



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

PETITION NO. 291 OF 2013

HON. ABUYA

ABUYA.....PETITIONER

VERSUS

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1st
RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT.....2nd
RESPONDENT**

JUDGMENT

INTRODUCTION

1. The Petitioner herein, Abuya Abuya, is a former Member of Parliament for Kitutu Masaba (formerly Kitutu East] Constituency in Nyamira County. He is also a life member of the Orange Democratic Movement (ODM), a political party in Kenya.
2. In his Petition dated 10th June 2013, he alleges that during the nomination process by the ODM Party on 17th January 2013, he was declared unopposed as the ODM nominee for the position of Senator of Nyamira County but the 2nd Respondent nonetheless issued a nomination certificate to one, Okong'o Omogeni, in total violation of the Law. That as a result of that action and subsequent actions of the Respondents, his fundamental rights and freedoms were violated and now seeks the following orders:

a. That this Honourable Court be pleased to declare that the Petitioner's constitutional rights under Articles 27, 35, 38, and 47 have been violated.

b. That having so declared, the Honourable Court further be pleased to assess and award general as well as punitive damages for the loss, pain and suffering experienced by the Petitioner.

c. That an order do issue directing the 2nd Respondent to refund to the Petitioner Kshs.100,000/= being nomination fees paid.

d. That the Respondents do pay costs of the Petition.

e. Such other orders as this court shall deem fit to grant.

PETITIONER'S CASE

3. In the Petition aforesaid and in the Supporting Affidavit sworn on 10th June 2013, the Petitioner has made the point that he had fulfilled all legal requirements leading to the nomination exercise for the ODM Senatorial position in Nyamira County and on 17th January 2013, one Elias Keton, the ODM Returning Officer for the nomination, declared him as the ODM nominee for the said position. He was then advised to collect his nomination certificate at the Party's Headquarters in Nairobi but he was never issued with one.
4. That to his surprise, Okongo Omogeni, who had not even appeared to present his nomination papers in Nyamira was issued with a nomination certificate prompting the Petitioner to file a petition before the 1st Respondent's Nomination Dispute Resolution Committee (hereinafter "**the Committee**"). The said Committee delivered its decision on 26th January 2013 in his favour and ordered the 2nd Respondent to issue him with a nomination certificate.
5. That subsequently, Okongo Omogeni filed a petition before the High Court challenging the decision of the 1st Respondent's Committee aforesaid and the High Court remitted the dispute back to the Committee for resolution of the entire dispute. The Committee reheard the matter, reviewed its earlier decision and ordered that Omogeni should be issued with a nomination certificate by ODM and further, that the Petitioner should be refunded his nomination fee of Kshs.100,000/=.
6. The Petitioner is dissatisfied with that decision and has faulted the 2nd Respondent for ordering that he should be refunded Kshs.100,000/= nomination fee paid in seeking nomination for a seat in the National Assembly and yet he had sought nomination for a seat in the Senate. Further, that the officials of the 2nd Respondent refused to give him a copy of the Committee's Ruling and final orders. His letters in that regard also went unanswered. He thereafter reached the conclusion that both Respondents had colluded to deny him a chance to get to the Senate hence the present Petition.
7. It is also the Petitioner's case that he has suffered injustice, humiliation, embarrassment and damage and his supporters have been left a disappointed lot.
8. He further contends and claims that he suffered discrimination, lack of access to information and his political rights were violated and he now seeks orders elsewhere above reproduced.

1st RESPONDENT'S CASE

9. In response to the Petition, Director of Legal and Public Affairs of the 1st Respondent Commission, deponed that the Commission is wrongly enjoined in the proceedings as they relate to nominations to political party lists which matter is to be settled according to the Political Party's Constitution and Nomination Rules including on refunds of nomination fees.
10. That it was indeed true that the Commission's Dispute Resolution Committee initially upheld the Petitioner's complaint but on reviewing the same it changed its decision and upheld ODM's nomination of Okongo Omogeni as its nominee. That the Committee did so only after fresh evidence was presented to it.
11. Further, that the Commission is not involved in the preparation of party lists for nomination of persons to either House of Parliament and it did not also order any refund of the nomination fee paid by the Petitioner to his party for the nomination exercise and process.
12. With regard to the Committee's decision not being allegedly availed to the Petitioner on time, the said allegation is denied and it is stated that none of the Petitioner's rights under the Constitution

were violated in any event.

