



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 301 OF 2017

IN THE MATTER OF ARTICLES 20 (10, 22, 23, 27, 35, 38, 47, 48, 50, 81, 87, 88, 165 (3) (A) AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 4 (E) OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT

AND

IN THE MATTER OF SECTION 3, 4, 9 AND 11 OF FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF ODM NOMINATIONS FOR COUNTY ASSEMBLY ELECTIONS FOR CENTRAL NYAKACH COUNTY ASSEMBLY WARD

BETWEEN

HYPOLITUS OWITI

OBUNGA.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....RESPONDENT

AND

CAROLINE OJIENGE OGOT.....1ST INTERESTED PARTY

ORANGE DEMOCRATIC MOVEMENT.....2ND INTERESTED PARTY

JUDGEMENT

1. The petitioner states that he won the party primaries held on 26th April 2017 for the Orange Democratic Movement as the Party's candidate for Member of County Assembly for Central Nyakach Ward. A complaint was filed at the Political Parties Dispute Tribunal[1] and the PPDT ordered the party to do fresh nominations.
2. The first interested party's appeal to the High Court of Kenya against the said decision was dismissed on 30th May 2017.[2] Instead of repeating the nominations as ordered, the second interested party forwarded the first interested party's name to the I.E.B.C. as the duly nominated candidate.
3. The petitioner claims that he forwarded a complaint to the I.E.B.C. via e-mail on 5th June 2017, but it failed to hear the complaint or provide the information. He claims this violated his rights under articles **35, 27, 38, 47** and **50** of the constitution, hence the declarations sought in the petition.
4. In opposition to the petition, the first interested party filed a Replying affidavit on 17th July 2017 stating inter alia that the petition has been overtaken by events since he has been gazetted, and that the issue of non compliance with the decision of the PPDT and the High Court decree can only be challenged in the said courts and not by this petition. Further, I.E.B.C. is mandated to hear disputes filed before it but not to determine compliance or otherwise of court orders.
5. He also averred that the Tribunal had ordered fresh nominations under the party's rules and not repeat elections, hence, the interested party complied with the court decision and nominated her. She further avers that the petitioner is indolent and that no basis has been established for granting the orders sought.
6. Also, in opposition to the petition is the affidavit of **Douglas Bargoret** on behalf of the Respondent filed on 7th July 2017. He terms the petition as frivolous, vexatious and an abuse of court process. Also, the orders relied upon by the petitioner were not directed to the Respondent and that upon conducting the repeat nominations, it was for the second interested party to forward its nominees name, and that it was not within its mandate to supervise the nominations.
7. He also avers that the Respondent duly notified the public that it would hear disputes from 4th June to 13th June 2017 and further that a look at the e-mail relied upon reveals that no complaint was forwarded, hence, the Respondent could not be expected to adjudicate over a complaint it did not receive nor has the petitioner demonstrated that he exercised due diligence in following up the alleged complaint.
8. The petitioner filed a supplementary affidavit on 17th July 2017 disputing the contents of the above affidavit and insisting that he exercised due diligence.
9. The core of the petitioners counsels submissions is that the petitioners constitutional rights were violated, while the Respondent's counsel insisted that no complaint was received and that the candidates to participate in the elections have already been gazetted. The second interested party did not file submissions while the first interested party did not participate in the proceedings.
10. The core issue for determination is whether the petitioner has established a case to warrant the court to grant the orders sought. The petitioner alleges to have forwarded his complaint to the I.E.B.C by way of e-mail and the next follow up was by a letter dated 12th June 2017. The Respondent disputes receiving the e-mail. Even assuming the e-mail was forwarded as alleged the petitioner has one hurdle to cross, that is whether or not he diligently pursued the complaint.
11. The Respondent communicated to the public that it was to hear the complaints from 4th June 2017 to 13th June 2017. These time frames were in public domain. It was incumbent upon the petitioner to diligently pursue his complaint. Only one letter by his advocates has been attached dated 12th June 2013, just one day before the deadline for hearing the disputes. In my view, assuming that the petitioner forwarded the complaint as alleged, which is doubted, it is clear that he slept on his rights. Equity aids the vigilant, not those who slumber on their rights. A litigant has a duty to pursue the prosecution of his or

her Case.[3] The petitioner has not explained why he forwarded his complaint (if at all he did) and took no steps to list it for hearing.

12. As was correctly held in *Utalii Transport Company Limited & 3 Others v NIC Bank & Another*[4] "it is the primary duty of a litigant to take steps to progress his case..."

13. To commence or to continue proceedings which a party has no intention to bring to a conclusion may constitute an abuse of process.[5] As Lord Woolf stated in *Arbuthnot Latham Bank Ltd vs Trafalgar Holdings*[6]

"Whereas hitherto it may have been arguable that for a party on its own initiative to in effect 'warehouse' proceedings until it is convenient to pursue them does not constitute an abuse of process, when hereafter this happens this will no longer be the practice. It leads to stale proceedings which bring the litigation process into disrespect. As case flow management is introduced, it will involve the courts becoming involved in order to find out why the action is not being progressed. If the Claimant has for the time being no intention to pursue the action this will be a wasted effort. Finding out the reasons for the lack of activity in proceedings will unnecessarily take up the time of the court. If, subject to any directions of the court, proceedings are not intended to be pursued in accordance with the rules they should not be brought. If they are brought and they are not to be advanced, consideration should be given to their discontinuance or authority of the court obtained for their being adjourned generally. The courts exist to assist parties to resolve disputes and they should not be used by litigants for other purposes."

14. It cannot be lost to this court that despite having a conscience, it is a court of law and not of mercy. [7] It is also bound by the law and more so the Constitution which binds all. Consequently, the constitutional, statutory and applicable regulations governing election nomination processes and conduct of court proceedings must apply with equal force so as to effectively serve the desired purpose of guaranteeing fairness for all. A litigant cannot simply institute court proceedings and sit back to wait for its determination without taking steps to progress the case.

15. In my view, judicial processes ought not only to be transparent but must be transparently exercised free of any taint. Delay or failure to prosecute a case taints the party's case to the extent that it constitute abuse of lack of seriousness on the part of the party involved. Persons aspiring for elective offices must embrace systems that promote sound ethical values and practices including exhibiting openly serious bias towards ensuring commitment to speedy disposal of their cases and taking appropriate steps to have their cases determined expeditiously that are consistent with the spirit and intent of the constitution.

16. Upon due consideration of all the material before me and upon considering the arguments advanced by all the parties, I find that the petitioner has not satisfied the threshold for this court to grant orders sought. He is guilty of unexplained delay if at all he filed the complaint as alleged. The time frame for resolution of such cases was clearly made public and he ought to have known and taken advantage of the prescribed time frame and prosecute his case within the stipulated period.

17. The effect is that the orders sought are hereby refused and this petition is dismissed with costs to the Respondent and the first interested party.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this 21st day of July 2017

John M. Mativo

Judge

[1] *No. 299B of 2017*

[2] *High Court Election Appeal number 80 of 2017*

[3] *Savings and Loans Limited -vs- Susan Wanjiru Muritu, Nairobi (Milimani) HCCC No. 397 of 2002.*

[4] **NBI HCCC NO {2014} eKLR**

[5] See *Grovit v Doctor* {1997} 1 WLR 640: *Habib Bank Ltd v Jaffer*

[6] {1988} 1 W.L.R. 1426 at p. 1437:

[7] *Yusuf Gitau Abdalla vs. The Building Centre (K) Ltd & 4 Others, Petition 23 of 2014*