



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS APPLICATION NO. 34 OF 2017

MICHAEL ALOO WAKHU.....APPLICANT

VERSUS

I.E.B.C.....RESPONDENT

RULING

Introduction

1. The exparte applicant Michael Aloo Wakhu is an aspirant for Member of County Assembly Mumias Central Ward and he is running as an independent candidate.
2. On the 30.05.2017 he filed a Notice of Motion seeking orders directing the respondent to include his nickname “Doctor” on the ballot paper. He claimed that he is widely known as “doctor” since he was a child. He claimed that an omission of his nickname from the ballot paper would greatly prejudice him because his electorate may be unable to identify him without his nickname.
3. The orders were granted exparte and the Respondents ordered to include his nickname in the ballot.

Respondent Application.

4. The Respondents have filed a Notice of Motion dated 22.06.2017, seeking stay of execution of the orders granted to the applicant exparte on the 31.05.2017. They further beseech this court to review, vary and/or set aside the said orders and they be granted leave to file their replying affidavit in response to the applicant’s application dated the 30.05.2017.
5. The application is based on the grounds set out on the face and supported by the affidavit of Douglas Bargorett, the legal officer of the Respondents. Basically the respondent contends are that the orders of 31.05.2017 were issued on the basis of material non-disclosure that the alleged nickname “doctor” does not appear on the applicant’s National Identification card or any other identification document and can therefore not appear on the ballot papers, nor does the said nickname appear in the applicant’s name particulars in the register of voters.
6. The respondents also argue that the law only permits them to print the applicant’s’ names in the ballot paper as they appear in the register of voters and in his identification documents.
7. To buttress their position on the matter the respondent has placed reliance on the Registration of Documents Act Cap 285 Laws of Kenya and Article 50 of the Constitution. The respondent claims to have commenced the process of printing ballot papers and state that the orders sought are highly prejudicial to them as they may not be able to effectively fulfil their constitutional mandate.

8. In the supporting affidavit the respondent claims they were not served with the application dated 30.05.2017 nor given an opportunity to be heard or to respond to the applicant's assertions which is a violation of Article 50(1) of the Constitution of Kenya. They have further explained that to qualify for nomination as a member of the County Assembly one has to be a registered voter. Section 5 of the Elections Act no. 24 of 2011 and the Elections (Registration of voters) (amendment) Regulations 2017 have been emphasized. The respondent maintains that what is contained in the applicant's identification documents is what was used to print the applicant's name on the ballot paper.

9. The application was served upon the ex parte applicant. There is an affidavit of service on record. There is however no response to the application.

Submissions

10. The application was canvassed orally by Mr. Mukele for the respondent. He submitted that identification of candidates and voters is by way of identification documents which documents are the Kenyan identity card and/or Kenyan passport. He submitted that under the regulations in the Elections Act a Citizen of Kenya who has attained 18 years can be registered as a voter by showing and/or producing his National identity card or passport. He further submitted that there would therefore be no basis for the respondent to register a nickname or add a nickname to the registered name of any candidate and/or voter. Counsel contented that such additions of nicknames are calculated to mislead the voters.

Determination

11. The main issue for determination in this particular case is whether the grounds raised by the respondent are sufficient to grant the orders sought. The respondent has explained that for one to be registered as a voter and/or a candidate for a particular position one's identification documents be it an identify card or passport are to be used. In the case of **Jonas Misto Vincent Kuko and Another – vs – David Wafula Wekesa & 2 Others (2013) eKLR para 90 at Page12** of the judgment the Court clearly stated that registration of voters must be by identification.

12. Further in the case of **Sarah Mwangudza Kai- Vs – Mustafa Idd & 2 others [2013] eKLR** it was stated in the judgment that identification must be in accordance with the documents and the law that is to say the identity card and or passport.

13. I hasten to add that before an identity card or a passport is issued to any person his or her birth certificate is always used to verify his particulars. The birth certificate contains the names of the person as he/she would want them to appear in the identity card and or passport. To change one's names one will either swear an affidavit or file an application for a change of name. The new name is thereafter gazetted.

14. In the instant case, the applicant's nickname does not form part of his identification. He has not showed this court that his name was changed to include his nick name "Doctor". Section 5 of the Elections Act No. 24 of 2011 makes provision for the registration of voters as well as the qualifications and requirement for one to be registered a voter. The procedure for registration of voters has also been provided for under the Elections regulations 2017.

15. From all the above, I am satisfied that sufficient reasons have been advanced by the respondent to warrant a grant of the orders sought; the main ground being that the respondent was condemned unheard. That means that the applicant's right to a fair hearing under Article 50(1) of the Constitution of Kenya was violated.

16. In the premises, the respondent's Notice of Motion dated 22.06.2017 be and is hereby allowed. The orders of this court issued on 31.05.2017 are hereby set aside and the respondent be and is hereby granted leave to file and serve its Replying Affidavit or response to the applicant's application dated 30.05.2017. The replies shall be filed and served within seven (7) days from the date of this ruling for interparties hearing on 26.07.2017.

17. The costs of the instant application shall wait the outcome of the application dated 30.05.2017

It is so ordered.

Ruling delivered, dated and signed in open court at Kakamega this 18th day of July, 2017

RUTH N. SITATI

JUDGE

In the presence of;

N/A.....for Applicant

Mr. Mukele Gabriel.....for Respondent

Polycap.....Court Assistant