

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION NOMINATION APPEAL NO.10 OF 2017

(As consolidated with Election Nomination Appeal No.11 of 2017)

SAMSON MATIKO BOHOKO.....1ST APPELLANT

MOGENDI SAIYA.....2ND APPELLANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

WILFRED G. MACHAGE.....2ND RESPONDENT

JUDGMENT

The 1st Appellant Samson Matiko Bohoko, the 2nd Appellant Mogendi Saiya and the 2nd Respondent Wilfred G. Machage have offered their candidature to contest for the Kuria West Constituency seat in the National Assembly. The three were cleared by the 1st Respondent Independent Electoral and Boundaries Commission (IEBC) to contest for the said seat. The 2nd Respondent lodged two complaints before the IEBC Committee exercising its jurisdiction under **Article 88(4)(e)** of the **Constitution** seeking to have the Appellants disqualified from offering their candidature for the said seat on essentially the ground that they were members of two political parties at the time they presented their nominations to IEBC. In a decision delivered on 8th June 2017, the IEBC upheld the complaints lodged by the 2nd Respondent. The decision was rendered in the absence of the Appellants. The 2nd Respondent's counsel told this court that the IEBC Committee was satisfied that the Appellants had been duly served. The evidence of service were receipts indicating that the Appellants had been properly and duly served by courier service. The Appellants deny that they were served. Being aggrieved by the decision of the IEBC Committee, they lodged an appeal to this court. Another appeal filed on behalf of the 2nd Appellant was consolidated with the present appeal for the purposes of the hearing and determination of the appeal.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Matwere for the 2nd Appellant, Mr. Amolo for the 1st Appellant, Mr. Omoke for the 2nd Respondent and by Ms. Gitau for the 1st Respondent. This court has carefully considered the said submission. Due to exigencies of time, the said arguments will not be reproduced in this judgment. Suffice for this court to state that it has taken into consideration the point of views expressed on behalf of the parties to this appeal. The issues for determination by this court are two: firstly, whether the 2nd Respondent served the Appellants with the complaints that he presented before the IEBC Committee. From the submission made, it was clear that the 2nd Respondent chose to serve the Appellants by substituted service in form of service by courier service. There is no evidence that the Appellants received the complaints in time to enable them adequately prepare their respective responses to the complaints lodged by the 2nd Respondent.

There is no evidence that they were served with hearing notices of the date that was fixed for hearing that required them to appear before the said IEBC Committee. In cases such as the present one, where the right of the voters of Kuria West Constituency to democratically elect a representative to the National Assembly of their choice is in issue, the 2nd Respondent should have used the best form of service which

is personal service. In the absence of personal service, the 2nd Respondent was required to seek leave of the IEBC Committee to serve the Appellants by substituted service. A recognized method by which the Appellants were to be serviced by substituted service is by advertisement in a widely circulating newspaper. That was not done in this case. The complaints by the Appellants that they were condemned unheard therefore has merit. The IEBC Committee should not have proceeded to hear the complaints lodged by the 2nd Respondent without cogent and credible evidence that the Appellants had been properly served. For the above reason alone, the appeals lodged by the Appellants can be allowed.

On the merits, the 2nd Respondent allege that the Appellants were members of two different political parties and therefore they should be disqualified from offering their candidature against him in the forthcoming General Elections scheduled for 8th August 2017. The 2nd Respondent relied on the Kenya Gazette Notices published by IEBC indicating persons who were cleared by the respective political parties to contest in the primaries organized by the said political parties. In respect of the 2nd Appellant, the 2nd Respondent alleged that he was a member of Jubilee Party. His name appeared in the Kenya Gazette Notice of 13th April 2017 as a candidate for the said party. The 2nd Respondent explained that the 2nd Appellant participated in the primaries organized by Jubilee Party and lost. He then purported to resign from the party and offer his candidature under the auspices of Federal Party of Kenya political party. The 2nd Appellant denied that he was a member of Jubilee Party. He annexed documents which showed that he had resigned as a member of Jubilee Party long before Jubilee Party held its primaries. He was now a life member of Federal Party of Kenya. It was his case that he was properly nominated to contest the said seat by Federal Party of Kenya.

The 2nd Respondent complained that the 1st Appellant was a member of Amani National Congress though he had presented a nomination certificate to IEBC that was issued by the Orange Democratic Movement political party. Again the 2nd Respondent relied on the Kenya Gazette Notice published on 13th April 2017 to support his claim. On his part, the 1st Appellant denied ever having been a member of Amani National Congress. He annexed several documents to prove that he was a member of Orange Democratic Movement political party. These documents included a life membership certificate issued to him by the ODM party. When the 1st Appellant became aware that he had been wrongly gazetted by Amani National Congress as one of its candidate for the Kuria West Constituency National Assembly seat, he instructed his advocate to write to the said party to have his name de-gazetted as a member of the said party.

This court carefully re-evaluated the evidence that was placed before the IEBC Committee that influenced it to render the impugned decision. It was clear to this court that the IEBC Committee essentially relied on gazette notices published by political parties listing those who intended to participate in their respective party primaries. According to the Kenya Gazette Notice No.2393 which was published on 17th March 2017 by IEBC, it was the political parties themselves who were required to present names of persons intending to participate as candidates in their respective primaries to IEBC for publication in the Kenya Gazette. In the present appeal, it was clear that if Jubilee Party and Amani National Congress published the names of the Appellants as their candidates, they did so without any input from the Appellants. Therefore, the possibility that the Appellants could have been mistakenly gazetted by the said political parties as their members cannot be ruled out.

In cases such as the present one, the court can only rely on primary documents which can be produced in evidence during trial. These documents include the membership certificate of the individual issued by the political party, acknowledgment by the Registrar of Political Parties that the particular individual belongs to a particular political party and finally, confirmation by the particular political party that the individual is or is not its member. In the present appeal, it was clear that the IEBC Committee did not address itself on the question whether sufficient, credible and cogent evidence had been presented before it to support its decision that the Appellants were members of two political parties. On re-evaluation of the evidence presented before the IEBC Committee, this court is not satisfied that the required threshold in regard to standard of proof i.e. proof on a balance of probabilities was established. That decision cannot therefore be upheld.

In the premises therefore, the appeal lodged by the Appellants has merit and is hereby allowed. The decision of the IEBC Committee rendered on 8th June 2017 is hereby set aside and substituted by a judgment of this court dismissing the two complaints lodged by the 2nd Respondent. The 1st Respondent (IEBC) is ordered to gazette the Appellants as candidates for their respective parties for the Kuria West Constituency National Assembly seat. There shall be no orders as to costs. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF JUNE 2017

L. KIMARU

JUDGE