



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.92 OF 2013**

**BETWEEN**

**JOHN MBUGUA.....1ST PETITIONER**

**STEPHEN OMODIA.....2ND PETITIONER**

**AND**

**THE ATTORNEY GENERAL.....1ST RESPONDENT**

**MINISTRY OF JUSTICE.....2ND RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES**

**COMMISSION.....3RD RESPONDENT**

**REGISTRAR OF POLITICAL PARTIES.....4TH RESPONDENT**

**RULING**

1. On 19th February 2013, and by a very precise judgment, Ogola J. dismissed the Petition herein. In doing so, he stated partly as follows;

***“(6) The present proceedings are therefore premature as the Petitioner/Applicants are seeking the intervention of this Court without first invoking and exhausting the jurisdiction granted to the Commission under the Constitution and the Elections Act Number 24 of 2011.***

***(7) In any event the Petitioners being independent candidates, are alleged to have failed to submit to the Commission the symbol they intended to use in the forthcoming General Elections, at least twenty one days before the nomination day as required under Section 32(2) of the Elections Act, number 24 of 2011. The allegation has not been rebutted by the Petitioners.***

***(8) From the foregoing, it is clear that this Petition must fail. I dismiss the Petition by the Petitioners dated 6th February 2013 and filed in Court on 12th February 2013 with no orders as to costs.”***

2. With those orders, the matter should have come to an end but on 12th March 2013, the Petitioners

invoked **Order 43 Rules 1(2), (3), (4), 2 and 3** as well as **Orders, 44 (1) and 45(1)(2)(3)(4)(5) and (6)** of the **Civil Procedure Rules** to seek that the order of dismissal of the Petition be set aside.

3. The Notice of Motion seeking that order is undated but the joint Supporting Affidavit of the Petitioners was sworn on 12th March 2013. Both the grounds in support of the Motion and the said Affidavit are with respect, full of irrelevancies and are neither precise nor clear. Doing my best however, what I have gleaned from the two documents, and of some relevance to the order for setting aside, is that the Petitioners seek the single order above because they were denied the right by IEBC to participate as independent candidates in the 2013 General Elections. That as a result, they have suffered irreparable damages as their ***“families, constituencies, community, churches, supermarkets ... have branded [them] as losers and conmen who have no objectives in life and in the political since [they] have been at a loss to explain to them as to what exactly happened” (sic)***. That their right to vote was also violated and their supporters were very furious when they realised that the names of the Petitioners were missing from the ballot papers for their respective political positions.
4. Nowhere have the Petitioners stated what error of law or fact Ogola J. had committed in dismissing their Petition and specifically why the same ought to be heard in substanso but I have also gathered from the disjointed depositions that should the orders aforesaid be set aside, then the Court would have the opportunity to read all correspondence exchanged between them and the IEBC and properly understand their ordeal in the hands of officials of IEBC in the run up to the 2013 General Elections.
5. I have seen no responses from the 1st and 2nd Respondents but the 4th Respondent, the Registrar of Political Parties, filed a Replying Affidavit sworn on 10th February 2014 by one Rebecca Wahu, a legal officer attached to that office. In that Affidavit it is deponed that the 4th Respondent has been improperly enjoined to these proceedings as that office has no role to play in settling electoral disputes. That where disputes arise as to internal political party nomination processes or where an independent candidate seeks to stand for any election, the proper body to resolve any resultant issue is the IEBC and not the 4th Respondent.
6. Lastly, that there is no reason at all to justify setting aside of the orders made by Ogola J. aforesaid.
7. On its part, the 3rd Respondent filed Grounds of Opposition on 25th March 2014 and they are as follows;
  - (i) *The Petitioners' Petition dated 6th February 2013 was dismissed by this Court in a judgment delivered on 19th February 2013.*
  - (ii) *The present Application is in effect an appeal from the aforesaid judgment of this Court.*
  - (iii) *The Application offends the provisions of **Section 80 of the Civil Procedure Act, Cap.21, Laws of Kenya** and the provisions of **Order 45 of the Civil procedure Rules, 2010.***
  - (iv) *The General Election having taken place on 4th March 2013, the orders sought in the present Application have been overtaken by events and are therefore moot.*
  - (v) *The Petitioners have not established any ground to warrant review of the orders of the Court given on 19th February 2013 or of any other orders sought.*
  - (vi) *In any event and without prejudice to the foregoing, the Petitioners failed to invoke and exhaust the jurisdiction granted to the Commission under **Article 88(4)(e) of the Constitution of Kenya as read together with Section 74 of the Elections Act, No,24 of 2011,** to settle disputes relating to or arising out of nominations.*