13. Lastly, that the Commission is not liable to refund Kshs.100,000/= to the Petitioner as prayed or at all.

14. For the above reasons, the 1st Respondent seeks orders that the Petition be dismissed with costs.

2nd RESPONDENT'S CASE

15. The Respondent, the ODM Party was properly served but did not file any response to the Petition.

DETERMINATION

16. I have taken into account submission filed by Counsel appearing for the Parties and will refer to them, if necessary, along the way.

17. I must also begin by dealing with the position taken by ODM in the Petition. Certain allegations of fact have been made against it relating to the nomination process aforesaid and its conduct in that regard. To the extent that those allegations have not been denied and even the 1st Respondent made no mention of them, then I am of the view that those facts should be accepted and be deemed as unchallenged. That position was recently well expressed by the Supreme Court of Uganda in **Prof. Oloka - Onvango & 10 Others vs Attorney General & Others. Constitutional Petition No. 8 of 2014.**

18. Regarding the role of the 1st Respondent, it has been denied that it had anything to do with the whole nomination exercise and that the said exercise is governed by ODM's Constitution and the issue not having been rebutted in any way, then it is difficult to fault that position.

19. I also say so because nominations prior to an election are by their very nature, internal political party matters and the Commission has seldom, if any role to play, at all.

20. While it cannot be denied that the Commission thereafter dealt with the aftermath of the nomination exercise, through its Committee on Dispute Resolutions, the Petitioner has not challenged the legality of the Committee's decision nor has he challenged the decision per se. What I see as being challenged is the non-compliance with that decision and alleged violations of Constitutional rights in the entire process; from nomination to the implementation of the Committee's decision.

21. Before turning to the specific issues arising, I must revert to the exact contents of the final decision of the Committee.

22. In that regard, the Petitioner has submitted that the Committee, while ordering ODM to issue Okongo Omogeni with a nomination Certificate, also ordered that:

i] He should be refunded the Kshs.100,000/= he had paid to ODM as a nomination fee.

ii] He should be included in the ODM Party's Nomination List for the National Assembly.

23. The Petitioner is apparently not keen on the second issue for obvious reasons. On the first issue however, he has made a specific plea and I will address the issue later.

24. Having so said, suffice it to say that the 1st Respondent has denied that such orders were ever made and before me, I have two documents purporting to be the decision of the Committee. One is headed, "***Summary of Decisions of Political Party Nomination Disputes filed with the IEBC Nomination Dispute resolution Committee, 28th January 2013 and 1st February 2013***". It was annexed to the Petitioner's Affidavit in support of the Petition and has the IEBC Logo, IEBC

Stamp and the ODM Stamp (dated 12th April 2013).

25. The second is also headed, "**Summary of Decisions of Political Party Nomination Disputes filed with IEBC Nomination Dispute Resolution Committee, 28th January 2013 and 1st February 2013**".

26. It too has the IEBC Logo and a stripe across every page with the words "**Decision of the Dispute Resolution Committee, 28th January and 1st February 2013**". It also has the signatures of the Chairman and Members of the said Committee.

27. Of interest is the fact that in the latter document, the following words are missing;

"Further, that ODM Party refunds Kshs.100,000/= to Hon. Abuya Abuya being the nomination fees paid to the party, and that his name be included in the ODM Party List to the national Assembly."

It is unclear why such a disparity exists but in a letter dated 14th February, 2013, M/s Maroro & Omariba Associates, lawyers for the Petitioner, protested that the Committee had changed the wording of its decision as read to the parties. The lawyers partly stated as follows in that regard;

"Our client contends that this is not the original wording of your decision and is casting aspersions on not only your Committee but the entire IEBC as an Institution...

Our instructions are to seek a clarification on this issue, which if not done is likely to injure the credibility of IEBC and the entire electoral process. Do not allow Kenyans to start viewing you as just another Kenyan Political Party."

28. Earlier in the same letter, the lawyers had made the following statement;

"In your decision, you ordered and we quote, 'The ODM party list be and is hereby amended to include nomination of Hon. Abuya Abuya to the National Assembly'. This is the decision you read in the High Court, Milimani and this is what our client saw and read in your offices at Anniversary Towers a day before you signed it." There is no response on the record to that letter.

