



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELECTION PETITION APPEAL NO. 125 OF 2017

IN THE MATTER OF MEMBER OF COUNTY ASSEMBLY

BUNYALA EAST WARD

NAVAKHOLO CONSTITUENCY, COUNTY OF KAKAMEGA

EDWARD MUKAYA KHAMALAAPPELLANT

VERSUS

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....RESPONDENT

JUDGMENT

[1] This is an appeal from the Decision of the Respondent's Dispute Resolution Committee dated **8 June 2017** by the Appellant, **Edward Mukaya Khamala**. The Appellant raised two grounds of appeal, namely:

[a] That the Respondent's Disputes Resolution Committee erred in its ruling that the Appellant was time-barred from presenting his nomination documents;

[b] That the Respondent's Disputes Resolution Committee erred in holding that the Appellant did not have the required documents on **30 May 2017**.

On the basis of the aforesaid grounds, the Appellant prayed that his Appeal be allowed.

[2] Attached to the Memorandum of Appeal was a Petition dated **21 June 2017** expressed to have been filed pursuant to **Articles 27, 38, 47 and 48** of the **Constitution of Kenya**. The Court was thereby petitioned for an award in General and Special Damages for the violation of the Petitioner's constitutional rights by the Respondent and any other order that the Court may deem fit and just to award. The Petition was hinged on the grounds that on the **31 May 2017**, the Appellant could not present his nomination papers as the Respondent's offices were closed; and that when he returned on **1 June 2017** to present his nomination papers to the Respondent's Returning Officer, the same were rejected on the ground that the Appellant was time-barred.

[3] It was further the contention of the Appellant that by **1 June 2017**, the time set for presentation of nomination papers had not expired; and that when he subsequently presented his Complaint to the

Respondent's Dispute Resolution Committee, his Complaint was dismissed; thereby infringing on his constitutional rights as enshrined in **Articles 27, 38, 47 and 54** of the Constitution. He therefore sought an award of General and Special Damages as compensation for the aforesaid infringements.

[4] The Petition was supported by the affidavit of the Appellant annexed thereto, sworn on **21 June 2017**; in which he averred that he attended the pre-nomination exercise on **23 May 2017**, whereupon he prepared his nomination papers for verification on **25 May 2015**. According to him, he was assured that everything was in order, but when he presented the same documents for clearance at the Navakholo IEBC Offices on **30 May 2017**, he was informed by the Returning Officer that his List of Supporters was below the requisite number of 500 by about 199 registered voters. He was accordingly advised to look for additional names; and that he still had time till **31 May 2017** to comply, but when he returned on **31 May 2017** with a view of resubmitting his nomination documents, he found the Respondent's offices closed. When he returned on **1 June 2017** he was told he was time-barred.

[5] The Appellant further averred that the aforesaid action by the Returning Officer amounted to discrimination as the Commission was busy clearing other candidates on the same day that his nomination papers were rejected; and that it was within his own personal knowledge that the period for clearance of Independent Candidates had been extended to **2 June 2017**. He added that he is a disabled person and that his rights to participate in the general elections were violated by reason of the decisions taken against him by the Respondent. Attached to his Supporting Affidavit were copies of the rejected nomination papers as well as the Decision of the Respondent's Dispute Resolution Committee.

[6] The Respondent on its part filed Grounds of Opposition dated **30 June 2017** contending that:

[a] The orders prayed for by the Appellant do not lie;

[b] The Appellant failed to meet the mandatory qualifications for election as a Member of the County Assembly as provided for by **Article 193** of the **Constitution**;

[c] The Appellant has not sought to have quashed, reviewed or set aside the decision of the Respondent dated **8 June 2017**;

[d] The Appellant has not particularized or specifically pleaded his loss and is therefore undeserving of the prayer for damages;

[e] The petition is incompetent, incomplete and premised on the wrong understanding and interpretation of the law.

[7] There can be no doubt from the foregoing that this matter is hodgepodge of sorts, clearly straddling two very different regimes of law, in that whereas it has been fashioned as an Appeal, it has a Petition attached thereto, supported by an affidavit complete with annexures. It note however that the matter was registered and argued as an Appeal. Accordingly, a question immediately arises as to whether a right of appeal is available in the circumstances, and by extension whether the Court has the requisite jurisdiction to entertain the Appeal. There is no express provision conferring a right of appeal either in the **Article 88** of the Constitution or **Section 74** of the **Elections Act**, pursuant to which the impugned decision was made, or any indication therein that such a decision is appealable. In the case of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others [2012] eKLR**, the Supreme Court made it clear that:

A Court's jurisdiction flows from either the Constitution or legislation. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

[8] And in the case of Owners of **Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1**, the Court of Appeal expressed itself thus on the issue of jurisdiction:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

[9] Accordingly, it appears to me that the only available recourse in the circumstances would be by way of judicial review pursuant to **Articles 23 and 165** of the **Constitution** as read with **Order 53 Rule 1** of the Civil Procedure Rules. But even assuming that the matter is competently before this Court, it is evident from the Decision of the Respondent's Dispute Resolution Committee that the Appellant was accorded an opportunity to present his nomination papers and that he did present the same within the timelines set by the Respondent; and that when the verification of the names on the Appellant's List of Supporters, it was found to be short by 199 registered voters. The Appellant did not dispute and could not dispute this, granted that **Regulation 43(2)(a) and (d)** of the **Elections (General) Regulations, 2012** mandates the Respondent to verify such lists with a view of ensuring that the supporters so listed are registered voters in the ward/electoral area in question.

[10] Further to the foregoing, **Regulation 43(2)(g)** of the **Elections (General) Regulations** recognizes that a Returning Officer can reject nomination papers on the ground that the documents were time-barred. **Section 2** of the **Elections Act** provides that the time for nomination is between 8.00 a.m. and 4.00 p.m. of the date specified; and the Court takes judicial notice that the specified dates for nomination of Independent Candidates for the position of Member of County Assembly was set by the Respondent to be **Sunday May 28, 2017** and **Wednesday May 31, 2017** per paragraph (k) of the Gazette Notice No. 2697 of **17 March 2017**. The Appellant conceded that after being given an opportunity to avail additional names of supporters, he was unable to resubmit his nomination papers because he was time barred. Accordingly, granted the thrust of the Appellant's case, I would be of the view that the appeal has no merit and therefore lends itself dismissal.

[11] In view of the foregoing, I find it superfluous to make a determination on the merits or otherwise of the Petition, which was itself predicated on the same grounds. Thus, the Appeal herein is hereby dismissed with no order as to costs.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY 2017

OLGA SEWE

JUDGE