



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL PETITION NO. 79 OF 2013

TERESIA WAIRIMU KAIRUPETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....RESPONDENT

JUDGMENT

Introduction

1. The petitioner, who was a candidate for the Senate seat in Kiambu County in the last general elections, seeks compensation from the respondent for expenses that she allegedly incurred during the 2013 election campaigns and exemplary damages for alleged violation of her rights. She contends that the respondent, which is responsible for the registration of voters, wrongly failed to register her as a voter in Kiambu County, failed to correct its records with regard to her registration as a voter in time, and she thereby lost a chance to vie for nomination for the Kiambu Senate seat on The National Alliance Party of Kenya (TNA) ticket.
2. The respondent is a Commission established under Article 88 of the Constitution of Kenya and the **Independent Electoral & Boundaries Commission Act** of 2011. It is mandated to oversee elections in the country and is responsible for the registration of voters, revision of the voters' roll, and regulation of the nomination process by political parties for elections.

The Petitioner's Case

3. The case for the petitioner is contained in the petition dated 6th February 2013 and supported by an affidavit sworn by the petitioner on the same day. The petitioner has also filed written submissions dated 11th July, 2013. Learned Counsel, Mr. Muga, presented the petitioner's case in reliance on these documents.
4. The petitioner avers that on or about 9th October 2012, she applied and was duly registered as a member of TNA and was issued with an interim Membership Card No. 2692336. She was also registered as a voter on 22nd November 2012 at Kabuku polling station in Kabuku Primary School, Limuru Constituency, Kiambu County.
5. She states, however, that when she presented to the respondent's registration officials her National

Identity Card No. 1013577 for verification of her registration, she was informed by the registration officers that the name in the respondent's Biometric Voter Register was one Joyce Jepkemboi Kairu as the holder of ID No. 1013577 and not Teresia Wairimu Kairu, the true and correct name of the petitioner. According to the petitioner, she immediately informed the respondent of the anomaly and was assured that the same was a computer error that would be rectified immediately. An elector's card number 0121641211221159-1 was issued to her by the respondent.

6. On or about 27th November 2012, the petitioner lodged a formal complaint with the respondent to have her particulars rectified to reflect her true and correct names. She states that she also made a further complaint with the Criminal Investigation Department and the National Registration Bureau to establish whether there was an anomaly in the particulars of her Identity Card but the two government entities confirmed that the said identity card is valid and belongs to her.
7. The petitioner alleges that she received a telephone call on 4th December 2012 from an employee of the respondent, and was notified vide a letter dated 4th December 2012 that her registration particulars had been rectified. She avers, however, that when the respondent opened the voter register for inspection on or about 15th January 2013 and she checked her voter status, she found that her identification particulars were still under Joyce Jepkemboi Kairu.
8. The petitioner alleges that the respondent was lethargic in effecting the correction and gave conflicting information; that in the letter of 4th December 2012, the respondent alleged that it had corrected the anomaly and so the petitioner on 21st December 2012 proceeded with her campaign for nomination as a senator on a TNA ticket. When the Voter Register was opened on 14th January 2013, however, the anomaly had not been corrected and her name was not on the register.
9. She claims therefore that she has suffered loss as a result of the respondent's failure to correct the anomaly as she was not able to present herself for the TNA nomination; that she had applied and paid nomination fees to the TNA party and had the expectation that she would be accorded an opportunity to present her nomination; and that her registration particulars were rectified on 17th January 2013, the date that IEBC closed the nomination for TNA, and thus her rights under Article 38 as well as under Article 35(1) (b) and 35(2) which relate to the right to information and correction of information were violated.
10. In response to the respondent's challenge of the jurisdiction of this Court on the basis that she should have proceeded to the Magistrates Court as provided under section 11 and 12 of the Electors Act with regard to the question whether a person is qualified to be registered as a voter, the petitioner submits that the issue in this case is not whether the petitioner was qualified to be registered or not; that she was registered and there was a legitimate expectation that the anomaly in registration would have been rectified. She contends that as the respondent failed to correct the information about her, she is properly before the Court under Article 22 and 258.
11. The petitioner contends that the respondent willfully and unlawfully failed, delayed, ignored and/or refused to rectify her voter registration particulars rendering her party less and thus unlawfully and unconstitutionally denied her fundamental right to vote and freely participate in the political nominations in her political party of choice. She claims that she suffered enormous loss and damages and incurred huge expenses as an aspirant who used a lot of financial, material and emotional resources to campaign for the seat of Senator of Kiambu County on the TNA ticket. She has annexed to her affidavit a bundle of documents and receipts on expenses incurred during her campaign as a candidate of the TNA.
12. She prays that the petition be allowed and the direct losses which occurred as a result of the respondent's delay, together with exemplary damages under Article 23, be awarded to her.