29. The above words are of course disturbing because two weeks after the decision was read to the contesting parties, one party was saying that IEBC leaked its decision to him and later changed it to remove some words that were favourable to him. Serious as these allegations are, however, all that I have are copies of the purported decision and I do not have sufficient material to determine that the Petitioner's document actually emanated from IEBC. If he had access to the Committee's decision before it was read, could he also have access to it afterwards in the same way that he accessed it earlier? Can these actions be termed as lawful and can he benefit from them? Conversely, is the Committee and Commission innocent of the allegations made? Could it have tampered with the decision after delivering it by removing certain words after realizing that it had no mandate to grant the orders of refund of nomination fees and addition of the Petitioner's name to the ODM Nomination Party List?

30. I have no answers to the above questions because Parties did not address me sufficiently on them but the saving grace for the Petitioner is that he has made a specific claim against ODM and which I will address shortly. That is all I wish to say about the Committee's decision and the authenticity of the documents presented.

31. What then should I say about the alleged violations of the Petitioner's Constitutional rights and freedoms? In submissions, Counsel for the 1st Respondent correctly stated that "**a party alleging violation of a Constitutional right must demonstrate, with a reasonable degree of precision what provisions of the Constitution have been violated, as well as the manner in which they**

have been violated." This statement comes from a long chain of decisions of this Court and that is why in Trusted Society of Human Rights Alliance vs Attorney General & 2 Others [2012] e KLR. the Court stated thus;

"We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

The Court went on to express itself as follows;

"Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in Anarita KarimiNjeru(supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."

32.Has the Petitioner met the above test? In his Petition, his complaints are that the following rights and freedoms were violated;

- 1) Equality and freedom from discrimination
- 2) Access to information
- 3) Political Rights

I will address each of them separately.

Equality and freedom from discrimination

33.Article 27 of the Constitution provides as follows;

"1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

3)Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress the disadvantage suffered by individuals or groups because of past discrimination.

7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. "

34. In regard to the above provision, I have read the Supporting Affidavit to the Petition and in all its 23 paragraphs, Article 27 is only mentioned in the heading thereof. Nowhere is it indicated how all the rights in it were violated. In the Petition itself, while Article 27 is mentioned in the heading and at paragraphs 19 and 20, the sole reason why it was invoked was because **"the 1st Respondent reversed its own decision requiring the 2nd Respondent to issue a nomination certificate to the Petitioner without assigning proper reasons."**

35. In submissions, all that Counsel for the Petitioner stated was that the issuance of a nomination certificate amounted to discrimination in violation of Article 27 aforesaid. I expected the Petitioner to show why such an action amounted to discrimination when it was subjected to a lawful process both at the Committee stage and at the High Court.

36. I expected submissions on why, when a body like the Committee acts in a quasi-Judicial manner and rules in favour of one party then its decisions can be determined as being discriminatory. The casual treatment of such a serious constitutional issue would only lead me to invoke **Anarita Karimi** (Supra) and find that with the submissions made, it would be imprudent to guess or imagine what the Petitioner's case is and so I will dismiss the claim made under Article 27 of the Constitution.

Right of access to information under Article 35 of the Constitution

37. The Petitioner's claim in this regard is that he was denied access to the Committee's decision to enable him pursue other remedies elsewhere. Article 35 provides as follows;

"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.

3) The State shall publish and publicise any important information affecting the Nation".

38. In interpreting the above Article, Mumbi Ngugi, J partly expressed herself as follows in **Nairobi Law Monthly vs Kenya Electricity Generating Co. Ltd (2013) eKLR:**

"The Petitioner needs to show that it requires the information from the Respondents 'for the exercise or protection of another right', in this case its rights to freedom of expression and of the media. Our Courts have not yet had occasion to interpret the phrase 'for the exercise or protection of another right'. However, the Constitutional Court of South Africa, in interpreting a similar provision of the Constitution of South Africa, has ruled that the information sought in an application for disclosure of

information must be such as is required for the protection or exercise of another fundamental right. This was the principle that it applied in the case of Shabalala and 5 Others vs Attorney General of the Transvaal and the Commissioner of South African Police CCT/23/94 [1995]. The Applicants, who had been charged with murder, sought information in the possession of the Police on the basis that it was required for the exercise of their right to a fair trial. The Court made an order that denial of information contained in a police docket 'is inconsistent with the Constitution to the extent to which it protects from disclosure all the documents in a police docket, in all circumstances, regardless as to whether or not such disclosure is justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial...'. "

