



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.288 OF 2014

BETWEEN

HON. WILLIAM OMONDI.....PETITIONER

AND

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Introduction

1. The Application dated 26th June 2014 is brought under the provisions of **Articles 23, 38, 85 and 165** of the **Constitution** of Kenya as well as **Section 33** of the **Elections Act**. The Applicant is William Omondi, a former Member of Parliament representing Mathare Constituency (formerly Kasarani Constituency) and the specific orders he seeks are the following;

“(1) ...

(2) *That pending the hearing of the Application interpartes, the Court be pleased to grant an order of interlocutory injunction barring/restraining the 1st Respondent from carrying on the intended Mathare Constituency by-election, organising, planning, preparing for the election or declaring campaign period or conducting nominations on 10th July 2014 or doing anything whatsoever, howsoever in respect to the said Mathare Constituency by-elections or do order conservatory orders putting all plans in regard to the said election on hold.*

(3) *That a declaration do issue that the Respondents' refusal to grant the Petitioner an opportunity or eligibility to contest the Mathare Constituency by-election threatens and violates the Petitioner political rights.*

(4) *That an order do issue directing the Respondents to immediately accommodate and approve the Petitioner candidature as an independent candidate in the Mathare Constituency by-election and forthwith provide all the clearances necessary for purposes of contesting the by-election to the Petitioner.*

(5) *That the Respondents to meet the cost of the Application.”*

2. In his Supporting Affidavit sworn on 26th June 2012 and in Submissions by Mr. Omino, his Advocate, the Applicant's case is that prior to the 2013 General Elections, he was a registered member of the Orange Democratic Movement (ODM), a political party in Kenya but he resigned from the said Party on 21st January 2013. Thereafter, although there is evidence that he has an unclear link with The National Party alliance, he remained formally partyless hence his decision to contest the Mathare Constituency by-election stated for 7th August 2010 as an Independent Candidate. His complaint now is that the Independent Electoral and Boundaries Commission (IEBC), the 1st Respondent, by letter dated 19th June 2014, barred him from contesting the by-election for the reason that he had not complied with the law regarding resignations from political parties.
3. Mr. Omino submitted further that while the Applicant's letter dated 17th June 2014 had an endorsement by the Registrar of Political Parties indicating that the Applicant was not a member of any political party, the letter from IEBC dated 19th June 2014 stated otherwise. The said decision was therefore hurried, careless and negligent and was outside the law regarding eligibility of independent candidates to vie for elections.
4. The other issues raised by Mr. Omino were that;
 - (i) the requirement that one must notify the IEBC of his resignation from a political party within 3 days of such resignation is a mockery of the law,
 - (ii) that having met the requirement that he was not a member of any political party at least three months before the intended election, then the Applicant was eligible to vie as an Independent Candidate by dint of **Article 85** of the **Constitution**.
5. The response by the IEBC is contained in the Replying Affidavit sworn on 4th July 2014 by Mahamud Jabane, Legal Services Manager with the 1st Respondent, as well as in submissions by Mr. Mukele, Advocate for IEBC. Its case is firstly, that the Applicant's membership with ODM ceased on 13th June 2014 and therefore under **Section 14(3)** of the **Political Parties Act** as read with **Regulation 15** of the **Elections (General) Regulations 2012**, the Applicant was not eligible to contest the Mathare Constituency by-election.
6. Secondly, that **Article 85** entitled the Applicant to vie for an election as an Independent Candidate but pursuant to **Section 33** of the **Elections Act No.24 of 2011**, as read with **Regulation 15** aforesaid, he was obligated to obtain a clearance certificate from the Registrar of Political Parties indicating that he had complied with the requirement that he had not been a member of any political party at least three months prior. The Applicant failed to obtain such a certificate and so the 1st Respondent could not allow him to vie for the by-election aforesaid.
7. Thirdly, that the Applicant's contention that he resigned from ODM on 21st January 2013 could not create a legal basis for computing time from that date as opposed to 13th June 2014 when the Registrar of Political Parties received his letter of resignation.
8. In addition, Mr. Mukele raised the issue of jurisdiction in his Submissions and argued that this Court has no jurisdiction to deal with the dispute placed before it because **Article 88(4)(e)** of the **Constitution** grants IEBC the mandate to settle electoral disputes for election petitions but including those arising from nominations.
9. He also submitted that even if this Court had the jurisdiction to resolve the dispute, failure to enjoin ODM and the Registrar of Political Parties in the proceedings would mean that certain facts would remain unexplained. These would include why the letter of resignation from ODM was only transmitted to the Registrar of Political Parties on 18th June 2014.
10. Further, that since there is no prayer in the Petition that **Section 14(3)** of the **Political Parties Act** or **Regulation 15** aforesaid are unconstitutional, then those provisions of the law must be

complied with and since the Applicant has failed to do so, then he is ineligible to vie for elections. In any event, that those provisions were enacted to instil discipline within political parties and to stop party-hopping which was the norm in years past.