The Respondent's Case

13. The respondent filed a replying affidavit sworn on 25th February, 2013 by **Muhamud Mohamed**

Jabane, its Manager, Legal Affairs, and written submissions dated 30th August, 2013.

14. The respondent contends that the petition is incompetent on the grounds that the Court lacks the jurisdiction to entertain its subject matter as **Part V** of the **Elections (Registration of Voters) Regulations of 2012** reserves exclusive jurisdiction on claims and complaints and matters appertaining to registration of voters to the Registration Officer as the tribunal of first recourse; and that the Principal Magistrate's Court or High Court are vested with appellate jurisdiction only.
15. It contends, further, that **Part V** of the said regulations provides the manner in which the claim is to be set out which is not by way of petition; and lastly, that **Regulation 17(2)** precludes the filing of claims based on registration of voters within 90 days of a general election hence the petition is time barred.
16. The respondent acknowledges that an error did occur in capturing the petitioner's identification particulars. It states, however, that the error arose solely from the previous voter database; that it was an honest and inadvertent error, and immaterial in terms of consequences to the petitioner's registration status as a voter.
17. The respondent further concedes that it did receive the petitioner's letter dated 27th November 2012 setting out her complaints and that upon investigations, it responded by its letter dated 4th December 2012 assuring the petitioner of the rectification of the error. It asserts therefore that the petitioner could not have suffered any loss or damage in respect of her political, human and constitutional rights or fundamental freedoms as she has always been a duly registered voter since 22nd November 2012 when she presented herself for registration at Kabuku Polling Station.
18. The respondent contends further that the petitioner has not provided any evidence to demonstrate that by virtue of the error in the registration, she was locked out of the TNA nominations. It contends that it actually cleared the petitioner to run for the Kiambu Senatorial seat on a Saba Saba Asili ticket since there is and there have never been any question as to her voter registration status.
19. The respondent terms the claim for refund of expenses and losses incurred as speculative as it is made on the assumption that the petitioner would have been successful in the TNA nominations upon which she would have been refunded her expenses. Counsel for the respondent, Ms. Ngeresa termed the expenses claimed and the documents in support, which include receipts for food and accommodation, and overtime as outrageous as the petitioner cannot expect the respondent to underwrite all her expenses and should have sued TNA for the nomination fees since, as at 16th January 2013, she had indicated that she no longer wished to run on the TNA ticket.
20. With regard to the alleged breach of Article 38, the respondent submits that the petitioner was given adequate reasons why her data was inaccurately captured; that the respondent took reasonable steps and rectified the register; and that the petitioner participated in the elections as a candidate on the Saba Saba Asili Party. Counsel submitted that the petitioner's political rights were not limited to TNA as a party but could be exercised through other parties, and by her own admission, she participated in the Saba Saba Asili nominations.
21. The respondent submits that it is entitled, pursuant to Section 6 of the Elections Act and Regulation 33 of the Elections (Registration of Voters) Regulations of 2012, to amend, publish and compile the register and it is only thereafter that the exercise can be deemed to be complete. It asserts that by dint of these provisions, the law recognizes the possibility of human error in registration of voters which errors are amenable to rectification by the respondent as in the present case.

