Kingori & 2 others v Wamaitha & 5 others (Judicial Review Miscellaneous Application E110 of 2022) [2023] KEHC 852 (KLR) (Judicial Review) (25 January 2023) (Ruling)

Neutral citation: [2023] KEHC 852 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E110 OF 2022

AK NDUNG'U, J

JANUARY 25, 2023

BETWEEN

MARY WANGUI KINGORI ..... 1ST APPLICANT

MARGARET WANJIKU MIGONGO & ANOTHER ..... 2ND APPLICANT

AND

MERCY CHEPTKIRUI KILEL ..... 1ST RESPONDENT

ANN WAMAITHA & 4 OTHERS ..... 2ND RESPONDENT

RULING

1. This ruling resolves the application dated October 4, 2022. Vide that application, the following prayers are made;
    1. That this Honourable court be pleased to review and set aside the orders issued on the October 4, 2022.
    2. That this Honourable court be pleased to give further directions on the hearing of this matter.
    3. That costs of the application be in the cause.
2. The gist of the application as gleaned from the grounds and affidavit in support is that the suit herein was dismissed for non- attendance on October 4, 2022 when the matter was coming up for directions. Mwaniki Gacomo, the counsel on record for 2nd and 3rd applicant (the first applicant having filed a notice to act in person) has deponed that on the material day, he had technical issues in logging into the court session following a temporary interference with power which affected his connectivity. It is urged that the failure to attend court was not intentional and the applicants should be accorded a chance to prosecute their case. He adds that counsel's predicament should not be visits on the applicants.

3. The application is opposed. The 3rd respondent has in an affidavit sworn by Anthony Mwaura averred the stated reasons for non-attendance are not plausible for lack of electronic evidence to show that the applicants or their advocates on record attempted to log into the court online portal. It is urged that the application offends the Oxygen Principles and that the court has no jurisdiction to determine the judicial review application that the instant application hopes to reinstate. The 4th, 5th and 6th respondents filed grounds of opposition the gist of which is that the court satisfied itself that it had no jurisdiction to hear the dispute and struck out the suit for want of jurisdiction and having so found the court lacks jurisdiction to entertain the instant application.

4. The application was canvassed by way of written submissions. The 1st applicant filed submissions dated November 8, 2022. She submits that her then advocate was unable to log in on time due to a technical hitch or error. It is then that counsel for the 1st respondent and the 4th,5th and 6th respondent took advantage and argued the application in counsel's absence and a ruling issued. It is her case that the present application before court is to request the court to enforce a court order issued by the political Parties Tribunal (PPDT) against the 1st and 3rd respondents which was not fully implemented. She argues that this court has jurisdiction to hear the matter.

5. Counsel for the 2nd and 3rd applicants has submitted that this court has powers to set aside or vary the orders on such terms as may be just. It is asserted that the right to be heard is a well-protected right in our constitution and is also the corner stone of the rule of law. The right should not be taken away where sufficient cause has been shown. Reliance was placed on the case of *Philip Ongom, Capt vs Catherine Nyero Owota, Civil Appeal No 14 of 2001*. It is urged that counsel did not fail to attend court intentionally and that even after the technical hitch he logged back in and mentioned the case before this court.

6. On whether this court has jurisdiction to entertain the matter, counsel recognises the centrality of jurisdiction as espoused in *Owners of Motor Vessel 'Lilian S' vs Caltex Oil Kenya Ltd (1989) KLR 1*. He urges that this court has jurisdiction to set aside its orders. Further, that the issue whether the court has powers to entertain the judicial review application has not been canvassed and if the court will not reinstate the said motion, then the applicants would be shut out without a hearing.

7. The 1st Respondent filed submissions dated November 18, 2022. It is their case that that Order 45 Rule 1(b) of the *Civil Procedure Rules* provides the grounds under which a review can be sought and the same are limited to discovery of new and important matter, on account of a mistake or error apparent on the face of the record or for any other sufficient reason. It is contended that the applicants have not shown any proof of the alleged technical difficulties. It is argued that the current application is an afterthought. It is urged that election matters require expeditious disposal and an advocate should demonstrate greater caution and diligence to ensure that mistakes will not prejudice the dispensation of justice by the courts. Reliance is placed on the definition of sufficient cause in Black's Law Dictionary as that 'which must be rational, plausible, logical, convincing, reasonable and truthful.'

8. On jurisdiction, it is submitted that on publication in the Kenya Gazette on September 9, 2022, the jurisdiction of this court was extinguished and the right forum is now reserved for the Resident Magistrate's Court as an election court vide section 75 of the *Elections Act*.

9. The 3rd Respondent filed submissions dated November 14, 2022. It is submitted that the applicants have failed to demonstrate sufficient reason for this court to review and set aside its orders of October 4, 2022. Reliance is placed on the decision of the Supreme Court of India in the case of *Ajit Kumar Rath v State of Orisa & Others, 9 Supreme Court Cases 596* at page 608 where 'sufficient reason was defined to be a reason analogous to those specified in Order 45 of the Civil Procedure Rules. Counsel adds

that no electronic evidence is availed to prove the alleged technical hitch. The case of Utalii Transport Company Ltd and 3 Others is relied upon for the proposition that it is the primary duty of the plaintiff/ Applicants to take steps to progress their case since they are the ones who dragged the Defendant/ Respondent to court.

