



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL CASE 111 OF 1995**

**KIMANI WANYOIKE.....PLAINTIFF**

**VERSUS**

**ELECTORAL COMMISSION.....RESPONDENT**

**MORRIS KASHERO.....RESPONDENT**

**RULING**

The Plaintiff/Applicant in this suit is Kimani Wanyoike. The First Defendant is the electoral commission and one Morris Kashero described in the plain as the returning officer in a parliamentary election nomination exercise of Kipipiri Constituency is the Second Defendant. They are Respondents herein in that order. The plaint is headed as a Miscellaneous civil case and was initially filed in Nairobi High Court Registry. The file was transferred to this court for hearing and when the case was given a new registration number it was booked as a Miscellaneous Application. This led to the subsequent pleadings being wrongly headed. However, I do not think that this affects the substances and merits of the matter and decide the same on merits.

From what I gather and is established form the material before me, a vacancy had arisen after death of the member of Parliament for Kipipiri Constituency and a Parliamentary election was necessary to fill the vacancy. Registered political parties who were interested in fielding candidates for the election nominated candidates in accordance with the law.

The Plaintiff/Applicant Mr. Kimani Wanyoike was nominated by a party known as Forum for Restoration of Democracy - Ford Asili - in brief Ford A. The applicant was issue with Parliamentary Certificate of Nomination signed by the party's Secretary General Hon. Joseph Martin Shikuku EBS, M.P. the certificate is given serial N0.000001 and is dated 15<sup>th</sup> August 1995. It is addressed to the Returning Officer Kipipiri Constituency.

It would appear from exhibit G1, I, a cutting from the "Daily Nation" of 16<sup>th</sup> August, 1995, that the applicant's nomination was in dispute. Intimidation and rigging was alleged.

On the 15<sup>th</sup> August, 1995, two gentlemen M/S Peter Njuguna and James Githinji filed a case before the chief Magistrate, Nakuru against the Applicant herein. The two gentlemen described themselves as members of the Ford-Asili political party. They gave their membership card numbers.

On the 16<sup>th</sup> day of August, 1995, the two were able to obtain the following orders from the Chief Magistrate Nakuru.

1. That service of the application be and is hereby dispensed with in the first instance due to the urgency of the matter.
2. That the Secretary-General and/or National Officials of Ford-Asili political party be and is hereby restrained from declaring the defendant herein namely KIMANI WA NYOIKE as the party's nominee for Kipipiri Constituency, parliamentary elections.
3. That this application be heard inter-partes on 29.8.95.
4. That the costs of this application do abide the outcome of the application. The applicant was served with the order and other relevant documents from the Chief Magistrate's Court, Nakuru. The nomination of candidates under regulation 15 of the national assembly, and Presidential Elections had been scheduled for 17.8.95 between 8:00 a.m. and 1:00 p.m.

The following day the applicant rushed to, the High Court at Nyeri and filed originating motion praying for orders to nullify the orders of the Chief Magistrate, Nakuru. The applicant managed to obtain the following orders:-

1. On the application of the applicant's counsel this matter is hereby transferred to Nakuru High Court for hearing and disposal.
2. That there be a stay of the subordinate Court's order pending the hearing and final determination of the originating motion to be heard today at 3:00 p.m. before the Nakuru High Court. The applicant did not pursue the hearing at Nakuru High Court but thought that since he had stay of the Chief Magistrate's orders he could present his nomination papers to the returning officer.

Time had been wasted due to distance involved between Nyeri and Kipipiri, and some difficulties encountered when obtaining the High Court Order. But the applicant and his advocate managed to get to the venue of nomination before 1:00 p.m. The applicant was surrounded by his supporters who naturally wanted to know what had happened and the applicant took more than 10 minutes to enter the venue and present his papers. He was late and his papers were rejected. The case before the Chief Magistrate Nakuru and the Originating Motion transferred from Nyeri High Court to this court are still pending for hearing.