Determination

22. From the pleadings and submissions of the parties in this matter, the Court takes the view that the following three issues arise for determination:

- i. **Whether the Court has the jurisdiction to hear this petition;**
- ii. **Whether there was a breach of the petitioner's rights and fundamental freedoms;**
- iii. **Whether the petitioner is entitled to damages for any losses incurred.**

Jurisdiction

23. The respondent challenges the jurisdiction of this Court on the basis that **Part V of the Elections (Registration of Voters) Regulations of 2012** vests jurisdiction in matters pertaining to registration on the Registration Officer. On her part, the petitioner alleges violation of her rights and asserts that the Court has jurisdiction under **Article 258** of the Constitution which entitles any person to move the Court where the Constitution is contravened or threatened with contravention and that her rights are enforceable under **Article 22** of the Constitution. She also relies on **Article 165(3) of the Constitution** which clothes the High Court with original and unlimited jurisdiction to determine such cases.

24. It is incontestable that the High Court has unlimited original jurisdiction under **Article 165(3)**, and that under **Rules 4 and 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013)**, where a contravention of any fundamental rights and freedoms of an individual is apprehended, an application shall be made directly to the High Court by way of petition.

25. However, it is also the law that where a clear dispute resolution procedure is provided by the Constitution or statute, that procedure must be followed - see the case of **Francis Gitau Parsimei & 2 Others vs National Alliance Party & 4 Others, Petition No. 356 and 359 of 2012** in which the Court reiterated the principle that where the Constitution or a statute establishes a dispute resolution procedure, that procedure should be followed.

26. The question to be addressed then is whether the **Election Act and Part V of the Election (Registration of Voters) Regulations, 2012** provide specific avenues through which this dispute should have been solved.

27. **Section 11 and 12** of the Elections Act are in the following terms:

“11. Any question whether a person is qualified to be registered as a voter shall be determined in accordance with this Part.

12. (1) A person who has duly applied to be registered and whose name is not included in the register of voters may submit a claim for the name to be included in the register to the registration officer in the prescribed form and manner and within the prescribed time.

(2) Subject to the Constitution, a claim under subsection (1) shall be determined by the registration officer in the prescribed manner, and an appeal shall lie in the prescribed manner, to the Principal Magistrates Court on matters of fact and law and to the High Court on matters of law.”

28. **Part V** of the Regulations provides at regulations 17 and 18 as follows:

17. (1) A claim to a registration officer under section 12 of the Act in respect of an application under these Regulations shall be made at any time by the registered voter.

(2) A claim under sub regulation (1) shall not be made within ninety days to the date of a general election or referendum or within sixty days to the date of a by-election.

18. A claim shall be in Form F set out in the Schedule and shall be accompanied by a new application for registration under Part IV.

29. Two observations may be made with regard to these regulations. First, they relate to applications for registration as a voter, and apply with regard to application for registration. Secondly, there appears to be some inconsistencies with regard to the making of claims under the regulations. While regulation 17(1) provides that the making of a claim under the regulations may be made at any time, regulation 17(2) appears to have been intended to limit the time for the making of such claims to a period of not less than ninety days and sixty days in respect of a general election and by-election respectively.

30. In the end though, I agree with the petitioner that these provisions are not applicable to the present case. The petitioner had been duly registered as a voter, a fact that is not in dispute. The problem was that her identification particulars were erroneously ascribed by the respondent to another person. In the circumstances, her claim does not fall for adjudication under the regulations. She alleges violation of her rights under Articles 35 and 38, and she is, in my view, entitled to approach the Court under Articles 22 and 23 of the Constitution. I therefore find and hold that this Court has jurisdiction to hear and determine this petition.

