



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

JUDICIAL REVIEW NO. E001 OF 2021

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF VIOLATION OF THE ARTICLES 10 AND 38 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF THE ELECTIONS ACT

AND

**IN THE MATTER OF FIFTH SCHEDULE SECTION 4 AND 5 OF THE INDEPENDENT ELECTORAL AND BOUNDARIES
DISPUTE ACT, 2012**

AND

IN THE MATTER OF SECTION 7 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF SECTION 14(4) OF THE POLITICAL PARTIES ACT, 2011

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS, 2012

BETWEEN

REPUBLIC APPLICANT

-VERSUS-

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION..... 1ST RESPONDENT

MUUNGANO PARTY OF KENYA 2ND RESPONDENT

AND

WIPER DEMOCRATIC PARTY 1ST INTERESTED PARTY

EX-PARTE APPLICANT JULIUS MUTUNGA NZUMBI

RULING

1. The ex-parte Applicant Julius Mutunga Nzumbi has come to this court through a Notice of Motion dated 3rd February 2021 citing Order 53 Rule 1(2) of the Civil Procedure Rules, section 72(2) of the Elections Act, section 13 of the Elections (General) Regulations 2012, section 8 and 9 of the Law Reform Act (cap 26), section 4 and 5 of the Fifth Schedule of the Independent Electoral and Boundaries Disputes Act 2012, section 7 of the Fair Administrative Action Act 2015 and section 3A of the Civil Procedure Act (cap 21) seeking the following orders –

a) *That the Honourable Court be pleased to bring to this court for the purposes of quashing the decision of the 1st Respondent dated 27th January 2021 in Complaint No. 3 of 2021.*

b) *That the Honourable Court be pleased to grant an order of prohibition directed to the 1st Respondent prohibiting it from accepting, considering, acting upon, preparing ballot papers, or any other act in favour of any nominee of the 2nd Respondent pursuant to the decision of the Disputes Resolution Committee dated 27th January 2021 in complaint No. 3 of 2021.*

c) *That the Honourable Court be pleased to grant an order of prohibition against the 2nd Respondent prohibiting it from fielding any other candidate pursuant to the decision of the Dispute Resolution Committee dated 27th January 2021 in complaint No. 3 of 2021.*

2. The ex-parte Applicant relies on the grounds in the Statutory Statement and the affidavit verifying the facts filed with the Summons for leave to file judicial review proceedings. Several grounds are listed, the main grounds being that the decision of the Dispute Resolution Committee was arrived at through an illegality, and flawed process with reasonable suspicion of bias against other players in the by-election, and that the ex-parte Applicant herein though named as the interested party in those proceedings before the Dispute Resolution Committee was not notified of the proceedings and thus was not availed an opportunity to present his case before the Committee. Thus the ex-parte Applicant seeks the prayers above.

3. The 1st Respondent – Independent Electoral and Boundaries Commission (IEBC) in response to the application filed a replying affidavit sworn by its Director of Legal and Public Affairs Michael Goa on 9th February 2021 in which the sequence of events in the matter was given and specifically it was deponed that on the date scheduled for registration of candidates for the by-election which was 19/01/2021, the ex-parte Applicant sent an e-mail to the Returning Officer stating that he had made a candid decision not to be in the race; that thereafter on 26th January 2021 Muungano Party the 2nd Respondent herein (*which had nominated the Applicant for the by-election*) filed Machakos High Court Petition No. 2 of 2021 seeking orders that they be allowed to nominate a different candidate but the court directed them to lodge a complaint before the 1st Respondent's Disputes Resolution Committee as required by Law; and that the 2nd Respondent then filed Complaint No. 3 of 2021 before the Dispute Resolution Committee which deliberated on the same and allowed the 2nd Respondent to nominate another candidate, which decision of the committee was made within the law.

4. The 1st interested party Wiper Democratic Party in response filed a replying affidavit sworn by its Deputy Secretary General Peter Mutuku Muthuki on 3rd February 2021 deponing that the ex-parte Applicant was its member and never resigned from the party before he sought to contest the said by election through Muungano Party; that the 1st interested party had on 02/02/2021 written a letter of complaint to IEBC (1st Respondent) on the nomination of the ex-parte Applicant; that the 2nd Respondent used dubious and fraudulent means to dupe the 1st Respondent in allowing the 2nd Respondent to field a different candidate in the by-election. It was also deposed that the 2nd Respondent did not have reason to seek extension of time to field a different candidate in the by-election; and that since the ex-parte Applicant was not heard by the Dispute Resolutions Committee it was impossible for the Committee to identify the factual misstatements of the 2nd Respondent; and further that the committee failed to ensure that the 2nd Respondent had made sufficient efforts to serve the ex-parte Applicant with complaint No. 3 of 2021 before conducting proceedings.

