



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

JUDICIAL REVIEW APPLICATION NO. 8 OF 2013

IN THE MATTER OF AN APPLICATION BY IBRAHIM KONES FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE ELECTIONS ACT NO 24 OF 2011 LAW OF KENYA

AND.

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND.

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

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE INDEPENDENT

ELECTORAL & BOUNDARIES COMMISSION.....RESPONDENT

AND

CHEPROT CHESIBOK.....1ST INTERESTED PARTY

THE JUBILEE POLITICAL PARTY.....2ND INTERESTED PARTY

SPEAKER, COUNTY ASSEMBLY OF BUNGOMA...3RD INTERESTED PARTY

AND

IBRAHIM KONES.....EX-PARTE APPLICANT

JUDGMENT.

By way of notice of motion dated 20th December 2017, the ex parte- applicant moved this court seeking order;

- i. **That** the Honourable court grant the applicant orders for certiorari to remove to this court for purpose of quashing the respondent's decision to publish in the Kenya gazette vide Gazette Notice No.8380 of the 28th August,2017,the name of the 1st

interested party CHEPROT CHEPSIBOK as the nominee with priority in the nomination list of 2nd interested party JUBILEE POLITICAL PARTY for position of nominated members of the county Assembly of Bungoma;

ii. **That** the honorable court be pleased to grant the applicant orders of mandamus directing the respondent to gazette the name of the ex-parte applicant as the correct and priority nominee of the 2nd interested party JUBILEE POLITICAL PARTY for the marginalized Group category to be nominated and sworn as member of the county Assembly of Bungoma.

The application is supported by supporting affidavit of Ibrahim Kones sworn on 20th December 2017 on grounds that publication in the Kenya Gazette of the 1st interested party name as nominee of 2nd interested party was irregular and illegal. He stated that the respondent acted ultra vires in making orders of substitution of the ex-parte applicant's name with the name of 1st interested party. He stated that the 2nd interested party was number two on the 2nd interested party's list of nominees and was in priority and respondent had no jurisdiction to alter the list presented to it by 2nd interested party.

The 1st interested party herein thereafter filed preliminary objection dated 14th March 2018 on grounds;

i. **That** this honourable court lacks jurisdiction to entertain this matter in view of the provisions of article 88(4)(e) of the constitution of Kenya, section 74(1) of the Election Act, 2011 and section 40 of Political Parties Act;

ii. **That** the petitioner's petition is incompetent as orders sought are legally untenable in view of the provisions of Article 88(4)(e) of the constitution, section 74(1) of the Elections Act and Regulation 99(2) of the Election (General) Regulations, 2012 which vests the respondent with power to settle nomination disputes;

iii. **The** petitioner's petition is time barred in view of the provisions of Article 87(2) of the constitution and sections 74, 75 and 76 of the Elections Act 2011;

iv. **That** the orders sought cannot be granted as the court lacks jurisdiction and granting the order sought will be tantamount to clothing the court with jurisdiction it doesn't have in view of provisions of section 75 of the Election Act.

Upon filing the application the 2nd interested party filed reply to the Preliminary objection on ground that stating that a distinction has to be drawn between an election petition and a contest to political party nomination and that the law does not grant power to IEBC to adjudicate upon nomination process of a party and role is entirely left to political parties.

The 2nd interested party also file an affidavit by **Cornelius Simiyu** sworn on 11th Feb 2019 briefly stating that the 1st interested party had not paid membership fees of Kshs.10,000/= and therefore to date he is not the member of the party and his nomination is illegal. He stated that they have written to respondent advising them to make amends but in vain and they now support the application by the exparte applicant.

The 1st interested party also filed a replying affidavit sworn on the 7th June 2019 opposing the instant application reiterating grounds on Preliminary Objection that I have fully considered.

By way of consent the instant application and preliminary objection were argued together by way of written submissions.

The 1st interested party filed submission to the Preliminary objection dated 14th March 2018 through advocate on record counsel Anwar. He submitted that process of nomination starts with proportional determination of the number of seats due to each political party then selection of members and thereafter gazettelement.

He submitted that an election dispute is through election petition and not judicial review as in the instant matter relying on supreme court decision in **Moses Mwicigi & 14 others V. IEBC & 5 Others (2016) eKLR**

He submitted that the instant application as envisaged in the Constitution and section 75 of Election Act is the Magistrate Court as designated by Chief Justice and not any other court placing their reasoning in **ODM Vs. Yusuf Ali Mohammed and two others (2018) eKLR**

In the instant application the 1st interested party indicated to this court that they wish to rely on submissions in the P.O. and the replying affidavit.

The Respondent filed written submission to its preliminary objection through Counsel Ogejo. He submitted that article 177 of the constitution of Kenya is the source of political parties and it provides political parties with mandate to nominate members to the county assembly we cited **Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others (supra)** in support for his contention. He submitted that political parties are required to nominate members as prescribed in the constitution under article 88(4) of the constitution. He submitted that the IEBC is the regulatory body that ensure compliance with election.

