



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 576 OF 2017

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

AND

IN THE MATTER OF ARTICLE 23 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

POLITICAL PARTIES DISPUTE TRIBUNAL.....1ST RESPONDENT

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

KALTUMA ABDULAHIM MAALIM.....1ST INTERESTED PARTY

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

EX PARTE :

SAADIA AHMED MUMIN

JUDGMENT

The Application

1. The Application before the Court for determination is a Notice of Motion dated 27th November 2017 by Saadia Ahmed Mumin, the *ex parte* Applicant herein, (hereinafter “the Applicant”), in which she is seeking the following orders:

(a) That an order of Certiorari be and is hereby issued and directed to the 1st Respondent, by itself, its servants and or/or agents or any other officer acting under its authority to bring to the court for the purpose of being quashed the decision made by it or about 28/7/2017 to record and adopt a consent order substituting the 1st Respondent as candidate No 1 in the party list in the place of the *ex-parte* Applicant.

(b) That an order of Prohibition be and is hereby issued and directed to the 2nd Respondent prohibiting him or any of others officers acting with his authority from swearing in the 1st Interested Party as a nominated member of the 2nd Interested Party in Wajir County Assembly representing Special interest Groups.

2. The application was supported by a statutory statement of facts dated 20th September 2017, and a verifying affidavit and further affidavit sworn by the Applicant on 6th September 2017 and 13th March 2018 respectively.

3. The Applicant averred that she was nominated by Kenya African National Union Party, the 2nd Interested Party herein, and gazetted on 28th August 2017 to represent special interest groups in Wajir County Assembly. That before being sworn, she saw a special gazette notice dated 6th September 2017, in which Kaltuma Abdulahim Maalim, the 1st Interested Party herein, had been nominated as her replacement. Further, that the alleged replacement was as a result of a consent recorded and adopted with the 1st Respondent on the 28th July 2017 in PPDT Complaint No. 500 of 2017. She averred that she was not a party in PPDT Complaint No. 500 of 2017; that she communicated the said decision to the 2nd Interested Party, who denounced participation in the alleged consent; and that she has learnt from the Registrar of the Political Parties that the 1st Interested Party is not a member of 2nd Interested Party, but of the Agano party.

4. The Applicant annexed copies of letters dated 11th September 2017, 5th October 2017 and 15th September 2017 respectively, where the national organising secretary of the 2nd Interested Party had written to Independent Electoral and Boundaries Commission informing them that they were not aware of proceedings before the 1st Respondent; where the chairman of the 2nd Interested Party clarified that the Applicant was the 2nd Interested Party's first nominee; and where the Registrar of Political Parties reiterated that the 1st Interested Party is not a member of the 2nd Interested Party.

5. Therefore, that the 1st Respondent exercised jurisdiction through misrepresentation of the 1st Interested Party's status as she was not a member of the 2nd Interested Party at the time. In addition that the Applicant's right to be heard and her right to fair administrative action was obliterated as the decision/consent to change her name was done in her absence.

The Responses

6. The 1st Respondent and 2nd Interested Party did not respond to the Applicant's application, nor participate in these proceedings.

7. The 2nd Respondent's response was through a replying affidavit sworn on 6th October 2017 by Osman Mohamed Adan, the Clerk of the Wajir County Assembly. He averred that the Applicant was gazetted by the independent Electoral and Boundaries Commission as a duly nominated member of County Assembly for Wajir County under the Gender top up list through Gazette notice Vol CXIX-No 124 of 28th August 2017. It is his case that the Assembly held its first sitting on 7th September 2017 where all elected and nominated members, including the Applicant, were sworn on the strength of the Gazette Notice dated 28th August 2017.

8. The 2nd Respondent asserted that he was not aware of the Gazette Notice CXIX No 131 dated 6th September 2017 reallocating the Applicant's slot to the 1st Interested Party, and that the same was not brought to his attention in time by the Independent Electoral and Boundaries Commission. Further, that by the time it was brought to his attention the swearing in of the members of the County Assembly had already been done.

9. Further, that through a letter dated 29th September 2017, the Speaker of the County Assembly of Wajir sought clarification on the issue with the Chairperson of the 2nd Interested Party, who through a letter dated 5th October 2017 confirmed that the Applicant is the nominee of the party and the Independent Electoral and Boundaries Commission was in the process of rectifying the anomaly.

10. The 2nd Respondent contended that once a nominated member is gazetted by the Independent Electoral and Boundaries Commission, she becomes an elected member of that assembly. Further, that based on Article 194 of the Constitution as read with section 37 of the Elections Act, the only known channels through which a nominated or elected member of the County Assembly can be degazetted and the seat declared vacant are through death of the member, resignation from the sponsoring party, or nullification of his or her nomination to the assembly; and that the said conditions for degazetment have not been met in the case of the Applicant.