5. The 2nd Respondent (Muungano party) on their part filed a replying affidavit sworn on 10th February 2021 by Jonathan Muoki Mwaniki its Secretary General in which it was deponed that the dates for registration of candidates for Kitise Kithuki Ward by-election were published by the 1st Respondent for 18th and 19th January 2021; that as a party they nominated the ex-parte Applicant as candidate for the by-election after he had resigned from the 1st Interested Party herein; that thereafter the said ex-parte Applicant disappeared or went missing and failed to appear before the said Returning Officer and instead informed the Returning Officer by e-mail that he would not be in the race; that the 2nd Respondent thus on 26th January 2021 filed Machakos Petition No. 2 of 2021 but the court directed them to lodge a complaint before the 1st Respondent's Dispute Resolution and Committee as required by law which they did through Complaint No. 3 of 2021 and as a result the Committee allowed them to field another candidate. It was lastly deposed that the 2nd Respondent had a legitimate right to field a candidate and that the Committee did not breach any law. These were the pleadings of the parties.

6. The petition was heard through filing and highlighting of written submissions.

7. The ex-parte Applicant's counsel M/s O.N. Makau & Mulei in their written submissions identified two issues for determination. First, whether the 1st Respondent heard the 2nd Respondent through Complaint No. 3 of 2021 without the ex-parte Applicant being served either with a hearing notice or the complaint No. 3 of 2021 at all contrary to the law and procedure established currently in Kenya despite being an interested party herein. Secondly, whether the ex-parte Applicant had complied with section 14(2) and 14(3) of the Political Parties Act as at the time he was nominated by the 2nd Respondent.

8. With respect to the first issue whether the 1st Respondent heard the 2nd Respondent without either the ex-parte Applicant being served with hearing notice or the Complaint No. 3 of 2021, counsel relied on the case of **Republic –vs- Attorney General and 4 others exparte Diamond Hashim Lalji & Ahmed Hashim Lalji (2014) eKLR** in which it was held that judicial review applications cannot deal with the merits of the case but merely with the form. According to counsel therefore, the proceedings before the Dispute Resolution Committee being

quasi-judicial in nature, the ex-parte Applicant should have been served and given the opportunity to appear in person to explain his side of the allegations of the 2nd Respondent attributed to him. Counsel contended that if that had happened herein, the 2nd Respondent would not have given another opportunity to the 2nd Respondent to present another candidate. The counsel also relied on section 4(5) of the Fair Administrative Action Act which provides that the right under the Act does not limit the right of any person to appear by a legal representative in judicial or quasi-judicial proceedings.

9. Counsel also relied on the English case of **Associated Provincial Picture Ltd -vs- Wednesbury Corporation (1947) 2ALL ER 680** to support the argument that in all matters in which an authority is exercising discretion, regard must be had to all relevant matters for consideration. Counsel also relied on the case of **Republic -vs- Kenya Revenue Authority – ex-parte Amsco Kenya Ltd (2014) eKLR** where the court held that administrative action cannot be said to be procedurally fair if the process of arriving at it is shrouded in mystery.

10. Counsel further contended that the 1st Respondent's Committee did not follow due process and relied on the case of **Republic -vs- County Government of Kiambu – ex-parte Robert Gakuru & Another – Judicial Review No. 434 of 2015; Republic -vs- Public Procurement Administrative Review Board & 3 Others – ex-parte Olive Telecommunications PVT- Ltd Judicial Review No. 106 of 2014; and Republic -vs- Director of Survey & 2 Others, ex-parte Sayani Investments Ltd Miscellaneous Civil Application No. 313 of 2014** and stated that the ex-parte Applicant having been aggrieved by the administrative decision issued by the 1st Respondent in which the ex-parte Applicant had legitimate expectation of fair administrative action under Article 47 of the Constitution and the Fair Administrative Action Act, and this court should grant reliefs as appropriate.

11. With regard to the 2nd issue whether the ex-parte Applicant had complied with section 14(2) and 14(3) of the Political Parties Act as at the time he was allegedly nominated by the 2nd Respondent, counsel submitted that the ex-parte Applicant had not resigned from his party and relied on section 14(3) of the Act which states as follows –

14(3) The political party, the member or the clerk of the relevant house or County Assembly shall notify the Registrar of such resignation within three days of the resignation.

