



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 576 OF 2017

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW
ORDERS OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF ARTICLE 23 OF THE CONSTITUTION 2010

AND

IN THE MATTER OF POLITICAL PARTIESACT

AND

IN THE MATTER OF POLITICAL PARTIES TRIBUNAL

AND

IN ACCORDANCE WITH ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF AN APPLICATION

BETWEEN

SAADIA AHMED MUMINEX PARTE APPLICANT

AND

POLITICAL PARTIES TRIBUNAL.....1ST RESPONDENT

CLERK WAJIR COUNTY ASSEMBLY.....2ND RESPONDENT

AND

KATLUMA ABDULAHIM MAALIM.....1ST INTERESTED PARTY

KENYA AFRICAN NATIONAL UNION PARTTY.....2ND INTERESTED PARTY

RULING

1. By a Chamber Summons dated 1st March, 2018, the 1st interested party herein seeks an order compelling the ex parte applicant herein to supply the Court and the 1st interested party for scrutiny, a certified copy of the ex parte applicant's KCSE certificate or its equivalent and hat the 2nd interested party be compelled to similarly supply to the Court and to the 1st interested party, the ex parte applicant's academic documents submitted by the ex parte applicant during nomination process.
2. The application was grounded on the fact that it is a requirement of law that for one to contest for the seat of a member of county assembly, he ought to have obtained at least a post-secondary education recognised in Kenya. According to the 1st interested party, the information sought is crucial for the Court and other parties herein to be able to fully address and adjudicate on the pertinent issues in this matter.
3. It was the 1st interested party's case that this Court has the inherent power to grant the orders sought for the ends of justice or to prevent abuse of the Court process and therefore it is in the interest of justice that the same be granted as no prejudice would be occasioned to the ex parte applicant or the 2nd interested by the grant thereof.
4. These grounds were expounded by **Mr Karim**, learned counsel for the 1st interested party in his oral address to the Court.
5. The application was however opposed by the ex parte applicant through his learned counsel, **Mr Okubasu**.
6. According to the ex parte applicant, this application was triggered by the refusal by the Election Court in Petition No. 12 of 2017 to review the question of the x parte applicant's academic suitability. It was his case that the question whether he meets academic requirements for elections/nominations is not an issue before this Court and that it is a question which can only be determined by an election court when properly moved for the purpose.
7. While insisting that he has his O Level qualifications, the ex parte applicant contended that he has no duty to subject his academic papers t the 1st interested party for scrutiny.
8. It was disclosed that previous efforts to seek orders for determination of his academic qualifications have been found inappropriate in petition 12 of 2017.
9. It was the ex parte applicant's case that in any event the requirement that a nominee must possess a degree from a university was deferred by Parliament to the general election to be held after 2017, to wit 2022 courtesy of section 8(b) of the ***Election Laws (Amendment) Act, 2017***.
10. In his oral submissions, **Mr Okubasu** averred that since the 1st interested party avers that the ex parte applicant has no qualifications, this application is misconceived. In his view, the question before this Court is whether the Political Parties Tribunal properly exercised its power by substituting the applicant with the 1st interested party and not whether or not the applicant was eligible to contest the said elections, an issue which can only be determined by the Election Court.
11. It was submitted that in this application the 1st interested party has not sought the information he now seeks either from the ex parte applicant or from the body that ought to have the same, the Kenya National Examinations Council. Therefore this Court ought not to grant the same.
12. It was further contended that the 1st interested party has not disclosed the right he seeks to enforce upon being furnished with the said information.
13. To the ex parte applicant, to disclose the said information to the 1st interested party, a political opponent, would be prejudicial to him.

14. The application was similarly opposed by **Mr Ogle**, learned counsel for the Respondent. According to him, the applicant is meant to circumvent the jurisdiction of an Election Court and yet the clear is clear that this Court ought not to issue orders that ought to be sought before an Election Court, such as an order dealing with qualifications of candidates.

15. I have considered the application the subject of this ruling and the material placed before me by way of affidavits and submissions.

16. Article 35 of the Constitution of Kenya provides:

(1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.

17. It is therefore clear that as regards a person other than the State, the right to information only applies where the applicant seeks the same for the exercise or protection of a right or fundamental freedom. In this case, the matter before me is a judicial review proceeding challenging the decision of the Political Parties Tribunal. The aggrieved party in so far as these proceedings are concerned is the ex parte applicant and not the interested party. It is the ex parte applicant that is alleging violation of his rights or fundamental freedoms and not the 1st interested party. The 1st interested party's basis for seeking the information is however that the information sought is crucial for the Court and other parties herein to be able to fully address and adjudicate on the pertinent issues in this matter. There is no express averment that the 1st interested party seeks the said information for the the exercise or protection of his rights or fundamental freedoms.