Similarly in Cape Metropolitan Council v Metro Inspection Services Western Cape and Others (supra) it was held that;

"Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information ...an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right. "

This proposition was also adopted in Unitas Hospital v Van Wvk and Another (231/05) (2006) ZASCA 34 where the Court stated that;

"The threshold requirement of 'assistance' has thus been established. If the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied. Self-evidently, however, mere compliance with the threshold requirement of 'assistance' will not be enough"

39. I agree with the Learned Judges in the above cases and it is obvious that the law does not create the impression that access to information is purely for cosmetic reasons but for purposes of enforcing a fundamental right or freedom. In any event, the Petitioner has admitted that he had access to the decision of the Committee before it was delivered and in the Petition and correspondence cited above, he was also aware of the reasons for the decision. I am unable in the circumstances to find any breach of Article 35 of the Constitution as alleged.

Political rights under Article 38 of the Constitution

40. Article 38 of the constitution provides as follows;

"1) Every citizen is free to make political choices, which includes the right -

a. To participate in the activities of, or recruit members for, a political party or

b. To form, or participate in forming, a political party;

c. To campaign for a political party or cause.

2) Every citizen has a 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."

41. In submissions, the only reference made to the above Article is in the statement made that "***under Article 38(2) of the Constitution of Kenya 2010 '... every citizen has a right to free, fair and regular elections...' Our interpretation of 'elections' includes all nomination processes. The 1st Respondent had a Constitutional responsibility to protect the Petitioner from unfair nominations carried out by the 2nd Respondent. The 1st Respondent is liable.***"

42. The above statement is expressive of the casual nature in which the submissions were made. Nothing more was said of the alleged violation of Article 38 and it is left to the Court to find out why the 1st Respondent is liable for the alleged violation. In that regard, my view is that the process undertaken by the Dispute Resolution Committee was lawful. Twice it sat to determine the Petitioner's fate and ultimately made a decision which stands to date.

43. The Petitioner did not challenge that decision at the High Court and the present challenge is too late. There is nothing more to say as I see no breach of Article 38 of the Constitution.

Whether any prayer made in the Petition should be granted

44. It is obvious that prayers (a) and (b) of the petition cannot be granted because once I have found no that constitutional right was violated, then no damages are thereafter payable

45. The claim for a refund of Kshs.100,000/= nomination fee was directed at the ODM Party which has chosen not to oppose the Petition and specifically to show whether the refund claim has a basis or not. In such circumstances, I can only follow the approach of the Supreme Court of Uganda in **J. Oloka-Onvango & Others vs Attorney General (supra)** and state that once a matter of fact is uncontested, the Court should take it as proved.

CONCLUSION

46. Nominations are generally a chaotic and less than transparent process in Kenya's history. The Elections Act, 2012 now has elaborate mechanisms to ensure that there is fairness, order and transparency in such nominations. The Petitioner, it is a matter of public knowledge, was once a Member of Parliament and the Electoral Commission of Kenya and knows the electoral system well. Whether his Political Party of choice, ODM, mistreated him is not a matter for this court to determine as those issues were placed before the relevant bodies at the material time and decisions lawfully made.

47. In any event, I must reiterate that the Petition was neither properly drawn nor argued and I have shown why I have made that categorical statement.

48. In the end therefore, while dismissing prayers (a) and (b) of the Petition, Prayer (c) is granted in the following terms;

a) That an order do issue directing the 2nd Respondent to refund to the Petitioner Kshs.100,000/= being nomination fees paid.

b) As for costs, let the 2nd Respondent pay the costs of the Petition.

49. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF OCTOBER, 2014.

ISAAC LENAOLA

JUDGE

In the presence of:

Mr. Omariba for Petitioner

Miss Kageni for 1st Respondent

No appearance for 2nd Respondent though duly served.