12. Counsel argued that since the copy of resignation letter dated 8th January 2021 annexed to the replying affidavit of the 2nd Respondent sworn on 10th February 2021 did not bear the stamp of the 1st interested party but only the Registrar of the Political Parties such letter did not comply with the legal requirements for resignation of a member of a Political Party.

13. Counsel further relied on the case of **William Omondi -vs- Independent Electoral & Boundaries Commission & 2 Others – Petition No. 288 of 2014** in which the statutory process of resignation from a political party and joining another party was stated by the court. Counsel also relied on the case of **Carol Omondi -vs- Registrar of Political Parties & Another- Petition No. 195 of 2017** in which it was noted that resignation from a political party took effect when a resignation notice is received by the political party under section 14(2). Thus counsel argued that the ex-parte Applicant had not resigned as a member of Wiper Democratic Movement Party.

14. In oral submissions, Mr. Kithuka for the ex-parte Applicant submitted that his client (*the ex-parte Applicant*) was joined *suo motu* in the impugned proceedings (Complaint No. 3 of 2021) by the 2nd Respondent, but was never served nor informed to attend those proceedings, even though the decision of the Dispute Resolution Committee adversely mentioned him as having been abducted. According to counsel, his client should not have been adversely mentioned nor should the Committee have made an adverse finding when he was not given a chance to explain his side of the story. According to counsel, the 2nd Respondent not having stated that they attempted to serve or inform his client about the proceedings in Complaint No. 3 of 2021, the decision of the Committee was improper and urged this court to give appropriate orders as there was procedural impropriety and lack of fair administrative action.

15. Counsel concluded by stating that the ex-parte Applicant had legitimate expectation to fair administrative action which was violated in the present case, thus asked that the orders sought be granted.

16. The 1st Respondent's counsel Nancy Koros in their written submissions highlighted the pleadings of the parties and submitted that the 1st Respondent's Dispute Resolution Committee acted within the law in its decision, and that they supported the reasoning of the Committee that mere acceptance of the ex-parte Applicant of direct nomination by the 2nd Respondent meant that the ex-parte applicant had resigned from Wiper Democratic Party (*the 1st Interested Party*). Counsel submitted that the legitimate expectation of the 2nd Respondent to field a candidate in the by-election was respected by the Committee.

17. Counsel submitted further that the prayer for quashing the 1st Respondent's Dispute Resolution Committee had long been overtaken by events as the 2nd Respondent's candidate had already been successfully registered as a candidate and published in the Kenya Gazette and that if the orders sought were granted it would lead to additional expenses for the 1st Respondent in printing ballot papers and other expenses.

18. On the Law, counsel relied on Article 38 of the Constitution on the recognition of political rights of every citizen and the rights against unreasonable restrictions to be a candidate. Counsel also relied on section 14(5) of the Political Parties Act – which provides for the acts of a person that are deemed to show that he or she has resigned from previous political party.

19. In oral submissions, Ms. Koros submitted that the Dispute Resolution Committee had mandate under Article 88(4) (e) of the Constitution and section 74(4) of the Elections Act to handle such disputes, thus the Committee proceedings were proper. Counsel further submitted that the conduct of the ex-parte Applicant were governed by section 14(5) of the Elections Act. Thus he was legally cleared to be a candidate having resigned from Wiper Democratic Party and joined Muungano Party. Thus the proceedings and decision of the Committee was proper.

20. The 2nd Respondent's counsel Judah Kioko & Company in their written submissions highlighted the contents of the ex-parte Applicants application and contentions therein and stated that this being a judicial review application the court is required not to deal with the merits of

the case but only with the process and relied on the case of **Republic –vs- Attorney General & 4 Others ex-parte Diamond Hashim Lalji & Ahmed Haslim (2014) eKLR** relied upon by counsel for the ex-parte Applicant. Counsel identified three issues to be addressed by this court. Firstly, whether the quasi-judicial body making the decision had the jurisdiction; secondly, whether the persons affected by the decision were heard before the decision was made; and thirdly whether the decision made by the Committee took into account relevant matters or took into account irrelevant matters.

21. Counsel argued that by the time the 2nd Respondent made a complaint to the 1st Respondent, the ex-parte Applicant herein had already sent a communication to the 1st Respondent through e-mail explaining that he was not willing to participate in the by-elections but he had not communicated the same to the 2nd Respondent thus there was no need to invite him to appear before the Committee to answer whether he was still interested to vie. It was their submission that the ex-parte Applicant had sent an e-mail to the 1st Respondent's Returning Officer on 19th January 2021 at 10:59 am that he had withdrawn from the election race which only became known to Muungano Party (2nd Respondent) when its officer went to the Returning Officer to seek his permission to return nomination papers.

