



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO JR 320 OF 2017**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE ACT, CAP 21 LAWS OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION BY NIXON KIPROTICH MOROGO (EX PARTE)**

**JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE DECISION BY INDEPENDENT ELECTORAL BOUNDARIES COMMISSION COMMITTEE**

**AND**

**REPUBLIC.....APPLICANT**

**VERSUS**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION...RESPONDENT**

**JUBILEE PARTY OF KENYA.....1<sup>ST</sup> INTERESTED PARTY**

**REGISTRAR OF POLITICAL PARTIES.....2<sup>ND</sup> INTERESTED PARTY**

**MELVIN KIPKOECH KUTOL.....3<sup>RD</sup> INTERESTED PARTY**

**CLEMENT CHERUIYOT KIPLAGAT.....4<sup>TH</sup> INTERESTED PARTY**

**JUDGEMENT**

**Introduction**

1. The applicant herein, **Nixon Kiprotich Morogo**, has moved this Court seeking the following orders:

**1. That a judicial Review order of Certiorari be issue to remove into this honourable court and quash the decision of Independent Electoral and Boundaries Commission (IEBC) Committee delivered on 9<sup>th</sup> June 2017, but dated 8<sup>th</sup> June 2017 to remove the Ex parte Applicant as a candidate of Jubilee Party of Kenya contesting for position of Member of County Assembly, Solai Ward, Nakuru County and replace it with the name of the 3<sup>rd</sup> Interested Party.**

**2. That a Judicial Review order of Prohibition do issue barring, restraining and prohibiting IEBC, the Respondent herein from removing the Ex parte Applicant's name from the list of contestants for Jubilee Party of Kenya in the forth coming general elections scheduled for 8<sup>th</sup> August, 2017**

**3. That a Judicial Review order of Prohibition do issue barring, restraining and prohibiting IEBC, the Respondent herein from publishing in the Kenya Gazette the name of the 3<sup>rd</sup> Interested Party as a candidate for the position of Member if County Assembly, Solai Ward in Nakuru County.**

**4. That a Judicial Review order of Mandamus do issue directing and or compelling the Respondent herein to remove the name of the Ex parte Applicant herein in the gazette notice published on 19<sup>th</sup> May 2017 wherein it is erroneously indicated that the Ex parte Applicant is an Independent Candidate for election for Member of County Assembly for Solai Ward in Nakuru County.**

**5. That costs of the application be provided for.**

**Applicant's Case**

2. According to the applicant, he is a Jubilee Party (hereinafter referred to as "the Party") candidate for Solai Ward in Nakuru County in the forthcoming general election. That seat was contested by among others, the 3<sup>rd</sup> interested party herein. However on 22<sup>nd</sup> May, 2017 he was informed that his name was appearing in the Kenya Gazette as an independent candidate as a result of which he moved to the office of the Political Parties Registrar and lodged his complaint since according to him he has always been a member of the Jubilee Party.

3. The applicant averred that his requests to have the error corrected by the Respondent were not complied with. It was disclosed that the 3<sup>rd</sup> interested party's attempts to be declared as the Jubilee Party's candidate for the seat or as an independent candidate have failed both before the Political Parties Disputes Tribunal and before this Court. Thereafter through the 4<sup>th</sup> interested party, the 3<sup>rd</sup> interested party sought to have the have the Respondent's Dispute Resolution Committee (hereinafter referred to as "the Committee") declare him the Party's candidate an application which the Committee allowed

4. In these proceedings, it is contended that the said decision was marked by irregularities since the Respondent decided a case wherein it was named as the 2<sup>nd</sup> Respondent hence acted as a Judge in a case against it. To the applicant it was the Respondent he was supposed to have explained the erroneous gazettelement yet it decided to preside over the dispute and issued orders therein.

5. To the applicant the Respondent's decision was ultra vires since it is the Party that can determine its

own candidates and not the Respondent.

6. It was further contended that the Respondent could not declare someone who had unsuccessfully moved the court to run as an independent candidate as the Party's candidate.

