



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE’S COURT, AT KAKAMEGA

ELECTION PETITION NO. 9 OF 2017

IN THE MATTER OF THE ELCTION ACT

AND

IN THE MATTER OF POLITICAL PARTIES ACT

AND

**IN THE MATTER OF THE ELECTIONS(PARTY PRIMARIES AND PARTY
LISTS)REGULATIONS 2017**

AND

IN THE MATTER OF NOMINATED MEMBERS TO THE COUNTY ASSEMBLY

SCHOLASTICA NGINA SHIRAKU.....1ST PETITIONER

FEISAL MUSTAFA ABDI.....2ND PETITIONER

VERSUS

ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

AND

GEOFFREY MUHANGO MITALO.....APPLICANT

RULING

This ruling relates to the notice of motion application brought under certificate of urgency and supported by the applicant’s affidavit all dated 15th September 2017 together with the annextures attached thereto.

The application is brought under section 1 and 3A of the Civil Procedure Act.

Responses to this application were filed only by the 2nd petitioner and 2nd respondent.

The 2nd respondent's replying affidavit is sworn by Salome Oyugi who identifies herself as its returning officer is dated 29th September 2017.

The 2nd petitioner's replying affidavit is dated 10th September 2017.

The applicant's sole prayer is to be enjoined as a petitioner. The main grounds in support of his application is that despite having been gazetted as a nominee for 1st respondent representing the youth in kakamega county assembly vide legal notice no. 8380 published on the 28th day of august 2017, his name was left out to his detriment.

The 2nd respondent opposes the application. The 2nd respondent argues that this matter is subjudice as the applicant filed a petition no. 4 of 2017 which is still pending.

Additionally, that the applicant has not deposited security for costs as required by law.

On his part, the 2nd petitioner argues that the application is not merited as the 1st respondent was given two positions in the categories of gender top up and ethnic minority.

He intimates that the position of youth representative was allocated to ANC party.

Annexed to his replying affidavit is a supporting affidavit sworn by Prof. Philip M. Kutima, deputy governor of kakamega county and 1st respondent's kakamega county branch chairman.

I have carefully perused and considered the pleadings and materials in support and opposition of the application. The following are my points of consideration in determination of the same:

1. Whether the applicant is a member of the 1st respondent?
2. Whether, the 1st respondent nominated him to the Kakamega County Assembly?
3. Which category was the applicant nominated to represent in the county assembly?
4. Whether, the applicant has on a balance of probabilities established his case?

FACTUAL DIGEST

The applicant has shown that he is a life member of the 1st respondent. He has furnished court with evidence of his payment for the same.

The applicant further supplied court with a copy of a list of nominated members by the 1st respondent to Kakamega County Assembly. It is clear that the applicant was nominated to be considered for nomination under the category of Youth representative.

I take note that annexure "GMM3" was obtained from the social media. Be it as it may, the same is a list of nomination of persons representing the marginalized groups.

THE LAW

Essentials to be considered in an application seeking injunction in a petition have been set out in numerous judicial pronouncements notably in the case of Francis Kariuki Muruatetu and Wilson Thirumbu Mwangi v Republic and 4 others. Supreme court petition no. 15 and 16 of 2015.

This application ought to have been canvassed by way of written submissions. However, when, it came up counsels present invited to consider the application as pleaded with the filed responses and make a

determination to which this court obliged.

Clear guidelines on instances when a person may be enjoined to proceedings as an interested party were set out in Supreme Court Election petition no. 1 of 2017 between H.E Raila Amolo Odinga & others v IEBC, Uhuru Kenyatta & others.

It was stated therein that.....Enjoinment is not as of right, but is at the discretion of the court; hence sufficient grounds must be laid before the court, on the basis of the following elements:

- a. The applicant's personal interest or stake must be set out. The interest must be clearly identifiable and must be proximate enough.
- b. The prejudice to be suffered by the interested applicant in case of non-joinder.
- c. Applicant must set out the submissions he intends to make before the court.

CONCLUSION

Consequently, I have applied the essentials highlighted above and find that the present application does not conform to the principles laid out in Trusted society of human rights alliance v Mumo matemu & others. Supreme court petition no. 12 of 2013 and the earlier on mentioned case of Francis kariuki muruatetu & another v Republic and others in supreme court petition no. 15 and 16(Consolidated)

In the upshot I find and hold that the applicant has on a balance of probabilities failed to his case. The notice of motion application dated 15th September 2017 is not merited. The same is dismissed in its entirety. Each party to bear its own costs. It is so ordered.

Ruling read, dated and signed on open court on this 21st day of November, 2017

KHAPOYA S. BENSON

SENIOR RESIDENT MAGISTRATE