10. Counsel relied on the case of *Richard Nchapi Leiyagu v IEBC & 2 Others* where the Court of Appeal held that the discretion to set aside an ex parte judgement or order is intended to avoid injustice or hardship resulting from an accident, inadvertence or an excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. On the question of jurisdiction, it is submitted that this court has no jurisdiction to determine a post-gazettement nomination as the jurisdiction to hear such disputes relating to the membership to a County Assembly is vested in the Magistrates court.

11. The submissions by counsel for the 4th, 5th and 6th Respondent are dated November 15, 2022. In a nutshell, counsel takes the position that even assuming that the court were to be sympathetic to the applicants for being unable to join the online court session on October 4, 2022 when the suit was struck out, it would not be useful to reinstate the suit as the court lacks jurisdiction to hear and determine the same since the the publication of the Gazettete Notice on September 9, 2022 extinguished the jurisdiction of this court to determine any disputes emanating from the general electoral process as that power was effectively assumed by the elections court under section 75 of the *Elections Act*.

12. I have had occasion to consider the application, the affidavit evidence and grounds in support and in opposition to the application. The issues for determination and to which the parties generally agree are;

    1. Whether the orders of October 4, 2022 should be reviewed and set aside.

    2. Whether the Court has jurisdiction to determine this suit.

    3. Who bears the costs of the current application?

13. Before venturing into the issues for determination, I find it necessary to put clarity to what appears to be a misconception by the 1st and 3rd respondent whereby they seem to have misapprehended the application at hand as one seeking a review of the court's orders under Order 45 of the Civil Procedure Rules. It is apparent that this view by the respondents arises from the applicants' lack of clarity on the application before court. The application is said to be brought under Order 8(1)(5) of the Civil Procedure Rules and section 1A, 1B and 3A of the *Civil Procedure Act*. A reading of that law readily shows that the orders sought herein are alien to the provisions of the law cited. Order 8(1)(5) is a provision for effect of service of an amended counter claim on a party other than the plaintiff in a matter. How the applicants ended up citing this provision in the instant application is mind boggling and is a demonstration of a casual and sloppy approach to the matter at hand on the part of counsel. Such attitude must be deprecated. Am however aware of the legal position that an application shall not be defeated merely because it is premised on a wrong provision of the law. Order 51 Rule 10 Civil Procedure Rules provides that:

> ' (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.
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> (2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.'

14. A cursory perusal of the application readily shows that the application is one seeking the exercise of the court's general power to set aside its judgement or order under its inherent powers under section 3A of the *Civil Procedure Act* and Order 12 Rule 7 of the Civil Procedure Rules and it is not one seeking a review of a court's judgement or order based on discovery of a new and important matter, an error apparent on the face of the record or for any other sufficient reason.

15. Order 12 Rule 7 Civil Procedure Rules provides;

> ' Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.'
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> The court has discretion to set aside judgment or order to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake. See Shah v Mbogo & Another [1967] EA 116.
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> In *Patel v EA Cargo Handling Services Ltd [1974] EA 75* the court stated that:
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> 'There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just... The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.'

16. For an applicant to succeed in an application like the one before the court, the duty is on him to demonstrate that the predicament they find themselves in arises from an accident, inadvertence of an excusable mistake or error. In the present application, the mainstay of the application is that counsel for the applicants was unable to log onto the court's online court session due to a technical hitch. Am alive to the convenience offered by technology and the drawbacks associated with its failure from time to time. Indeed, even this court has on various occasions suffered technical hitches which have at times suspended court sessions for considerable periods. Even though the applicants have not availed electronic evidence of the terms to log in on the part of counsel, his timely drawing of the application the same day gives credence to the assertion that he attempted so to do and that prompt filing is also a clear demonstration that the applicants were keen and vigilant to pursue their claim. The failure to attend is thus excusable in the obtaining circumstances.

17. That said, it is important to revisit the actual order of the court made on October 4, 2022 and the reasons behind the order. In its short ruling on the material day the court stated;

> ' The facts disclosed and specifically the gazettement of the members of the house the subject matter of these proceedings puts this matter in the realm of an election petition. The applicant has not appeared in court. The matter is struck out. In view of the circumstances of the case, I direct that each party bears its own costs.'

18. This extract from the proceedings open the door to the question whether this court has jurisdiction to entertain the judicial review proceedings herein. Whereas the respondents have addressed this issue at length, the applicants have argued that this issue should be canvassed once the judicial review proceedings are reinstated. In my view that position is not entirely correct. The court in its ruling and order of October 4, 2022 found and stated that its jurisdiction had been ousted by the gazettement of the members of the house. Jurisdiction was thus a live issue in these proceedings and ought to have been specifically addressed by all the parties. A pertinent question stands out as a sore thumb; whether any useful purpose will be gained in setting aside the dismissal order.