18. Accordingly there is no basis upon which I can direct the ex parte applicant to supply the same. That was the position adopted by **Mumbi, J** in **Nairobi Law Monthly vs. Kenya Electricity Generating Company & Others NBI HC Petition No. 278 of 2011**, where she held that *“in order to enforce this right, a citizen claiming a right to access information must not only show that the information is held by the person from whom it is claimed; the citizen must go further and show that the information sought is required for the exercise or protection of another right.”* [Emphasis added].

19. To my mind the information sought in the instant application is not material to the determination of the issues before this Court and this Court will not issue orders in vain.

20. In addition, the nature of the information sought is the kind of information that ought to be sought either before an Election Court or before the Tribunals or bodies entrusted with determining qualifications of candidates to an election. It is not for this Court sitting as a judicial review court to determine whether or not a person was duly qualified to contest for an electoral post or to be nominated as a candidate. Accordingly this is not the right forum to seek such information. It is trite that judicial review is a remedy of last resort and, unless there exist exceptional circumstances, ought not to be invoked as a complementary or concurrent remedy where there exist other dispute resolution mechanisms that are more or equally beneficial, convenient and effectual. See **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013.

21. In this case, it is contended which contention was not seriously controverted that a similar relief has been sought in other legal forums but has been declined. Therefore to seek the same before this Court

amounts to an abuse of this Court's process and judicial review remedy being a discretionary, ought not to avail a person who seeks to abuse the process of the Court.

22. Whereas this Court is aware of the fact that the requirement that a nominee must possess a degree from a university was deferred by Parliament to the general election to be held after 2017, to wit 2022 by section 8(b) of the *Election Laws (Amendment) Act, 2017*, I am not prepared to find that the effect of that deferral is a vacuum in the qualifications for Members of County Assemblies and that is all I wish to say on the matter.

23. Apart from that it is now trite that before an applicant seeks orders from the Court compelling the Respondent or any other person to give him access to certain information, he must show that the said information was requested for. As was held in **Charles Omanga & 8 Others vs. Attorney General and Another [2004] eKLR:**

“This case concerns Article 35(1). The petitioner argues that this provision is self-propelling and that a person is entitled to apply to the court directly for such information to be given. In my view, this is the wrong approach. Article 35 is part of the Bill of Rights and any person is entitled to enforce these rights under Article 22(1) claiming, *“that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”*[Emphasis mine] How is the right to information threatened unless a person has been requested and has been denied the information? A person moving the court to enforce fundamental rights and freedoms must show that the rights sought to be enforced is threatened or violated and that is why in the case of *Kenya Society for the Mentally Handicapped (KSMH) v Attorney General and Others* Nairobi Petition No. 155A of 2011 (Unreported), the court stated that, “[43] I am not inclined to grant...the application as the Petitioner has not requested the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where the request has been neglected, then the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order.” In *Andrew Omtatah Okoiti v Attorney General and 2 Others* (Supra), Musinga J., stated that, “Before an application is made to court to compel the state or another person to disclose any information that is required for the exercise or protection of any right or fundamental freedom, the applicant must first demonstrate that a request for the information required was made to the state or to the other person in possession of the same and the request was disallowed. The court cannot be the first port of call. The petitioner herein did not demonstrate that he requested the JSC to avail to him any information that he considered necessary and the same was not granted. In that regard, prayer 4 of the applicant’s application is rather premature.” There may well be circumstances where the Court may be required to make an order in the first instance but I think the Court should not exercise coercive power before the State organ, institution or body is given an opportunity to meet its constitutional obligation to provide the information. The right to information is not an absolute right. Each institution or person is entitled to assert any limitations consistent with Article 24 of the Constitution.”

24. In this case there is no evidence that the 1st interested party has sought for the information sought herein from the ex parte applicant or the 2nd interested party or any other person or entity possessed of the same.

25. Having considered the application dated 1st March, 2018, it is my considered view and I find that the application is unmerited.

26. Consequently, the same fails and is dismissed with costs to the ex parte applicant and the 2nd Respondent.

27. It is so ordered.

Dated at Nairobi this 9th day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Gikonyo for Mr Okubasu for the ex parte applicant

CA Ooko