Whether there was a Violation of the Petitioner's Rights

Violation of Article 35

31. The petitioner has alleged violation of her rights under Articles 35 and 38 of the Constitution. Article 35 provides that:

35. (1) "Every citizen has the right of access to-

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person."

32. I have not heard the respondent dispute that the petitioner does indeed have these rights. On the contrary, from the averments in both the petitioner's and respondent's affidavits, the respondent clearly conceded that an error had been made and made efforts to rectify it. While it indicated that it had made the correction by 4th December 2012, it appears that the correction was only effected on or about 16th January 2013. At any rate, the petitioner was entitled to have misleading information about her-if this is how one interprets the use of the wrong names by the respondent-corrected. This was done, albeit late, and the petitioner was able to vote and vie as a candidate, though not on the party on whose ticket she intended to vie. No violation of her rights under Article 35(2) has therefore been demonstrated.

Violation of Article 38

33. The petitioner alleges that she requested the respondent to correct her registration details, once she realized that there was an anomaly in the names, as early as November 2012. While the respondent did eventually correct the anomaly, that was not done, according to the petitioner, in time to allow her to vie on the party of her choice, TNA. The question is whether this failure by

the respondent amounted to a violation of her rights under Article 38.

34. Article 38 provides as follows:

“(1) Every citizen is free to make political choices, which includes the right—

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party;
or

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.

(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.”

35. Section 24 (1) (a) of the Elections Act stipulates that ***“a person qualifies for nomination as a Member of Parliament if the person is registered as a voter”***. Regulation 38(a) of the ***Elections (General) Regulations, 2012*** requires that a ***“Nomination Paper submitted by a Political Party candidate to the Commission shall contain the candidate’s name as it appears in the register of voters”***.

36. For the petitioner to lawfully exercise her political rights under Article 38 of the Constitution, she had to be a duly registered voter and her names must have appeared in the voter register. Pursuant to ***Section 4(a) of the IEBC Act***, the respondent is charged with the responsibility of registering voters. Counsel for the petitioner argues that the petitioner did all that was required of her under the law to be correctly registered as a voter. She also brought to the attention of the respondent the error appearing against her national identity card. She alleges that the error was not corrected until 17th January 2013 at 5. p.m., even though the respondent misrepresented to her that it had been corrected.

37. The petitioner claims that as a consequence of the failure by the respondent to correct its records, she was not able to present her nomination as a candidate for Kiambu County on the TNA ticket.

However, some doubt is cast on this assertion by her undated letter which, from the receipt stamp, was received in the TNA office on 18th January 2013. In the said letter (annexure ***TWK-16*** at page 25 of her bundle of documents), she asks TNA for a refund of her nomination fees, stating that she had decided to move her nomination from TNA to Saba Saba Asili party. The letter is in the following terms:

Teresia Wairimu Kairu

P. O. Box 35260

Nairobi, Tel [0715015352](tel:0715015352).tk4kiambu@gmail.com

The National Alliance (TNA Party)

Promiso House, Off Jogoo Rd

P. O. Box 13913-00800

NAIROBI.

Ref: Membership and Nomination under the The TNA Party Banner

To Whom it may concern

After going to register as a voter in Kabuku polling Station, I realised that my National ID had been assigned to someone by the name, Joyce Chepkemboi Kairu. (This matter is known to you since it has been a subject in the Kenyan Media).

Since then, the DPP has ordered the investigation into the circumstances resulting in the criminality. The matter is still under investigation. Given this therefore, I have been waiting to receive a confirmation from the IEBC that the matter has been resolved. It wasn't until the 17th of January 2013 that the Registrar of political parties confirmed to me that their registry has been changed to reflect my Name and ID.

IEBC was slow to change the information on the Biometric Voter Registry, thus dis-chanting (sic) me and in fact violating my rights as a citizen, a matter I intend to take to court.