11. Lastly, that regarding constitutional timelines under **Article 101(4)** of the **Constitution**, no Court can issue an injunction to change those timelines as such an injunction would itself be unconstitutional.

12. Mr. Kakoi, learned Litigation Counsel agreed with Mr. Mukele and relied on his Grounds of Opposition dated 2nd June 2014 and filed on 13th July 2014 (*I presume there is an error on the date as these proceedings only commenced on 26th June 2014.*)

13. On my part, I have considered the rival Submissions placed before me and the first issue to determine is that of jurisdiction. **Article 88(4)** of the **Constitution** provides as follows;

“(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.”

14. The above provision must be read together with **Article 85** of the **Constitution** which provides as follows;

“Any person is eligible to stand as an independent candidate for election if the person—

(a) is not a member of a registered political party and has not been a member for at least three months immediately before the date of the election; and the candidate.

(b) satisfies the requirements of—

(i) Article 99 (1) (c) (i) or (ii), in the case of a candidate for election to the National Assembly or the Senate, respectively; or

(ii) Article 193 (1) (c) (ii), in the case of a candidate for election to a county assembly. ”

15. Pausing here for a minute, it is indeed true that the IEBC has the obligation to resolve all electoral disputes save election petitions and I heard Mr. Mukele to be saying that the present dispute is akin to a nomination dispute but **Article 99(1)(c)(i)** and **(ii)** provide as follows;

“(1) Unless disqualified under clause (2), a person is eligible for election as a member of Parliament if the person—

(a) ...

(b) ...

(c) *is nominated by a political party, or is an independent*

candidate who is supported—

(i) *in the case of election to the National Assembly, by at least one thousand registered voters in the constituency;*

or

(ii) *in the case of election to the Senate, by at least two thousand registered voters in the county.”*

16.A clear reading of the above provision would show that an independent candidate does not go through a nomination process for obvious reasons. Nominations are a preserve of political parties to enable them nominate one candidate from a pool of candidates. An independent candidate need not go through that process. Mr. Omino's argument in that regard is therefore correct but Mr. Mukele is also right when he argues that the IEBC settles all electoral disputes save election petitions and the present dispute is one such dispute. The inclusion of disputes relating to nominations does not exclude other electoral disputes including one between the Applicant and the Registrar of Political Parties. To that extent therefore, any dispute relating to an independent candidacy is a dispute within the jurisdiction of the IEBC under Article 88(4) aforesaid and the High Court has in more than one decision in the recent past stated so.

One such decision is **Petition No.92 of 2013, John Mbugua & Anor vs The Attorney General & Others**. In that case, the Petitioners who had intended to vie as independent candidates in the 2013 General Elections were adjudged to have failed to meet the requirements of the Elections Act and were therefor barred by IEBC. Their Petition was dismissed by Ogola J. who invoked **Article 88(4)** of the **Constitution** in doing so and cited failure to invoke the dispute resolution mechanism in it. An Application to review that order was dismissed by the High Court, subsequently.

17.The Applicant herein is in the same position as in **John Mbugua (supra)**. The main crux of his dispute is that the Registrar of Political Parties failed to grant him a clearance certificate under **Regulation 15** of the **Election (General) Regulations, 2012** which provides as follows;

“A person who intends to contest for an elective post as an independent candidate shall-

(a) Obtain and file with the Commission a clearance certificate from the Registrar of political parties certifying that the person has not been a member of any political party for at least three months immediately before the date of the election”.

18.The letter dated 19th June 2014 from the Chairman of IEBC notified the Applicant of the above provision of the law and clarified that without the certificate, he was not qualified to vie as a candidate. That notification should have led to a dispute being filed before the IEBC between the Applicant and the Registrar of Political Parties but the Applicant instead chose to come to this Court which can only be seized of the dispute as an election Court after the filing of an election Petition or as a judicial review Court after the IEBC decision on the matter.

19.My finding therefore is that the dispute before the Court is one to be handled by the IEBC and not this Court at the present stage of the said dispute. I will make necessary orders at the end of this Ruling.