11. In closing, it was the 2nd Respondent's case that his only role as the Clerk of the Wajir County Assembly was limited to the administration of oaths or affirmation of all members present in the Assembly on the first sitting of the County Assembly, pursuant to standing order 3(2)(c) of County Assembly of Wajir Standing Orders, and the day to day management of the County Assembly, and that he therefore did not have power to administer any oath or affirmation after the first sitting.

12. The 1st Interested Party, Kaltuma Abdulahim Maalim, filed a replying affidavit and further affidavit, sworn on 18th December 2017 and 20th December 2017 respectively in response to the application. She averred that she is a golden member of the 2nd Interested Party, and described the processes by which the said 2nd Interested Party invited applications for nominations to various positions, which included the special seats in various County Assemblies, between the months of May and June 2017. Further, that she applied to the 2nd Interested Party for the nomination for the Gender special seats provided for under Article 177(2) of the Constitution of Kenya. That the 2nd Interested Party subsequently submitted its Gender nominee list to the Independent Electoral and Boundaries Commission, which published a list of nominees in the category of gender seats in the County Assembly of Wajir.

13. The 1st Interested Party contended that she was dissatisfied with the gender nominee list published by the Independent Electoral and Boundaries Commission, taking into account that she was more qualified in comparison to the other nominees who were ranked higher than her, and that after the 2nd Interested Party failed to address her concerns, she referred her complaint to the Political Parties and Disputes Tribunal for redress.

14. The 1st Interested Party in addition refuted ever being a member of the AGANO party, and she contended that the 2nd Interested Party

through a letter dated 2nd October 2017 confirmed that she is its member, and the party's nominated member for Wajir County Assembly, and that she should be sworn in according to Kenya Gazette special issue of 6th September 2017.

15. According to the 1st Interested Party, on the 6th September 2017 a Gazette Notice was published by the Independent Electoral and Boundaries Commission removing the Applicant as the 2nd Interested Party's nominated member of County Assembly of Wajir. However, that the 2nd Respondent proceeded to swear the Applicant as the nominated member of Wajir County Assembly even after receiving a copy of the said gazette notice. In addition, that Gazette Notice No. 8380 Vol CXIX-No 124 upon which the Applicant lays her claim to have been nominated by the 2nd Interested Party to represent special interest groups in Wajir County Assembly, has since been declared null and void by the Chief Magistrate's Court at Nairobi In Election Petition No 20 of 2017, by way of a judgment delivered on the 14th of December 2017.

16. That as a result the Applicant is no longer a member of the County Assembly of Wajir, and that the net effect of the judgment is to render the party list gazetted on the 28th July 2017 inoperative. Further, that in delivering its judgment, the said Election Court ordered the Independent Electoral and Boundaries Commission to among others constitute and gazette the gender top up list of Wajir County, including the name of the Petitioner therein, one Miriam Abdi Mohamud, in compliance with the law. The Interested Party in closing also stated that the Applicant does not possess the minimum academic qualification for the position of member of the County Assembly.

The Determination

17. The parties were directed to canvass the application by way of written submissions, and oral submissions made in Court during a hearing held on 2nd July 2018. At the outset, this Court notes that while the 1st Interested Party and 2nd Respondent made detailed submissions on the issue of this Court's jurisdiction as a judicial review Court vis-vis an Election Court, that issue is *res judicata*, having been the subject of a preliminary objection dated 25th September 2017 filed herein by the 1st Interested Party. This Court (Odunga J.) delivered a ruling on the said Preliminary Objection on 21st November 2017, in which it was found that this Court had jurisdiction to entertain the Applicant's application.

18. The learned judge held as follows in this regard in the said ruling:

“59. What then is the option available to a person whose gazettelement has been purported rescinded? In my view such a scenario is similar to where for some reason a duly elected member is degazetted. To my mind is such a case the applicant is not challenging the election of his or her substitute but the degazettelement. If the position was otherwise, such a person would be left with no remedy since an election petition must pursuant to Section 76(1)(a) of the Elections Act be filed within twenty eight days after the date of declaration of the results of the elections. This means that a person who is degazetted after the expiry of the 28 days period would be unable to lodge a petition and if his only option was to challenged the decision degazetting him or her was by way of a petition, he would be left with no remedy.

50. In my view where what is being challenged is not the election but a decision wrongfully declaring a person who was in effect legally a Member of Parliament or County Assembly to be no longer such a member, there is no bar to such challenge being initiated by way of judicial review or a petition.