Given the IEBC's mistake which led to me not having a party legally, I decided after finding out this fact from the Registrar of Political Parties to move my nomination from TNA to SABA SABA Asili. (Notwithstanding, after several complaint seeking your assistance to your office were ignored). Until the 17th January 2013, I was not registered as a voting member of any party.

This letter is to confirm what the Registrar of Political Parties confirmed yesterday: That I am a Senate Candidate under the SABA SABA Asili party banner and will be running in the upcoming general elections as thus.

Please note that I had always intended to be part of TNA but the illegality within IEBC prompted a state of confusion that has lead to my being a member now of SABA SABA ASILI party.

Given that I am not seeking nomination with your party, and I am not responsible for the confusion involving my Voter Registration, I kindly request that you refund the fee I paid in the amount of Kshs125,000 for nomination into your party. This is also because I was never registered as a voter or member of any party according to the registrar of Political parties until the 17th of January 2013.

Sincerely

Teresia Wairimu Kairu

Senate Candidate (SABA SABA ASILI)

ticket and been rebuffed. Indeed the tone of the letter suggests that she had made up her mind much earlier than the 17th of January 2013 which she submits was when she decided not to run on the TNA ticket.

39. My view in this regard is fortified by the letter from the respondent dated 16th January 2013 (annexed to the petitioner's affidavit as **TWK-14(b)**) in which the respondent confirms that the petitioner's registration details had been rectified and refers to a decision by the petitioner to ask the Registrar of Political Parties to allow her to run for the Kiambu Senate seat on another party's ticket, according to the said letter, the Safina party. The letter states in the penultimate paragraphs as follows:

"The Registrar of Political Parties (RPP) has also embarked on your candidature request of transfer from The National Alliance Party (TNA) to Safina Party.

"Please liaise with the office of RPP as soon as you can for finalization of you transfer request."

40. It would have assisted the Court had the petitioner disclosed when she made the election to move her candidature from TNA to Saba Saba Asili or Safina, and thereafter communicated her decision to the Registrar of Political Parties. At any rate, for the respondent, in its letter of 16th January 2013, to refer to a request from the petitioner to the Registrar of Political Parties for a transfer of the petitioner's candidature from one party to another suggests that such request had been made, at the very latest, by the 16th of January 2013.

41. From the evidence therefore, the petitioner elected to move from TNA to another party on or before 16th January 2013, and she did contest the Kiambu senatorial seat on a Saba Saba Asili party. Was she, then, denied political participation as contemplated under Article 38?. In my view, the answer, and in this I agree with the respondent, is in the negative. The admitted failure by the respondent to rectify the register in a timely manner did not result in precluding her entirely from participating in the elections, either as a voter or as a candidate. It resulted only in her exercising her rights under the said Article in a political vehicle that she submits that she had not intended to use. Consequently, I find a qualified but not material limitation of her rights under Article 38: she was able to exercise her right to vie as a candidate, but not on the political vehicle she initially intended to use.

Whether the Petitioner is entitled to Damages

42. The petitioner also seeks an order compelling the respondent to compensate her for the loss and damage that she suffered as a consequence of its not having rectified the register in time for her to be nominated as a candidate for TNA. She has set out in her affidavit her claim in this respect as well as documents in support thereof. These include air tickets for flights from the United States in September 2013, nomination fees for the TNA, and receipts for accommodation and meals dating from November 5 2013, amounting in total to Kshs.3,225,444.67 .

43. Aside from challenging the production of vouchers as proof of special damages in reliance on the case of **Apollo Insurance Co. Ltd vs Peter Kimani Njuguna [2007] eKLR** where the Court held that vouchers are not proof of special damages and should be disregarded, the respondent argues that it cannot be expected to underwrite all her expenses, and that that she should have sued TNA for refund of the nomination fees when she switched to Saba Saba Asili.