7. Apart from the foregoing it was submitted on behalf of the applicant by his learned counsel, **Mr Bosek**, that the Respondent's Committee erroneously found that the ex parte applicant herein did not attend the hearing or file any papers in rebuttal yet the ex parte applicant's counsel represented the ex parte applicant at the hearing.

### **1<sup>st</sup> Interested Party's Case**

8. On behalf of the 1<sup>st</sup> interested party, Jubilee Party (hereinafter referred to as "the Party") it was contended by its learned counsel, **Miss Mboce**, that since both the ex parte applicant and the 3<sup>rd</sup> interested party are its members, it would abide by the Court's decision. Learned counsel's plea to the Court was only that in making its decision the Court should give directions which would ensure that the Party has a candidate in the forthcoming elections for the subject ward.

### **Respondent's Case**

9. The Respondent herein filed grounds of opposition.

10. In the submissions made on its behalf by its learned counsel **Mr Kimani Muhoro**, it was contended that as has been disclosed in the 4<sup>th</sup> interested party's affidavit, the ex parte applicant herein had left the Party and only returned after the nomination window had been closed. This fact, it was submitted was not disclosed by the ex parte applicant to the Court.

11. It was therefore contended that the applicant had moved the Court with clean hand and ought not to benefit from the Court's discretionary remedies.

12. With respect to the issue of impartiality, it was contended that pursuant to Article 88(4)(e) of the Constitution there is no other body mandated to deal with nomination disputes apart from the Respondent hence the issue of impartiality does not arise.

13. As regards the issue that the presence of the ex parte applicant's counsel before the Committee was not appreciated, learned counsel submitted that since the proceedings before the Committee were inquisitorial as opposed to being adversarial, it was necessary for the ex parte applicant to appear in person and hence the presence of his counsel was inconsequential.

14. Since the 3<sup>rd</sup> interested party was not a party before the Committee and no orders were made in his favour, it was submitted that the orders sought against him could not be granted and in any case such orders were speculative.

15. The Court was therefore urged to dismiss the application with costs.

### **3<sup>rd</sup> interested party's case**

16. In opposition to the application, the 3<sup>rd</sup> interested party averred that at the time the complaint was made, the Applicant had been cleared to run as an independent candidate with his unique party symbol of a fishing hook, consequently gazette and as such he could not run both as an independent candidate and a jubilee party nominee. According to the 3<sup>rd</sup> interested party, the Applicant had resigned from the Jubilee Party and this explains why he was cleared as an independent candidate and he cannot now turn around to claim that there was an error in his gazette. To him, the applicant had presented his papers of independent candidature to the IEBC (the Respondent herein) which papers were used to clear him.

17. It was disclosed that even as fresh nominations were being conducted as ordered by the Political Parties Tribunal, the Applicant had already resigned from the jubilee party and was in any case not eligible to contest in primaries which is a reserve of only members.

18. It was asserted by the 3<sup>rd</sup> interested party that based on the decision of the IEBC dated 8<sup>th</sup> June 2017 the Jubilee party under its party Constitution issued the 3<sup>rd</sup> interested party with a nomination certificate for clearance with IEBC as the duly nominated candidate for Solai Ward.

19. The 3<sup>rd</sup> interested party's case was supported by the submissions of his learned counsel **Mr. Odhiambo**.

#### **4<sup>th</sup> Interested Party's Case**

20. It was the 4<sup>th</sup> interested party's case that he is a Kenyan Citizen and duly registered voter as Solai Ward, Rongai Constituency-Nakuru County. He averred that on 5<sup>th</sup> June 2017 he lodged a complaint before the IEBC Disputes Resolution Committee challenging the nomination and clearance of the Ex parte Applicant **Nixon Kiprotich Morogo** as the Jubilee Candidate for Solai Ward Member of County Assembly which complaint he lodged in his capacity as a voter and a Kenya Citizen with the responsibility to uphold and protect the constitution and on behalf of the entire people and votes of Solai Ward and not as a conduit, crony or proxy of the 3<sup>rd</sup> Interested party as alleged by the Ex parte Applicant.