51. Accordingly, I decline to lay down this court's tools on the basis of lack of jurisdiction. “

19. In addition, it ought to be emphasized from the outset that this Court as a judicial review Court is not concerned with who as between the Applicant and 1st Interested Party, whether on educational or other considerations, merited to be nominated or was validly nominated by the 2nd Interested Party. The purpose of the remedy of judicial review is to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of that purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question. As was held in **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited, (2008) eKLR**, the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.

20. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** that while **Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, , the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. In addition, the grounds of irrelevant considerations, unreasonableness and proportionality that normally involve such a merit review are not in issue in the present application**

21. The 1st Interested Party and Applicant in their submissions alluded to various election Petitions where the issue of who was validly nominated as member of the County Assembly of Wajir to represent special interests has been in issue. The 1st Interested Party in this respect submitted that the Gazette Notice relied upon by the Applicant for her nomination was quashed by the Chief Magistrate's Court at Nairobi In **Election Petition No 20 of 2017**, by way of a judgment delivered on 14th December 2017. The Applicant refuted this position, and submitted that the High Court sitting in Nairobi (Sewe J.) overturned this decision on appeal, in **Election Appeal No 2.of 2018**, in a judgment rendered on 13th June 2018.

22. The 1st Interested Party and Applicant will therefore have to analyse the import and effect of these various Election Courts decisions, for the validation or otherwise of their respective claims to nomination as members of the Wajir County Assembly. In addition, this validation will have to be undertaken with the concerned electoral authorities and not by this Court.

23. The only substantive issues that this Court therefore has to determine is whether the processes applied by the 1st Respondent to replace the name of the Applicant with that of the 1st Interested Party were legal and procedurally fair, and whether the Applicant is entitled to the relief sought.

24. In this respect, the counsel for the Applicant, Mr. O’Kubasu, submitted relying on the case of **Republic v Secretary County Public Board & Another ex parte Hulbai Gedi Abdile [2015] eKLR**, that judicial review is concerned with the decision making process and not merits of the decision, and that notwithstanding the questionable manner in which the proceedings by the 1st Respondent were conducted, the Applicant was not involved in the said proceedings despite the fact that she stood to suffer adversely because of the consent entered into therein. Further, the fact that the Applicant was not involved is not contested in any pleadings.

25. It was the Applicant’s submission that considerations of natural justice require that every person who is likely to be affected by the decision should be afforded an opportunity to respond to the claims. Reliance was placed on the decisions in **Republic vs The Chief Justice of Kenya and Others ex parte Moijo Mataiya Ole Keiwua, HCMCA No. 1298 of 2004**, and **Board of Education vs Rice (1911) AC 179** that persons who are likely to be affected by a proposed action must be afforded an opportunity of being heard. It was also submitted that what was in question was the Applicant’s suitability and qualification for the position of the member of the County Assembly for Wajir, and that this was an irrelevant question, and one in which the Applicant was not given an opportunity to address.

26. Mr. Ogle for the 2nd Respondent on the other hand relied on the decisions in **National Gender and Equality Commission vs Independent Electoral and Boundaries Commission and Another, (2013) e KLR** and **Moses Mwigigi and 14 Others vs Independent Electoral and Boundaries Commission and 5 Others [2016] eKLR** for the position that upon gazzatement, nominated members of the Senate and National and County Assemblies all become elected members of their respective houses.

27. Further, as to whether or not the Applicant was procedurally and legally degazetted and/or her seat re- allocated, Article 194 of the Constitution provides for the circumstances when the office of a member of the County Assembly becomes vacant, and that at no point did the Applicant ever vacate her office as a member of the County Assembly of Wajir as provided in the said article. Lastly, that section 37 of the Elections Act 2011 also provides for the circumstances of the reallocation of special seats, which have not been met in this application.

28. Mr. Anyoka and Mr. Mugumya made submissions for the 1st Interested Party. A substantial part of their submissions was on the jurisdiction of this Court to hear this application and the effect of the decisions by the Election Courts, which issues has already been dispensed with. On the outstanding issues under consideration, the Counsel pointed out that the Gazette Notice dated 6th September 2017 that nullified the Applicant’s nomination was published before the swearing of the Applicant took place on the 7th September 2017, but that the 2nd Respondent selectively and on his own motion chose to ignore it.

29. Further, that the Applicant and 2nd Respondent in their responses do not state when they got to know of the Applicant’s de-gazettement, and what steps they took to remedy the situation and pursue their rights with the 1st Respondent. The counsel also urged the Court not to rely on the letters annexed by the Applicant from the 2nd Interested Party and Registrar of Political Parties, as they were procured after the impugned proceedings and consent order by the 1st Respondent.