19. In *Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR* the Supreme Court stated;

> ' The Gazette Notice in this case, signifies the completion of the 'election through nomination', and finalizes the process of constituting the Assembly in question. On the other hand, an 'election by registered voters', as was held in the Joho Case, is in principle, completed by the issuance of Form 38, which terminates the returning officer's mandate, and shifts any issue as to the validity of results from the IEBC to the Election Court.
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> [107] It is therefore clear that the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the Election Courts. The Gazette Notice also serves to notify the public of those who have been 'elected' to serve as nominated members of a County Assembly.
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> [108] We have taken note of the argument by counsel for the 3rd, 5th and 6th respondents, that what was before the Court of Appeal (and the High Court), was not an 'election petition', but a constitutional petition seeking to prevent the violation of the rights of the respondents. Counsel for the 3rd respondent urged us to distinguish between an 'election petition' and a contestation over the 'validity of a political-party list'. On this question, however, the broader spectacle is compelling: the electoral-process is dominant; and it allows no separation between Article 90 (which deals with party-list seats) and Article 177 (which deals with membership of County Assemblies).
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> [109] The respondents had sought a declaration that the list of nominees for Nyandarua County Assembly published by the IEBC, had violated Articles 90, 98, 174 and 177 of the *Constitution*, as it purported to exclude Ndaragwa, O'l Kalau and O'Jororok Constituencies. Indeed, one of the respondents' contentions in the Court of Appeal was that the High Court erred by failing to consider the diversity of Nyandarua County, in the formulation of TNA's party list. Is it conceivable that such a petition had nothing to do with elections, and was only concerned with constitutional questions? Not in our view: this was a petition contesting the nomination of the appellants¾a nomination which we hold to have been an integral part of the electoral process, in the terms of the *Constitution* and the electoral law.
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> [110] It follows that only an Election Court had the powers to disturb the status quo. Any aggrieved party would have to initiate the process of ventilating grievances by way of an election petition, in accordance with Section 75 of the *Elections Act*. (emphasis added) The High Court had declined jurisdiction on the perception that this dispute ought to have originated at the Political Parties Disputes Tribunal. The Appellate Court, however, assumed jurisdiction, and issued Orders as follows:'

20. In our instant suit, the gazettement of the 4th, 5th and 6th respondents extinguished the jurisdiction of this court to determine any disputes emanating from the electoral process and such jurisdiction now lay in the hands of the Resident Magistrates Court which by dint of section 75 of the *Elections Act* has powers to hear and determine the validity of the election of an MCA. This position is reaffirmed by the Court of Appeal decision in *Orange Democratic Party Movement v Yusuf Ali Mohamed & 5 Others [2018] eKLR* where the court held;

> ' 48. An issue urged by the 1st respondent is whether the threshold for a constitutional petition was met in the petitions filed at the High Court.

In our considered view, the claims by the 1st and 2nd respondents not only met the threshold for a constitutional petition but also substantially met the threshold and grounds for an election petition. The substratum of the 1st respondents claim is founded on nomination to the County Assembly using Party List as an electoral process. In our view, the undisputed background facts in support of the 1st respondent's claims in the constitutional petition and his claim founded on nomination to the County Assembly are intertwined and inseparable. Being intertwined and not severable, the specific election dispute resolution mechanism provided under the *Constitution* and the *Elections Act* is the procedure to be adopted. The mechanism provided is that an election petition is the only way to challenge post-gazettment electoral disputes.

49. On the question whether there is a specific constitutional or statutory bar to the High Court to entertain a constitutional petition on settlement of electoral disputes in relation to Membership to a County Assembly we answer in the affirmative. There is an express statutory bar to the original jurisdiction of the High Court to handle post-gazettment nomination or electoral disputes relating to Membership to the County Assembly. The original jurisdiction to hear and determine post-gazettment electoral disputes relating to membership to a County Assembly is vested upon the Magistrates Court. The High Court has appellate jurisdiction in respect disputes relating to post-gazettment of Members to a County Assembly. The express statutory bar is Section 75 (1A) of the *Elections Act*. The Section provides:

A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.'

21. This consistent interpretation of the law by the Court of Appeal and the Supreme Court, decisions which are binding on this court is testimony that the setting aside of the orders of the court orders of 4th October 2022 would be a futile exercise that would serve no useful purpose. The court must rise to the occasion to give effect to the overriding objective of the *Civil Procedure Act* and the Rules made thereunder.

Section 1A of the *Civil Procedure Act* provides: -

' (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.'

Section 1B of the *Civil Procedure Act* imposes a duty on the court to further the overriding objective in its handling of disputes.

22. In my considered view, any attempt to prolong these proceedings when it is manifestly clear that the jurisdiction of the court is ousted would be imposition of an unnecessary burden on the parties and would result in undue delay and an unnecessary escalation of costs. This is a path the court in deference to the overriding objective herein above must avoid.

23. In the premises, I find no merit in the application dated October 4, 2022. The application is hereby dismissed. Each party is to bear its own costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 25TH JANUARY 2022

A. K. NDUNG'U

JUDGE