Briefly, that is what brought about the case before me. The plaint filed on 18<sup>th</sup> August, 1995, prays for Judgement against the defendants as follows.

- a. A declaration that the plaintiff is entitled to be candidate for Kipipiri Constituency to be held on 4<sup>th</sup> September, 1995.
- b. an order directing the Defendants to accept the Plaintiff's nomination papers.
- c. Costs of the suit.
- d. Any further or better relief deemed fit

With the plaint, an application was filed under the Judicature Act, Vacation Rules, and Order XXXIX Civil Procedure Rules.

The application makes the following prayers.

1. This application, being of urgent nature be heard during the court vacation.
2. The Defendants by themselves, servants or agents or any of them or otherwise howsoever BE RESTRAINED from refusing to accept the Plaintiff's nomination papers in respect of the Kipipiri Constituency to be held on 4<sup>th</sup> September, 1995.
3. The 1<sup>st</sup> Defendant be ordered forthwith to include the plaintiff's name and other necessary particulars on the ballot papers to be issued in respect of the parliamentary election in respect of Kipipiri Constituency to be held on 4<sup>th</sup> September, 1995.
4. Costs of the application can be provided for.

The application is supported by an affidavit sworn by Mr. Gitobu Imanyara, Advocate who appeared for the Applicant. There are several annexures to the affidavit. I have perused them all.

The application is opposed by the defendants who have filed their own application to strike out the Applicant's application. They gave notice of legal objections. The respondents are relying on two replying affidavits, one sworn by the Chairman of the First Respondent and the other by the returning officer, the Second Respondent.

It was agreed by consent that the applications and legal objections be consolidated and heard together.

In his submissions Mr Imanyara for the Applicant contended among other things that his client should not be penalised for not presenting his papers in time. He submitted that as a law abiding citizen, Wa Nyoike had to do what was in his power to have the order by the Chief Magistrate Nakuru set aside before he presented his papers. Distance and lack of co-operation, from Deputy Registrar, Nyeri took a lot of the applicant's time. The little time left on arrival at the venue was spent when the applicant was surrounded by his supporters. Mr. Imanyara also submitted that regulation 15 of Presidential and Parliamentary Election Regulations is ultra vires the provisions of section 13 of the Act as far as it sets out the time for nomination of candidates. All in all there are no good reasons for shutting out the applicant from the elections.

Mr. Kivuitu and Mr. Mukele both Advocates of this court, who appeared for the respondents blamed the applicant for the predicament he now finds himself in. They contend that the applicant was to blame for the time wasted. There was no order to prevent him from presenting his nomination papers in time. In any case it is agreed that the applicant did not present his nomination papers in time. The returning officer has no power to extend the nomination period.

Section 13 (3) (b) of the National Assembly and Presidential Elections Cap 7 provides:-

“13(1) For purposes of parliamentary election

3 (b) Cause to be published in the Gazette a notice in the prescribed form which shall specify

i).....

(ii) the day for nomination of candidates for the parliamentary election.”

Regulation 15 provides as follows:-

15 (1) (b) For the purposes of nomination of candidates at a parliamentary election every candidate shall be

(a).....

(b) nominated by the delivery by the candidate or his duly appointed agent to the returning officer of the constituency between the hours of eight o'clock in the morning and one o'clock in the afternoon of the nomination day for election of a nomination paper in Form 9.”

Relying on the High Court case, Nairobi Misc. Application No. 790/93 Matiba vs Attorney General, Mr. Imanyara maintained that the day mentioned in the Act means the full day. It means the time of light, from sun rise to sun set. The regulation that fixed the time from 8:00 a.m. to 1:00 p.m is in contravention and contradicts the Act and is therefore ultra vires the provisions of the Act and should be held to be of no effect.

As was said in the case of Liverpool Borough Bank vs Tumar (1861) 30 at p. 380

“It is the duty of court of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.”