30. I have considered the pleadings and arguments made by the parties herein. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where his or her interests and rights may be adversely affected by a decision-maker; and secondly, that no one ought to be judge in his or her case which is the requirement that the deciding authority must be unbiased when according the hearing or making the decision.

31. These principles are restated in **Halsbury’s Laws of England Fourth Edition Vol. 1** at paragraph 74 as follows:

“The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations.”

32. These requirements of fairness by decision makers are now a Constitutional and legal requirement under Kenyan law. Article 47 of the Constitution now provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

33. In addition, section 4 (3) and (4) of the Fair Administrative Action Act provideS as follows:

“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;
 - (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-
- (a) attend proceedings, in person or in the company of an expert of his choice;
 - (b) be heard;
 - (c) cross-examine persons who give adverse evidence against him; and
 - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

34. These provisions apply to the 1st Respondent, which is a quasi-judicial body, and therefore falls within the ambit of agencies to which these provisions apply pursuant to Articles 10, 20 and 21 of Constitution and section 3 of the Fair Administrative Action Act. It is notable in this regard that an administrative action is defined under the Fair Administrative Action Act to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals.

35. Similarly, in **Pashito Holdings Ltd. & Another vs. Paul Nderitu Ndun’gu & Others Civil Appeal No. 138 of 1997 [1997] 1 KLR (E&L)** the Court of Appeal expressed itself as follows in this regard:

“An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under duty to ‘act judicially’

36. It is notable that it is not contested that the Applicant was neither a party in, nor participated in the proceedings before the 1st Respondent in Political Parties Dispute Tribunal Complaint No. 500 of 2017, or the consent order issued therein on 31st July 2017, that are the subject of these judicial review proceedings. In addition, a copy of the said consent order was produced in evidence by the Applicant.

37. The said consent order issued on 31st July 2017 sought to amend the 2nd Interested Party’s nominees to the Independent Electoral Boundaries Commission to rank the 1st Interested Party as the first nominee. The effect of the consent order was to replace the Applicant, who was previously ranked as the 2nd Interested Party’s first nominee, and had on this strength been gazetted as a nominated member of the Wajir County Assembly in the Gazette Notice Number 8380 dated 28th August 2017. A new gazette Notice Number 8752 published on 6th September 2017 consequently deleted the Applicant’s name, and replaced it with that of the 1st Interested Party as the nominated member by the 2nd Interested Party.

38. There was a clear breach of the rules of natural justice and fair action by the 1st Respondent, 1st Interested Party and 2nd Interested Party, who were the parties involved in the said proceedings and consent order, as they engaged in proceedings and made a decision that adversely affected the Applicant’s position and interests without giving her an opportunity to be heard.

39. The fact that there were later proceedings in Elections Courts that either upheld or overturned the 1st Respondent’s decision is immaterial to the breach and the illegality of the decision. It was held by the Court of Appeal in **Onyango Oloo vs. Attorney General, [1986-1989] EA 456** in this regard that a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right, since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at.

40. On the outstanding issue as regards the relief sought by the Applicant, in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroje Civil Appeal No. 266 of 1996** it was held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a

decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done... Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

41. The Applicant had initially sought orders of certiorari and prohibition, but during the hearing of the application, Mr. O’Kubasu submitted that since the Applicant had been sworn as a nominated member of Wajir County Assembly, she was only pursuing the remedy of certiorari to remove the impugned decision from the record, and would be abandoning the prayer for prohibition.

42. The 1st Interested Party submitted in this respect that the Applicant ought to have sought review of the consent order, and that the applicable principles for review of court orders are very clear. However, as the Applicant was never a party to the said consent order in the first place, it would be a self-defeating argument to ask her to seek review of the consent order. In addition, the Applicant did demonstrate her locus to bring the present judicial review proceedings, and she is thus properly before this Court.

43. I also find that as the 1st Respondent has been found to have breached the rules of natural justice and fair action, the Applicant is entitled to the order sought of certiorari to quash the impugned proceedings and consent order.

44. In the premises, I find that the Applicant’s Notice of Motion dated 27th November 2017 is merited, and I accordingly order as follows:

1. An order of Certiorari be and is hereby issued to remove into the High Court for purposes of quashing the proceedings and decision of the 1st Respondent made on 28th July 2017, and Consent Order issued on 31st July 2018 in Political Parties Dispute Tribunal Complaint No. 500 of 2017.

2. The 1st Respondent and 1st and 2nd Interested Parties shall bear the Applicant’s costs of the Notice of Motion dated 27th November 2017.

45. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JULY 2018

P. NYAMWEYA

JUDGE