20.But suppose I am wrong and in fact the dispute is one properly before the Court? In that case,

only one issue needs to be resolved viz. whether the Applicant was not a party member at least three months before the date of the Mathare by-election. For avoidance of doubt, the by-election is scheduled for 7th August 2014 and therefore he ought to have properly resigned from any political party by 5th May 2014.

21. What evidence has been tendered in the above regard? At this stage, I am only obligated to view the evidence at a *prima facie* threshold and see whether a case has been made out in favour of the Applicant. In support of his case therefore, the Applicant has tendered a resignation letter which has no date but addressed to the “ODM Party, P.O. Box 2478-00200 Nairobi” and copied to the Registrar of Political Parties. The same letter has two stamps in acknowledgment of receipt. The ODM stamp reads “21 Jan 2013” while the Registrar's stamp reads “13 Jun 2014”.
22. In addition, a hand-written letter “*from the Desk of Hon. William Omondi, former Member of Parliament for Kasarani Constituency*” dated 17th June 2014 has been exhibited to the Supporting Affidavit. It seeks a clearance certificate to vie for the Mathare by-election. The receipt stamp from the Registrars of Political Parties has the date “18 Jun 2014”. On the same letter, there is a handwritten statement that “*Mr. Omondi is not a member of any political party.*” It is unclear who made the writings.
23. The Applicant has relied on the latter statement to argue that the Registrar of Political Parties had made a decision that he was indeed not a member of any Political Party. That argument is flawed for the simple reason that such a statement on a hand-written letter by the Applicant cannot be authoritative on the Registrar's position because I cannot tell who inscribed that statement on the letter authored by the Applicant.
24. Further, it is obvious to me that although the undated letter of resignation was copied to the Registrar of Political Parties, it is unclear why it was received on 13th June 2014 and not a date nearer 21st January 2013 when ODM also received it. Mr. Kakoi for the 2nd Respondent is quite correct therefore when he stated in his Grounds of Opposition that the date when the Registrar took cognizance of the Applicant's resignation was not the date that ODM received the letter of resignation but the date the Registrar received the said letter. That date was 13th June 2014 which was a month and six days from the 7th May 2014 when the three months' constitutional period was to take effect.
25. Mr. Omino made a lot out of the letter dated 19th June 2014 addressed to the Applicant by the Chairman of IEBC. The apparent reference to the fact that the Registrar received the letter of resignation in June 2013 was of course an error but that error is of no benefit to the Applicant when it is obvious that the said letter was received by the Registrar on 13th June 2014 and not “*June 2013*” as erroneously indicated by the Chairman. The position therefore remains that the Applicant only brought his resignation to the notice of the Registrar of Political Parties on the date his letter was received by that office and not on the day it was received by ODM.
26. In a nutshell, the Applicant failed to meet the expectations of **Article 85** of the **Constitution** which is also operationalised by **Section 33** of the **Elections Act** (*almost word by word the same as Article 85*) and I am unable to find any fault on the part of the 1st Respondent.
27. Mr. Mukele raised another issue which is peripheral but crucial; why did the Applicant fail to enjoin the Registrar of Political Parties to the Petition? His problems began when no clearance certificate was issued by that office and not when IEBC barred him, for that reason, from vying for the election. In addition, regarding the letter of resignation it was only received by that office on 13th June 2014. Who delivered it on that day, if at all? Why did he not give reasons why although that letter was written by him and copied to the Registrar, it was only received, formally on that date?
28. As a corollary to the above, I also agree with Mr. Mukele that **Sections 14(3)** of the **Political Parties Act, 2011** which requires that a letter of resignation from a political party must be

transmitted to the Registrar of Political Parties within three days of resignation, is a reasonable provision to instil discipline between party members and their parties.

29. In any event, the Applicant has not sought any orders that the said Section or **Section 33** and **Regulation 15** aforesaid are unconstitutional and so they remain in our books and must be obeyed.

30. Regarding **Article 101(4)** of the **Constitution** and whether an injunction can issue to frustrate the timelines created therein, the issue was addressed in passing and I see no need to delve into it without hearing elaborate arguments.

31. It is now obvious that I see little merit in the Application before me and whereas the place of independent candidates has hardly been recognised in our political spectrum, those who aspire to vie for office as independents must abide by the threshold set by the law before venturing out to seek the votes of Kenyans.

32. In the event and for the above reasons, the Application dated 26th June 2014 is dismissed with costs to the Respondents.

33. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 9TH DAY OF JULY, 2014

ISAAC LENAOLA

JUDGE

In the presence:

Irene – Court clerk

Mr. Omino for Applicant

No appearance for Respondents

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE