



Rombo v Independent Electoral & Boundaries Commission; Ongondo (Interested Party) (Judicial Review 9 of 2022) [2022] KEHC 12414 (KLR) (25 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12414 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
JUDICIAL REVIEW 9 OF 2022**

KW KIARIE, J

JULY 25, 2022

BETWEEN

ZACHARY ASEDA OMONDI ROMBO APPLICANT

AND

**INDEPENDENT ELECTORAL & BOUNDARIES
COMMISSION RESPONDENT**

AND

BILLY ODHIAMBO ONGONDO INTERESTED PARTY

RULING

1. Zachary Aseda Omondi Rombo, the applicant herein moved the court by way of notice of motion dated June 30, 2022 under sections 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#), Order 53 of the [Civil Procedure Rules](#) and articles 88 (4) and 159 of the [Constitution](#) of Kenya. He is seeking the following orders:
 - a) That this application be certified urgent and the same be heard *ex parte* in the first instance. [Spent]
 - b) That pending the hearing and determination of the application, this honourable court be pleased to issue an interim injunction to prevent the respondent from processing and/or gazetting the name of the interested party as the Orange Democratic Movement Party candidate to vie for the position of West Kamagak Ward, Kasipul Constituency within Homa Bay.
 - c) That this honourable court do issue judicial review orders in the nature of *certiorari* seeking to remove into this honourable court and quashing the decision of the Independent Electoral and Boundaries Commission Dispute Resolution Committee issued and dated June 19, 2022 and



read in open court of June 20, 2022 dismissing complaint No 228 of 2022 in respect of Orange Democratic Movement Party nominee for West Kamagak Ward, Kasipul Constituency within Homa Bay County.

- d) That this honourable court do issue judicial review orders in the nature of *mandamus* compelling the respondent to immediately receive and effect changes confirming the applicant herein as the Orange Democratic Movement Party nominee to contest on the party ticket for the position of West Kamagak Ward, Kasipul Constituency within Homa Bay Ward.
- e) That this honourable court do issue judicial review orders in the nature of prohibition directed at the respondent prohibiting it from gazetting any other candidate on the ODM party ticket to vie for the position of West Kamagak Ward, Kasipul Constituency within Homa Bay ward.
- f) That the costs of these proceedings be borne by the respondent.
- g) That the honourable court be pleased to grant such other or further relief as it may deem fit in the circumstances.

2. The application was premised on the following grounds:

- a) The applicant filed a complaint before the respondent's Dispute Resolution Committee and the committee dismissed his claim on account that the committee has no jurisdiction to hear and determine the complaint.
- b) The respondent is in the process of gazetting the names of the nominated candidates by the various political parties to participate in the General Elections of August 9, 2022.
- c) The IEBC Dispute Tribunal erred in not considering the material evidence on record and for divesting itself of jurisdiction to determine the dispute.
- d) Sufficient evidence was adduced to confirm that the interested party was not a member of ODM party at the time of clearance. The law requires that before the 1st respondent clearance as an aspirant, the aspirant must be a member of the political party forwarding his name for clearance. The interested party's clearance was unlawful ab initio.
- e) The appellant appealed to the party disputes appeal tribunal and the finding was made in his favor. No material evidence was adduced by the 2nd respondent to demonstrate that ODM organized a fresh nomination resulting in his nomination. The orders of the appeals tribunal remain uncontroverted.
- f) The *Political Parties Act* and the party nomination rules require that where a direct ticket is being issued, a notice to that effect is issued publicly to that effect. No such notice was availed by the interested party to legitimize his purported nomination.
- g) For an aspirant to be cleared as a party candidate, membership is paramount. The 2nd respondent having been found to be partyless cannot be sustained as a party candidate since it creates a legal and factual absurdity.
- h) It is in the interest of justice that this crucial matter be heard forthwith and without delay.
 - i) The loss and damage will not be able to be compensated by damages

3. The respondent opposed the application on the following grounds:

- a) That the applications is misconceived, frivolous, vexatious, incompetent and otherwise an abuse of the process of court.



- b) That the application is bad in law and aimed at wasting the court's judicial time.
 - c) That under regulation 3 of the [Elections \(General\) Regulations, 2012](#) the 3rd respondent is mandated to appoint a Returning Officer to perform certain statutory functions including carrying out the nomination process.
 - d) That section 40 of the [Political Parties Act](#) provides that disputes pitting political parties against its members are dealt with at the Political Parties Dispute Tribunal and the 1st respondent was indeed correct in holding that it had no jurisdiction to entertain the complaint placed before it by the applicant.
 - e) That the IEBC Dispute Resolution Committee is established under article 88(4)(e) of the [Constitution](#) which mandates the IEBC to intervene and settle disputes relating to or arising from nomination.
 - f) That the candidate who was cleared to vie for member of County Assembly-West Kamagak Ward by the respondent was the one presented by the ODM party as the returning officer only clears aspirants presented to them by the political parties and does not concern herself with the party nominations.
 - g) That is trite law that judicial review is concerned with the decision-making process, not with the merits of the decision itself and it is clear that due process was followed as the dispute committee granted the applicant an opportunity to be heard before rendering its decision.
 - h) That the *ex parte* applicant has therefore not advanced any justification for the orders sought nor has he established sufficient reasons for the grant of the prayers sought.
 - i) That the instant application as filed is therefore devoid of merit and this court should dismiss it in its entirety with costs.
4. Billy Odhiambo Ongondo equally opposed the application on the following grounds:
- a) The interested party herein sort to file a review of that decision but before doing so Rosemary Akinyi Odongo, did write a consent letter to the ODM National Elections Board, signed by both the interested party and her. In the consent, she averred that she is no longer interested in challenging the nomination of the interested party and was in full support of the unity of purpose,
 - b) The applicant having not raised an objection to the consent nor applied for the review of the tribunal judgment, he cannot use delay tactics to appear from the blues to challenge the same through stealth.
 - c) The complainant challenging the nomination of the interested party having withdrawn, there was therefore no need for fresh nominations in West Kamagak Ward.
 - d) The consent having been sent to the ODM National Elections Board, the board proceeded to issue a nomination certificate to the interested party.
 - e) The ODM National Elections board has clearly written a letter to the commission denying ever issuing a direct nomination certificate to the applicant and has declared the annexed certificate as forgeries.



- f) The respondent, through the returning officer who was mandated to clear the candidates, swore a replying affidavit at the Dispute Resolution Committee, and responded to this stream of events.
- g) The applicant made heavy weather as regards to the allegation that I am not a registered party member of the ODM party. This is a fallacy in itself. The interested party has never at any given time resigned from the party by a letter or through any other means available.
5. The interested party further filed a preliminary objection on grounds that the application offends the provisions of section 41(2) of *Political Parties Act*.
6. A preliminary objection must be on a point of law and nothing more. This was clearly stated in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969]EA 696. At page 700 paragraph D-F Law JA as he then was, stated:
A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.
7. Section 41 (2) of *Political Parties Act* provides as follows:
 An appeal shall lie from the decision of the tribunal to the High Court on points of law and facts and on points of law to the Court of Appeal and the decision of the Court of Appeal shall be final.
 The import of this section is that any party who is not satisfied with the decision of the Political Parties Dispute Tribunal ought to seek redress through the appeal procedure.
8. Section 9 of the *Fair Administrative Actions Act* provides for the procedure for judicial review as follows :
- (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to article 22(3) of the *Constitution*.
 - (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
 - (3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
 - (4) Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
 - (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal. [Emphasis added]
9. It is clear that the import of this legal provision is that an applicant for judicial review must be aggrieved by an administrative action and that the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. It is only under



exceptional circumstances and on application by the applicant that the court may exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

10. The Court of Appeal in the case of *Republic v National Environmental Management Authority* [2011] eKLR stated as follows:

The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it – see for example *R v Birmingham City Council, ex parte Ferrero Ltd Case*.

11. In a similar application to the present one, in the case of *Wachira Martin Ngiri & 3 others v Independent Electoral and Boundaries Commission & 5 others* [2013] eKLR the court delivered itself as follows:

The *Political Parties Act* and the *Elections Act* provide for an elaborate procedure of dealing with disputes arising from the nomination process. That procedure ought to have been followed and exhausted especially where the Petitioners had already presented their grievance to The Independent Electoral and Boundaries Commission Tribunal. Of relevance here is section 41(2) of the *Political Parties Act*. What is before this court is the petition filed herein in this court's original jurisdiction. The decision of the tribunal still stands as it has not been challenged or set aside. It would be an unpleasant scenario to have the decision of the tribunal and another one by this court in its original jurisdiction over the same matter. My finding therefore is that this court lacks jurisdiction to deal with this matter before it. I uphold the preliminary objections raised and strike out the petition.

12. Looking at the application herein, the applicant has substantially raised issues of the merits of the decision of the tribunal and not with the process. In *Republic v Public Procurement Administrative Review Board & 2 others Ex parte Rongo University* [2018] eKLR Mativo J (as he was then) said:

15. There is a long-established and fundamental distinction between appeal and review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in judicial review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.

16. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach' judicial review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

I therefore find that the applicant herein did not exhaust the procedure for the appeal before his application to this court was filed. Secondly, he did not demonstrate any exceptional circumstances for him to be exempted from this legal obligation. The preliminary objection is therefore sustained.



13. Order 53 rules 1 & 2 of the [Civil Procedure Rules](#) provides:

- (1) No application for an order of *mandamus*, prohibition or *certiorari* shall be made unless leave therefor has been granted in accordance with this rule.
- (2) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.
- (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.
- (4) The grant of leave under this rule to apply for an order of prohibition or an order of *certiorari* shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing *inter partes* before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.

- 2) Leave shall not be granted to apply for an order of *certiorari* to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

14. In [Republic v County Council of Kwale & another ex parte Kondo & 57 others](#) (1998) 1 KLR (E&L) Waki J (as he then was) while explaining the purpose of leave stated:

The purpose of the application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. As was pointed out by Lord Diplock in *Republic v Inland Revenue Commissioners ex p National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617, the requirement that leave must be obtained before making an application for judicial review is designed to:

“Prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.

It is trite law that where leave has not been obtained from a judge in chambers, the whole process becomes a nullity.



15. In the instant application, I find that no leave was granted before this matter was transferred to this court. Even if we assume it had, I will still have found this application incompetent for it raises issues with the decision and not the process of arriving at the decision.
16. Due to the foregoing, the application is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 25TH DAY OF JULY, 2022

KIARIE WAWERU KIARIE

JUDGE