22. On the third issue, the counsel's argument was that the 2nd Respondent had nominated a candidate (ex-parte Applicant) as required by law, and since they did not commit any offence they should not be denied the right to nominate a candidate. Counsel emphasized that as judicial review proceedings dealt with the process rather than the merits of a case, if the ex-parte Applicant and 1st Interested Party wanted to raise issue on perceived electoral malpractices the same should be dealt with in another forum not the judicial review court. Counsel concluded by stating the decision of the Disputes Resolution Committee was fair and Muungano Party should thus be allowed to nominate another candidate.

23. In oral highlighting Mr. Kioko for 2nd Respondent, associated himself with submissions of counsel for 1st Respondent. Counsel emphasized that the ex-parte applicant had informed the 1st Respondent behind the back of 2nd Respondent that he did not wish to participate in the election, thus he has no reason to say that he was not invited to the Committee proceedings. Counsel submitted also that the Committee did not consider irrelevant matters and was thus correct in allowing the 2nd Respondent to nominate another candidate.

24. The 1st Interested Party's counsel Maanzo & Company in their written submissions also highlighted the surrounding circumstances of the application and maintained that the ex-parte Applicant never at any time resigned from being a member of their party. Counsel felt that the issues for decision are first, whether the resignation of the ex-parte Applicant adhered to the law and secondly whether the hearing of Complaint No. 3 of 2021 by the Committee without notification of an interested party (the Applicant) was lawful and adhered to the principle of fair hearing.

25. On the first issue, counsel relied on section 14(3) of the Political Parties Act which required the political party to notify the Registrar within seven (7) days of resignation of a member and upon such notification the Registrar shall remove such member from the membership list. Counsel argued that on 2nd February 2021 the 1st Interested Party wrote to the 1st Respondent protesting on the illegal removal of the ex-parte Applicant from membership of the party. Though counsel acknowledged that a member's resignation takes effect when a notice in writing is received by the party under section 14(2) of the Act, he emphasize that the party had to inform the Registrar within 7 days for such resignation to be complete.

26. On the second issue, counsel submitted that the failure of the 2nd Respondent to inform the ex-parte Applicant about the Disputes Resolution Committee proceedings made the decision of the committee null and void. Counsel relied on the case of **Accounting Officer Kenya Ports Authority (ex-parte) –vs Public Procurement Administrative Review Board and 3 Others – J/R Miscellaneous Application No. 37 of 2019** - on the application of the principles of natural justice and fair administrative actions, as well as the case of **Pashito Holdings –vs- Paul Nderitu Ndungu** also with regard to application of principles of the natural justice and fairness. Counsel also relied on Article 50 and 47(1) of the Constitution 2010 on the right to expeditious, effective, lawful, reasonable and fair hearing.

27. In oral highlighting, Mr. Maanzo for the 1st Interested Party emphasized that the ex-parte applicant was not given an opportunity by the Disputes Resolution Committee to be heard and thus argued that its decision was null and void. Counsel emphasized that if the decision was left to stand then the ex-parte Applicant would in future be excluded by IEBC (1st Respondent) from political candidature while he was a member of WIPER DEMOCRATIC PARTY (1st Interested Party).

28. In response to the Respondents submissions Mr. Kithuki for the ex-parte Applicant emphasized that the ex-parte Applicant though an interested party in Complaint 3 of 2021, was not informed of the Disputes Resolution Committee proceedings and felt that the Respondents did not address this issue in response. Thus counsel maintained the decision of the Committee was null and void.

29. In my view, the first issue is whether the Disputes Resolution Committee had jurisdiction to deal with Complaint No. 3 of 2021. I note that it was the High court which ordered the filing of the subject Complaint. None of the parties has challenged that. Though it has been argued by some counsel that the Committee did not have jurisdiction to hear and determine the dispute, Article 88(4) (e) of the Constitution confers on the 1st Respondent jurisdiction to settle some electoral disputes. It allows them to settle disputes as follows: -

88(4)(e) the settlement of electoral disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

30. In addition, section 74(4) of the Elections Act recognizes the Dispute Resolution Committee as the organ of the 1st Respondent to deal with such dispute resolution. Thus the fact that a named party was not served with process or hearing date, or whether a wrong party was joined in the dispute proceedings did not remove jurisdiction from the Committee.

Ultimately the decision reached by the Committee might be challenged for being wrong but in my view, the Committee had jurisdiction to handle such disputes and thus this particular dispute. I thus find that the Dispute Resolution Committee had jurisdiction to conduct the

proceedings in Complaint No. 3 of 2021 irrespective of whether the ex-parte Applicant was served or participated in the same.