The 2nd interested party filed written submission to the application through Counsel Ko'winoh and submitted that the respondent is obliged in law to publish names forwarded to it by political parties based on their priority. He submitted that omitting the name of 1st interested party without consultation of 2nd interested party was abuse of Respondents powers. He submitted that the 2nd interested party has confirmed that the 1st interested party is not its member having failed to pay for the mandatory registration membership fees.

Having analyzed the pleadings, affidavits and submissions made before this court by the Applicant, Respondent and interested parties. In my

view, the issues for determination is whether this court has jurisdiction to hear, determine and grant the orders sought in the application dated 20th December 2017.

It is trite law that jurisdiction is everything and without it court down tools. See the case of **THE OWNER OF MOTOR VESSEL "LILLIAN S" Vs. CALTEX OIL KENYA LIMITED(1989)KLR 1653(C.A)** where Court of Appeal stated as follows:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a “court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.” underlining mine.

In the case of **Samuel Kamau Macharia V Kenya Commercial Bank Ltd and Another [2012] eKLR**

“A court’s jurisdiction flows from either the constitution, or legislation or both. Thus a court of law can only exercise jurisdiction as conferred on it by law. It cannot arrogate to itself jurisdiction exceeding that which is conferred on it by law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...where the constitution exhaustively provides for the jurisdiction of a court of law, It must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation...”

The jurisdiction of this court is granted by **Article 165 (3)** of the Constitution which provides-

(3) “Subject to clause (5), the High Court shall have—

a) unlimited original jurisdiction in criminal and civil matters;

b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and a question relating to conflict of laws under Article 191; and

e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice. (emphasis).

The court must when issue of jurisdiction is raised, dispose of it first. In **Air Alfaras Ltd. Vs Paytheon Air Crafty Credit Corporation & Another [2000] KLR 62** it was held: Any issue regarding jurisdiction ought to be considered first so that in the event of the court coming to the conclusion that it has no jurisdiction, the intellectual exercise of going into the merits of the case would be futile.

Central to this application for judicial review is the legality or otherwise of the Respondent to gazette the exparte applicant as a nominated Member of County Assembly Bungoma and degazetting 1st interested party .The prayers sought of certiorari and mandamus all relate to the actions of the Respondent in the process of gazette of nominated member of County Assembly. In particular the Exparte application

seeks an order of Mandamus to regazette the exparte applicant as a nominated member of County Assembly. These are prayers which are related to the process of an Election and an integral part of an election process. The Supreme Court in **Moses Mwigigi & 14 others [2016] eKLR** extensively expressed itself in relation to the judicial review proceedings (or for that matter, constitutional petitions) as mechanisms for challenging nominations to membership to the National or County Assembly after gazettelement by the IEBC. The Court expressed as follows:

“[105] It is clear from the foregoing provisions that the allocation of nomination- seats by the IEBC is a time bound process, that starts with the proportional determination of the number of seats due to each political party. On that basis, IEBC then ‘designates’, or ‘draws from’ the allocated list the number of nominees required to join the County Assembly. To ‘designate’ or ‘draw from’ entails the act of selecting from the list provided by the political party. It is plain to us that the Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazettelement of the nominees’ names by the IEBC, as an integral part of the election process.

[106] 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. (Emphasis supplied)

[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. (Emphasis supplied)

[115] The Elections Act confers jurisdiction upon Magistrates Courts to determine the validity of the election of a member of a County Assembly; Section 75 (1A) of the Act provides that:

“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.”

[117] It is clear to us that the Constitution provides for two modes of ‘election’. The first is election in the conventional sense, of universal suffrage; the second is ‘election’ by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of ‘election petition’.

[119] To allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under Article 165 (3) of the Constitution, or through judicial review proceedings, in our respectful opinion, carries the risk of opening up a parallel electoral dispute-resolution regime. Such an event would serve not only to complicate, but ultimately, to defeat the sui generis character of electoral dispute-resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution.” (Emphasis supplied)

On the same issue the Court of Appeal in ODM -Vs- Yusuf Ali Mohamed & Others 2018 KLR observed; 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-gazettelement nomination or electoral disputes relating to Membership to the County Assembly. The original jurisdiction to hear and determine post-gazettelement 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-gazettelement 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.

This court in Bungoma H.C JR 6/2017 is a similar issue state;

“From the fore-going it is evident that the issues in this application and the prayers sought are all election related. They concern nomination of a Member of County Assembly. The dispute being election or nomination related and an off-shoot of the electoral process can only be properly adjudicated by an election court, in this case the Resident Magistrate Court. This court can only entertain appeals from that court and therefore has no original jurisdiction to sit as an election court in respect of the member of the County Assembly.

In the result, I find that this court has no jurisdiction to entertain and hear and determine these Judicial review proceedings whose substance is an election dispute and this court is not the proper court to handle election disputes, whether brought plainly or couched as Judicial review proceedings.”

After considering all the submissions. I am satisfied that the preliminary objection raised by the Respondent is with merit and same is upheld. In view of that finding, it will be an intellectual exercise to consider the main application which will not be of interest to anybody.

This application is found without merit and same is dismissed. Each party to bear its own costs.

Dated at Bungoma this 30th day of October, 2019.

S.N. RIECHI

JUDGE