44. I must agree with the respondent that it cannot be held liable for the petitioner's expenses. First, they cover expenses incurred way before the petitioner was registered as a voter. Secondly, they relate to expenses that any person would ordinarily incur in the normal course of their daily life such as expenses for meals.

45. Thirdly and more importantly, to make an award in respect of the expenses would be based on the erroneous assumption that the petitioner would have won the TNA nomination had it not been for the failure of the respondent to capture her registration details correctly.
46. Given my finding that the petitioner appears to have made no attempt to pursue her nomination with TNA but elected to vie on another ticket, to then make an award of damages on the basis that she could have run on the said party's ticket would set a precedent that would work against the public interest given the very volatile and unpredictable nature of party politics in Kenya. A party who senses the likelihood of defeat in one party's nomination may well decamp to another in circumstances such as are now presently before me and then seek recompense from the public purse through a claim against the respondent.
47. For the same reasons, the petitioner's claim for punitive and exemplary damages in the tune of Kshs. 5,000,000/= must fail. Even had the Court found any justification in the petitioner's claim, the facts of the present case do not justify an award of punitive or exemplary damages which, as the Court held in **Bank of Baroda (Kenya) Limited vs Timwood Productions Ltd. Civil appeal No. 132 of 2001**, should be awarded in circumstances where there is oppressive, arbitrary or unconstitutional action by the servants of the government. The facts of the present case do not demonstrate such action.
48. As the respondent explained in its letter to the petitioner dated 4th December 2012 and signed by its Chief Executive Officer, **O.J.H. Oswago (annexure TWK-13(a))**:

“....As part of our investigation, the Commission consulted the National Registration Bureau and confirmed that the ID Number 1013577 with serial Number 200465558 belongs to you. We also found out that from our previous voters database (which has been loaded in to the BVR kits for reference purposes), there is someone else registered in Kesses Constituency (formerly Eldoret South) by the name Joyce Jepkemboi with the same National ID number as yours.

However, Joyce indeed registered, but using a passport number A1013577. It is clear that an error occurred during data process and letter 'A' in the passport number of Joyce Jepkemboi was inadvertently dropped, thereby leaving the numbers 1013577, which is similar to your National ID Number.

Our records show that you were registered at Kabuku Primary School in Ngecha/Tigoni County Assembly Ward of Kiambu County. Your elector's reference number is 01216412112211591. You are thus validly registered as a voter.”

49. Admittedly, the respondent is not the epitome of efficiency, even taking into account the onerous task it had of registering millions of voters in a limited period of time and organizing a complex general election involving several seats at national and county level. However, it is not possible to attribute “**oppressive, arbitrary or unconstitutional action**” to the error it made in relation to the registration of the petitioner given the explanation set out above.

Disposition

50. The petition has sought a declaration that she is entitled to protection under the Constitution to her right to be duly registered as a voter, the right to vote and, under Articles 35(1) (b) and (2), to prompt correction and deletion of untrue and misleading information that affects or would affect her rights. The Court has already found that she was duly registered, and the information with regard to her registration was corrected. There is therefore no basis for the issue of this declaration.
51. The petitioner further seeks a declaration that her rights under Article 38(3) of the Constitution have been violated, infringed and denied by the respondent. As observed above, there was no

violation of these rights in that she was able to exercise both her right to participate in the elections as a voter but also as a candidate.

52. Finally, the petitioner seeks special, exemplary and aggravated damages against the respondent. As demonstrated above, and in light of the finding that there was no violation of any of her constitutional rights, the claim for such damages is unmerited.

53. For the foregoing reasons, this petition must fail. It is hereby dismissed but with no order as to costs.

Dated Delivered and Signed at Nairobi this 7th day of May 2014

Mumbi Ngugi

Judge

Mr Muga instructed by the firm of Robson Harris & Associates Advocates for the Petitioner

Ms Ngeresa instructed by the firm of Lubulellah & Associates Advocates for the respondent