Article 88 (4) of the Constitution which provides as follows:

“(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(a) the continuous registration of citizens as voters;

(b) the regular revision of the voters' roll;

(c) the delimitation of constituencies and wards;

(d) the regulation of the process by which parties nominate candidates for elections;

(e) 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;

The Commission was alleged to have failed to exercise this mandate when a complaint was lodged with the Chairman by the Petitioner on 2nd June 2017. There was however no evidence that the letters were ever received by the IEBC as alleged email communication was not attached, and it is not possible to find fault on IEBC.

[23] As to whether the papers are competently drawn is a matter for determination by the Electoral Commission through its authorised agents. Accordingly, the determination of validity of the Petitioner's nomination under the parameters of the relevant law is a matter of merits for determination by the IEBC and its agent the Returning Officer 2nd respondent herein.

[24] The Petitioner is innocent of the allegations of forgery and false particulars in nomination papers until proved guilty. Before conviction, there cannot be a valid reason to stop her presentation of nomination papers for consideration by the elections body in accordance with the law.

[25] However, the petitioner was unable to present her nomination papers to the election's Returning

Officer, the 2nd respondent herein, because of her being held in custody for the alleged offences. Although no right of the petitioner was violated by the arrest and detention by the police as they discharged their constitutional mandate to investigate crime, the petitioner was thus prevented by the circumstances that she found herself in following her arrest from enjoying her voting rights under Articles 38 (3) and 85 of the Constitution. The Court would note that she was prevented from keeping her schedule for presentation of nomination papers by circumstances beyond her control.

Misadventure or natural catastrophe

[26] Before the petitioner is tried and found guilty of the election offences with which she is charged, she has constitutional right to presumption of innocence, which places her in position of a person who is prevented from presenting her nomination papers on the scheduled date by reason of any accident, misadventure or natural catastrophe for which she cannot be blamed.

[27] The Court is not concerned with the merits or validity of the petitioner's nomination papers. That is a matter for the IEBC and its returning officer to determine in accordance with the law upon presentation of the nomination papers.

[28] As a constitutional body established under Article 88 of the Constitution for purposes of administering the process of elections in terms of sub-article (5) thereof to "exercise its powers and perform its functions in accordance with this Constitution and national legislation", the Electoral Commission is under Article 20 (1) bound to give effect to constitutional rights of the individual as follows:

"20. (1) The Bill of Rights applies to all law and binds all State organs and all persons."

[29] To the extent that the final list of nominated candidates has not been prepared and gazetted (counsel for the 1st and 2nd respondent indicated that the list of the candidates would be concluded on 17th June 2017), there is still room for the petitioner's voting rights to be enforced by permitting her to present her nomination papers for consideration by the 2nd respondent Returning Officer. This would accord to the constitutional requirement of Article 20 (3) of the Constitution for an interpretation that best suits the enforcement of rights.

Appropriate relief

[30] The appropriate relief in the present case must be the one that best promotes the enjoyment of the petitioner's voting rights under Articles 38 (3) and 85 of the Constitution to enable her to present herself as a candidate for election to the office of Member of Parliament. The relief must also consider the circumstances of the case where the petitioner is charged with election offences relating to the nomination process toward the said election. The relief must therefore seek a balance to ensure the enforcement of the petitioner's voting rights and the public interest that offences be prosecuted and punished. There is urgency in the determination of the criminal trial because the offences charged against the petitioner relate to the very election for which she has sought nomination, and the outcome of the criminal trial may affect the petitioner's eligibility for nomination and or election.

[31] I have considered that even if the petitioner is cleared for election in the nominations she would, if found guilty of the election offences with which she is charged under the Election Offences Act, 2016, be barred for the General Election by operation of the law under section 24 (3) of the Election Offences Act, 2016 which provides as follows:

*"24. (3) **A person who is convicted of an offence under this Act shall not be eligible for election or nomination** in an election for a period of five years following the date of conviction."*

[32] In addition, the Election Offences Act, 2016 provides for expedited determination of cases by

prescribing for a day to day hearing as follows:

“23. (2) Notwithstanding anything contained in the Criminal Procedure Code (Cap. 75), a special Magistrate shall, as far as practicable, hold the trial of an offence under this Act on a day-to-day basis until completion.”

[33] 1. Because of the bearing that the offences with which the Petitioner is charged have to the forthcoming general election, this is an appropriate case for a direction that the trial of the petitioner be had on day to day basis so that a determination of her guilt or innocence is made before the General Election of 8th August 2017.

Orders

[34] Accordingly, for the reasons set out above, the Petitioner’s Petition dated 9th June 2017 is granted to the extent that the 2nd Respondent will receive and consider in accordance with the law the nomination papers of the petitioner herein.

[35] For avoidance of doubt, the Court does not direct that the petitioner’s papers must be accepted or that she must be declared validly nominated. The Court order is restricted to facilitating the petitioner to present her nomination papers for consideration in accordance with the law.

[36] The criminal trial of alleged election offences against the Petitioner in Kabarnet Principal Magistrate’s Court Criminal Case No. 368 of 2017 shall so far as practicable proceed on a day to day basis until completion in accordance with section 23 (2) of the Election Offences Act, 2016.

[37] There shall be no order as to costs.

DATED AND DELIVERED THIS 15th DAY OF JUNE 2017.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Tarus & Co. Advocates for the Petitioner

M/S Magare Musundi & Co. Advocates for 1st and 2nd Respondent

Ms. Macharia for the 4th Respondent (DPP).