(vii) Further to the foregoing, the Petitioners being prospective independent candidates in the General Election held on 4th March 2013, failed to submit to the Commission, the symbol they intended to use in the General Election, at least twenty one days before nomination day as required under **Section 32(2) of the Elections Act, No.24 of 2011** and as such, the Petitioners are not entitled to any compensation.

8. I have read the Submissions filed by the Petitioners and I have taken them into account together with all matters on the record.
9. I have specifically read the undated Petition filed on 12th February 2013 together with the Supporting Affidavit and Annexures. Although neither can qualify as fine pleadings, I note that the genesis of the Petitioner's complaints was the rejection of their nomination papers by the IEBC vide letter dated 1st February 2013. All other issues raised are peripheral to that one issue. In that regard, I have reproduced the decision made by Ogola J. and specifically his finding that the Petitioners ought to have exhausted the available dispute resolution mechanism under the Constitution and the **Elections Act. Article 88(4)(e) of the Constitution** provides as follows;

**“(1) ...**

**(2) ...**

**(3) ...**

**(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) ...**

**(b) ...**

**(c) ...**

**(d) ...**

**(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.”**

10. Having been advised to abide by the above provision and file a formal complaint with IEBC, why did the Petitioners not follow that advice? Why did they also not file an appeal if they were dissatisfied with the decision by the learned Judge?

11. In any event, what are the reasons why his orders should be set aside? In the Application, the Petitioners merely repeated what was stated in their Petition and demanded to be heard on the substance of the Petition which matter had been determined by Ogola J. What error did he commit in making that decision? I am aware that there is no clear precedent on the principles applicable where a Constitutional Petition has been dismissed and a party dissatisfied with that order seeks setting aside orders but generally, the following principles apply;

(i) *Whether the Application was made without delay.*

(ii) *Whether the successful party will be prejudiced if the judgment is set aside.*

(iii) *The prospects of success should the matter be heard afresh.*

(iv) *The need to bring litigation to an end.*

(See **Shocked and Anor vs Goldschmidt & Others [1998] 1 All E.R.372**)

12. It is not in doubt that the present Application was brought timeously but that is all to be said for it. Elections have come and gone. What purpose will a rehearing of a matter relating to nominations for elections long gone, serve? The Petitioners failed to follow the provisions of **Article 88(4)(e)** and the door was closed for them. What prospects of success will a fresh hearing have? I submit None.
13. Prejudice would certainly be caused to the Respondents when a dead case is revived when later no practical orders can be made.
14. In any event, this sort of litigation must necessarily come to an end. Elections are not a continuous affair. The Constitution set strict time frames for every event leading to an election. What lawful purpose will the relitigation serve?
15. It is obvious that on the facts and the law, the Application before me is premised on legal sand and is best dismissed.
16. As for costs, the Petitioners filed the Petition as paupers. To order costs against them will be an untidy burden. Let each party bear its own costs.
17. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 4TH DAY OF JULY, 2014**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kariuki – Court clerk

Petitioners present

Mr. Malonsa for 2nd Respondent

**Order**

Ruling duly delivered.

**ISAAC LENAOLA**

**JUDGE**