21. He averred that the grounds for the said complaint before the IEBC Disputes Resolution Tribunal was that in 19<sup>th</sup> May 2017 the Respondent (IEBC) published the name of the Ex parte Applicant **Nixon Kiprotich Morogo** and his Symbol of A Fishing Hook in the Kenya Gazette Vol. CCCXIX-No. 65 being Gazette Notice No. 4891 to contest as an Independent Candidate for the Solai Ward Member of County Assembly in the Forthcoming 8<sup>th</sup> August 2017 General Elections. Subsequently, on 31<sup>st</sup> May 2017 the IEBC Returning Officer for Rongai Constituency one **Daisy Rono** cleared the Ex parte Applicant as the nominee for Solai Ward MCA under the Jubilee Party Ticket in full breach and violation of the law. It is against this backdrop that he lodged the complainant before the duly constituted IEBC Disputes Resolution Committee vide Complaint No. 153 of 2017 for determination.

22. According to the 4<sup>th</sup> interested party, the Ex parte Applicant and the Returning Officer Rongai Constituency were duly served with the complaint documents and all parties were contacted by the IEBC and informed of the hearing date and that the complaint was heard by the committee on 8<sup>th</sup> June 2017 at around 9.30 pm in his presence and in the presence of both my advocates on record and the advocates of the Ex parte Applicant one **Mr. Bosek Advocate**. He averred that both parties were given ample time and opportunity to be heard and a fair hearing was conducted only that the advocates for the Ex parte Applicant chose not to file any documents in support of their submissions.

23. It was averred that the committee in its decision dated 8<sup>th</sup> June 2017 allowed the complaint and nullified the clearance of the Ex parte Applicant as the Jubilee Party nominee for Solai Ward but did not direct or order the name be replaced with the name of the 3<sup>rd</sup> Interested Party **Melvin Kipkoech Kutol** as alleged.

24. To the 4<sup>th</sup> interested party, the Ex parte Applicant has not substantively demonstrate how the decision of the IEBC Disputes Resolution Committee is marked by irregularities and a violation of the law to warrant the grant of the reliefs sought.

25. It was disclosed that pursuant to the internal memo/circular released by the IEBC dated 30/5/2017 and especially at paragraph 4 of the said memo, the IEBC notified all political parties, candidates and Returning Officers that *in cases where a candidate defected from a party, submitted a notice to vie as an independent candidate and was gazette as such, and now seeks to be registered as a party candidate, such candidate shall not be nominated as a party candidate; however, should be candidate so desire, they could be nominated as independent as per the initial application.* In view of the foregoing and the

gazette notice which is valid and in force, that the Ex parte Applicant could not be nominated as the Jubilee candidate for Solai Ward thus informing the decision of the IEBC dated 8<sup>th</sup> June 2017.

26. It was contended that there was no request presented to the IEBC offices by the jubilee party or at all to the effect that the Ex parte Applicant's name was erroneously gazette as an independent candidate thereby requiring the IEBC to rectify the fault. The alleged letter from the Jubilee Party Secretary General was not a protest letter on how the name of the Ex parte Applicant was gazetted as such. To him, the decision to gazette a candidate as an independent candidate solely involves a particular candidate and not a political party.

27. It was averred that the nomination exercise for Solai Ward was conducted on 26<sup>th</sup> April 2017 wherein the 3<sup>rd</sup> Interested Party emerged the winner, the results for the Solai Ward Polling Station were challenged and a repeat nomination for the said polling station was conducted on 17<sup>th</sup> May 2017, the 3<sup>rd</sup> Interest Party again won with a narrow margin thereby fell short on aggregate and the Ex parte Applicant was thus declared the winner.

28. To him, the law is very clear that a party who has been cleared and gazette to contest as an independent candidate is not eligible and cannot be cleared again as a candidate for any political party.

29. These issues were expounded by **Mr. Ayieko**, learned counsel for the 4<sup>th</sup> interested party in his submissions.

### **Determination**

30. I have considered the application, the cases of the various parties presented before me the submissions made and the authorities cited in support thereof and this is my view of the matter.