31. The second issue is whether the ex-parte Applicant should have been informed of the proceedings in Complaint No. 3 of 2021. I note that the decision of the Committee dated 27th January 2021 was filed herein by the ex-parte applicant as annexe "JMN3". The parties in those proceedings were Muungano Party of Kenya as complainant, Independent Electoral & Boundaries Commission as Respondent and Julius Mutunga Nzumbi as interested party. There is no doubt in my mind that the interested party therein who is the ex-parte Applicant herein, should have been served as he was a named party. It is obvious he was not served. It was an error on the part of the 2nd Respondent herein not to have served the ex-parte Applicant herein, irrespective of whether the Dispute Resolution Committee made an order for such service. I thus find that the ex-parte Applicant should have been served or notified about the proceedings in Complainant No. 3 of 2021.

32. The 3rd issue is whether the proceedings in Complaint No. 3 of 2021 which were conducted in the absence of the ex-parte Applicant herein and without his knowledge were defective. In this regard, Article 47 of the Constitution on fair administrative action and Article 50 on fair hearing are relevant. Every person is entitled to fair administrative action and fair hearing. In my view the proceedings in Complaint No. 3 of 2021 were defective but only to the extent that they related to the ex-parte Applicant and in so far as adverse findings were made by the Committee against him behind his back, as such proceedings would violate the rules of natural justice and the requirements of fair administrative action.

33. I note that the counsel for the 1st Interested Party herein has put a spirited argument before this court, saying that they were adversely affected by the Committee's decision. In my view, the 1st interested party were neither parties in those proceedings in Complaint No. 3 of 2021, nor were any adverse orders made against them. In my view, Kenyans are free to join and pull out of political parties as they please, and they can still rejoin such parties again.

34. The last issue is whether this court should issue the orders sought. I have highlighted the prayers in the Notice of Motion at the beginning of this ruling. They are a prayer for orders of certiorari and two prayers for prohibition. I will start by saying that judicial review orders are discretionary orders issued by the court to cure an irregularity or an illegality. They are equitable reliefs and he who comes to equity has to come with clean hands in order to persuade the court to exercise its discretion in his or her favour.

35. The ex-parte Applicant does not dispute that he sent a resignation letter to his party. He does not deny that he was granted and accepted a nomination by another party, the 2nd Respondent herein. He does not deny that he sent an e-mail to the IEBC (1st Respondent) saying that he would not participate in the by-election for which he was nominated. Now he and the 1st Interested party allege all these were irregularities. His above conduct in the commission of irregularities would have ordinarily disentitled him to equitable reliefs from this court as such conduct means he has not come to this court with clean hands.

36. This however, being an election matter, which is a matter of representation of Kenyans by their popularly elected representative; this court considers that it has to be flexible not to deny Kenyans the right to representation by persons of their choice.

37. With regard to the request for certiorari, prayer (a), the ex-parte Applicant had the onus to demonstrate to this court the adverse findings made against him to persuade this court to make appropriate orders in line with the reasoning in Nairobi **Hc. Misc. Application No. 102 of 2006 – Republic –vs- Judicial Commission of Inquiry into the Goldenberg Affair ex-parte George Saitoti (2006) eKLR**. He has not done so and from my perusal of the impugned ruling, I find no adverse finding made against him that would call for quashing by this court. The ruling of the Committee dwelt on allowing the 2nd respondent to field another candidate rather than making adverse findings against the ex-part Applicant. I thus find no basis for granting certiorari orders. I decline to grant prayer (a).

38. With regard to prayers (b) and (c) in my view, the ex-parte Applicant has no legal interest in any of those two prayers, him not having presented his nomination papers to the Returning Officer on the scheduled date which was 19th January 2021, and currently being very eager to distance himself from Muungano Party the 2nd Respondent. He cannot hold the Kenyan democratic election system at ransom by seeking prohibitory orders in matters where he does not have a legal interest. Granting those orders sought in prayer (b) and (c) will amount to denying the people of the ward a chance to consider and vote for any other candidate, which cannot be acceptable in a democratic society.

39. To conclude therefore, I order as follows:-

1) Having found that the Dispute Resolution Committee did not make any adverse finding against the ex-parte Applicant, I decline to grant prayer (a) of the Notice of Motion.

2) I decline to grant prayers (b) and (c) of the Notice of Motion as there is no legal basis for granting the prohibition orders sought.

40. If any interim orders were issued, same are hereby vacated.

41. Parties will bear their respective costs of the proceedings.

Delivered, signed & dated this 23rd day of February, 2021, in open court at Makueni.

GEORGE DULU

JUDGE