What is clear from the provisions of Cap 7 is that the regulations were to be laid before parliament for approval by resolution of the National Assembly. See Section 34 (2) of Cap 7. The regulations are therefore not ordinary subsidiary legislation which is only required to be published in the Kenya Gazette. But unlike what Mr. Imanyara says, a day, in my respective view, is a period of 24 hours. It commences from midnight and ends at midnight. It was therefore necessary to fix the time of the day for nominations as was done by regulation 15.

A statute should be construed in a manner to carry out the intention of the legislature. It is not suggested that the current regulations were not approved by Parliament as required by the Act. If Parliament approved the regulations then they intended regulation 15 to be as it is.

Statutes pertaining to Elections must be strictly construed and adhered to. The nature of the subject requires just that. There is no dispute that the applicant did not present his nomination papers to the returning officer between the hours of 8:00 o'clock in the morning and 1:00 o'clock in the afternoon. The respondents had nothing to do with the applicant's inability to present his nomination papers. Whatever it was as Mr. Kivuitu pointed out was a dispute between the applicant and other members of his party. The respondents were not party to the cases before the Chief Magistrate Nakuru and the High Court at Nyeri.

In any case, it would appear that failure to present the papers to the returning officer was not caused by the delay at Nyeri but by the applicant at venue because he decided to attend to his supporters irrespective of the little time he had rather than dash to the nomination Hall to present his papers.

I have considered the authorities cited before me. See High Court NRB Election Petition No. 55/93 - F.O. Oduke vs Chesoni & Two others No. 14/93 - S.O. Ojaamong vs W.F. Shigoli & Another and the Court of appeal Civil Application No. 253/92. I find that the law does not empower the returning officer to extend or vary the time stipulated. The returning officer has no power to extend nomination period. He did not do so in this particular case.

Even if he has such powers when there was reasonable or sufficient cause there was none in this case. I find he was right in rejecting the applicant's nomination papers he had no alternative.

In the case of Aghal A.I.R. 1926 sind 201, Labu A.C.J. held that the court has power to grant an interim mandatory injunction under order XXXIX, r 1 and 2, (India) but this power is to be used sparingly and each case should be decided on its own merit for this purpose.

The facts and the law are obviously against the applicant in this case. He seeks a mandatory injunction against the respondents. As I have said the respondents have not committed any wrong against the applicant. They have not taken away his rights unlawfully. The respondents have only complied with the law as it is. There is no status quo to be maintained existing on the date of the suit. Mandatory injunctions cannot be issued as a matter of course.

I have considered all the relevant material placed before me and the able submissions of the learned Advocates for the parties.

It is clear that the order of the learned Chief Magistrate Nakuru served on the applicant was ineffective. It had been overtaken by events as the same was issued on 16-8-95. The Secretary General had issued a Certificate of Nomination to the applicant on 15-8-95.

The order from Nyeri High Court is of no assistance either. The stay ordered did not change the position.

The position is that the candidates who presented their nomination papers in time were nominated. The applicant did not present his papers as required by the law. He was time barred. The respondents cannot be held responsible for what happened to the applicant. Blame can only be apportioned between the applicant and members of his party who were dissatisfied with his nomination and took him to court.

The respondents swear that they were prepared to accept the applicants papers if they were in order despite the order from the Chief Magistrate, Nakuru if the same were presented within the prescribed time. No attempt was made to present the papers within the prescribed time. To me the applicant has no good reasons for turning against the respondents. He can only do so in law if he can prove a wrong done to him by the respondents. The respondents have committed no wrong.

As I have said, the blame lies with the applicant and members of his party who are parties to the causes I have mentioned above.

Finally, let me say that I am unable to find any merits in the applicant's application.

The application dated 18<sup>th</sup> August, 1995 is dismissed with costs to the respondents.

The plaint dated 18<sup>th</sup> August, 1995 discloses no cause of action against the defendants. It cannot survive the application. It is struck out with no orders as to costs.

Orders accordingly.

**Dated and delivered at Nakuru this 28<sup>th</sup> day of August 1995**

**D.M RIMITA**

**JUDGE**