31. The first issue is whether this Court can issue the orders sought against the 3<sup>rd</sup> interested party. In these proceedings, the ex parte applicant seeks an order of Prohibition barring, restraining and prohibiting IEBC, the Respondent herein from publishing in the Kenya Gazette the name of the 3<sup>rd</sup> Interested Party as a candidate for the position of Member of County Assembly, Solai Ward in Nakuru County.

32. It is however clear that the Respondent herein did not issue an order that the 3<sup>rd</sup> interested party be gazetted as the Jubilee Party candidate for the position of Member of County Assembly, Solai Ward in Nakuru County. This issue calls for circumstances under which an order of prohibition will issue. The parameters of judicial review remedy of prohibition were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** 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....”**

33. In **Robert Gathinji Kamat vs. The Minister of Local Government Nairobi HCMA No. 427 of 2004**, Nyamu, J (as he then was) held that prohibition addresses or looks to the future and where neither a replacement has been appointed nor is there proof that an appointment is threatened the order cannot be

granted.

34. What this means is that for the remedy to issue there must be a threatened action. In this case what is being challenged is a decision of the Committee. In the said decision, the Committee simply allowed the 4<sup>th</sup> interested party's complaint. That complaint was seeking a nullification of the clearance of the ex parte applicant herein as the Party's candidate. There is no indication in the said decision what if any action the Committee intended to take thereafter. In those circumstances, it cannot be said that there was in that decision an intended action that the Committee intended to take that would call for an order of prohibition. Accordingly I cannot issue the order of prohibition in the manner sought.

35. It was contended that the Committee ought not to have presided over the proceedings in question. However it is clear that it is only the Committee that is mandated by and under the Constitution to determine those disputes pursuant to Article 88(4)(e) of the Constitution. If such a course is unfair, it is an unfairness that is mandated by the Constitution itself and pursuant to Article 2(3) of the Constitution this Court is barred from questioning the wisdom behind such an enactment. As was held in by the Supreme Court in **Raila Odinga & 5 Others vs. Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR:**

**“...we do not think that our insistence that parties adhere to the constitutionally decreed timelines amounts to paying undue regard to procedural technicalities. As a matter of fact, if the timelines amount to a procedural technicality; it is a constitutionally mandated technicality.”**

36. This issue was dealt with by a 5-judge bench of this Court in **International Centre for Policy and Conflict & Others vs. The Hon. Attorney-General & Others Petition 552 of 2012 as consolidated with Petitions 554, 573 and 579 of 2012 [2013] eKLR** where the Court held as hereunder:

**“The Petitioners urge that this is not a dispute on the nomination of the 3rd, 4<sup>th</sup> and 5th Respondents, but rather, their non-compliance with Chapter Six of the Constitution. We have also taken into consideration the arguments set out by the Respondents with regard to jurisdiction of other statutory bodies in a matter such as this. All the parties in this petition acknowledge the High Court's unlimited jurisdiction under Article 165(3)(a) of the Constitution. This unlimited original jurisdiction however, cannot be invoked where Parliament has specifically and expressly prescribed procedures for handling grievances raised by the petitioners. See *Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425*, which held that:-**

**“In our view there is considerable merit....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”**

**Even if it was to be argued that the 3rd, 4th and 5th Respondents do not meet the integrity and leadership qualification as spelt out under Article 99 (2) (h) and Chapter Six of the Constitution, then the institution with the Constitutional and statutory recognition would be the IEBC under Article 88(4)(e) of the Constitution and Section 74 (1) of the Elections Act and Section 4(e) of the IEBC Act. This then divests the court of its original jurisdiction and places an exclusive mandate on IEBC. Matters would be different if IEBC had failed and/or refused to carry out its Constitutional mandate. It has not been demonstrated that the petitioners or any other person for that matter presented their grievances regarding the nomination of 3rd, 4th and 5th Respondents to IEBC and it failed or refused to act. Indeed in the case of *Narok County Council v Trans Mara County Council [2000] 1 EA 161* at page 164 it was stated**

**“It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister... refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse.”**

37. In other words the procedures provided for under the Constitution must be adhered to and if such procedures are unfair the solution is to initiate an amendment to the Constitution as this Court has no powers to ignore the express provisions of the Constitution.

38. It may well be that a particular member of the Commission may be so conflicted that it would not be proper for him or her to sit in the Committee. In this case however the Chairperson's only sin was that he signed the gazette notice and that when informed by the Party to correct the impression that the ex parte applicant was not an independent candidate he failed to do so. In my view mere ministerial action as opposed to a decision in which the authority has exercised judicial or quasi-judicial mind does not necessarily amount to bias. For the Chairperson to have been bias it must be shown that he indeed addressed his judicious mind to the matter before appending his signature to the said gazette notice. I do not have such evidence before me. With respect to the failing by him to rectify the Gazette Notice am not convinced that that *ipso facto* amounts to bias.

39. It was contended that the fact that the decision only mentioned one respondent when in fact there were two respondents shows that the Respondent had ceased being a respondent and had become an arbiter in its own cause. With due respect I do not read much into the omission to add "S" after "respondent". A holistic reading of the decision shows that the Committee was aware that it was dealing with two respondents and not just the ex parte applicant herein.

40. The issue that has caused me concern is the finding by the Committee that the ex parte applicant herein did not attend the hearing. Section 4(5) of the *Fair Administrative Action Act, 2015* provides as follows:

***Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.***

41. The proceedings before the Committee were clearly quasi-judicial in nature. Therefore the ex parte applicant could competently appear by legal counsel as he did. The failure by the Committee to appreciate such an appearance must in my view amount to both illegality and irrationality. By failing to take cognisance of the appearance by the ex parte applicant through his legal counsel and consequently ignoring the contribution of the applicant's counsel, the Committee's decision was tainted with procedural impropriety. The holding in the *locus classicus* of **Associated Provincial Picture Limited vs. Wednesbury Corporation [1947] 2 All ER 680; [1948] 1 KB 223** best summarizes this principle particularly in the words of **Lord Greene MR** at pages 681-682 thus:

**"If, in the statute conferring discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question; they must disregard these matters...Unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that has all been referred to as being matters which are relevant for consideration...For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from consideration matters which are irrelevant to the matter that he has to consider. If it does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably"...Similarly, you may have something so absurd that no sensible person could ever dream that it would lay within the powers of the authority..."**

42. Such a decision in my view cannot be permitted to stand.

43. The Jubilee Party has urged the Court to make orders that would allow the Party to front a candidate for the said Ward. Article 23 of the Constitution provides that a court "may grant appropriate relief, including a declaration of rights" when confronted with rights violations. Under the said Article, the Applicant is entitled to 'appropriate relief' which means an effective remedy: An appropriate remedy must

mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Section 11 of the *Fair Administrative Action Act, 2015* provides as follows:

***(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order:***

***(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;***

***(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;***

***(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;***

***(d) prohibiting the administrator from acting in a particular manner;***

***(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;***

***(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;***

***(g) prohibiting the administrator from acting in a particular manner;***

***(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;***

***(i) granting a temporary interdict or other temporary relief; or***

***(j) for the award of costs or other pecuniary compensation in appropriate cases.***

44. As stated in *Halsbury's Laws of England 4<sup>th</sup> Edn. Vol. 1(1) para 12 page 270*:

***“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant.”*** [Emphasis added].

45. Therefore the Court is empowered to fashion such remedies as are just. In this case the dispute revolves around the democratic rights of the people of Solai Ward to be represented in the County Assembly by a candidate of their choice through the machinery of a political party of their choice.

46. In the foregoing premises the order which commends itself to me and which I hereby grant is that the decision of the Respondent the subject of these proceedings is hereby quashed.

47. I hereby direct that a fresh nomination process be conducted by the Jubilee Party within 48 hours according to the party nomination rules from the date thereof.

48. There will be no order as to costs.

49. It is so ordered.

**Dated at Nairobi this 30<sup>th</sup> day of June, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Muchoki for Mr Muhoro for the Respondent**

**Mr Odhiambo for 3<sup>rd</sup> interested party**

**Mr Ayieko for the 4<sup>th</sup> interested party**

**Miss Okoth for Mr Bosek for the applicant**

**CA Mwangi**