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 MATTE OA 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..........................1ST INTERESTED PARTY

REGISTRAR OF POLITICAL PARTIES........2ND INTERESTED PARTY

MELVIN KIPKOECH KUTOL..........................3RD INTERESTED PARTY

CLEMENT CHERUIYOT KIPLAGAT..............4TH INTERESTED PARTY

NIXON KIPROTICJ MOROGO.........................EX PARTE APPLICANT

RULING

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 9th June 2017, but dated 8th 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 3rd 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 8th 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 3rd 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 19th 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.**

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 3rd interested party herein. However on 22nd 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 3rd 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 4th interested party, the 3rd 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 2nd 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 gazettement 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. Before the matter could be heard on its merits, the Respondent filed a notice preliminary objection along the following lines:

> 1**) That the ex parte applicant's notice of motion has raised extraneous issues which were not canvassed before the respondents committee.**
>
> 2**) That the ex parte applicant at prayer 4 in his notice of motion is seeking to quash the gazette notice published on 19th May 2017 whereas the issue nor validity of the gazette notice was not canvassed before the respondents committee.**
>
> 3) **That prayer 3 in the ex parte applicant's notice of motion cannot be granted the respondents committee having not decided that the 3rd Interested Party is the candidate for the position of Member of County Assembly for Solai Ward in Nakuru County.**

8. It was submitted by **Mr Kimani Muhoro**, learned counsel for the Respondent that whereas what the applicant seeks to quash is the Gazette Notice published on 9th May, 2017, before the Committee there was no such Gazette Notice nor was its validity in issue hence nothing was canvassed on its validity. It was therefore submitted that the Committee did not deal with the said Gazette Notice. Accordingly, since this Court deals with the process, what the applicant is attempting to do in these proceedings is to sneak in a matter not the subject of the proceedings under challenge.

9. It was submitted that if he applicant has any problem with the said Gazette Notice to challenge the same before the Committee since its validity is a factual issue.

10. It was further submitted that if the prayers dealing with the Gazette Notice are removed from the application the other prayers die naturally since they only raised extraneous issues.

11. The application was supported by **Mr Odhiambo**, learned counsel for the 3rd interested party who submitted that matters falling within judicial review relate to decisions already made, decisions which are being made or refusal to make a decision. Therefore for a party to seek orders which are moot and imaginary threats would be to improperly invoke the Court's jurisdiction. It was contended that the decision of the Committee does not relate to the 3rd interested party hence the prayer must fail as well as the consequential prayers.

12. **Miss Mboshe** for the 1st interested party, Jubilee Party of Kenya submitted that the applicant and the 3rd and 4th interested parties are members of the Jubilee Party whose role is to assist in coming to a correct decision. According to learned counsel, the Party's view is that there are substantive issues raised in these proceedings that ought to be determined on merits instead of being summarily dealt with.

13. This was so because the Respondent did not allow the complaint yet one of the issues that was raised the applicant was not eligible to be nominated as the Party's candidate. By allowing he complaint, in effect the IEBC found that the applicant was not a member of the Party hence the reason for determining the issue. It was submitted that the issue herein is not just about gazettement but that there are fundamental issues as certain positions have been taken by the parties including the Respondent herein.

The Court was therefore urged to consider the value of hearing the matter.

14. On the part of the 2nd interested party, the Registrar of Political Parties, it was submitted by its learned counsel, **Miss Kirimi** that she did not wish to take sides in the matter.

15. The objection was however opposed by **Mr Bosek**, learned counsel for the ex parte applicant who submitted that there were fundamental issues to be determined as opposed to just the issue of gazettement. It was submitted that since the issues in dispute are not agreed, a preliminary objection cannot be sustained. It was submitted that one of the issues for determination is the fact that the Respondent failed to consider the material that was placed before it. It was for example submitted that the ex parte applicant's membership of the Jubilee Party was supported by the Party itself and the Registrar of Political Parties and this issue was disregarded.

16. It was contended that even without prayers 3 and 4 the rest of the applicant can still be sustained so that the preliminary objection cannot dispose of the whole suit even if it were to succeed.

Determination

17. I have considered the issues raised herein.

18. This being a preliminary objection it is important to deal with circumstances under which preliminary objections can be entertained in order to determine whether or not the objection was properly taken in these proceedings. In NBI High Court (Civil Division) Civil Case No 102 of 2012 - **Cheraik Management Limited vs. National Social Security Services Fund Board of Trustees & Another** this Court expressed itself, *inter alia*, as follows:

> **"Ordinarily, a preliminary objection should be based on the presumption that the pleadings are correct. *It may also be based on agreed facts.* It, however, cannot be entertained where there is a dispute as to facts for example where it is alleged by the defendant and denied by the plaintiff that a condition precedent to the filing of the suit such as the giving of a statutory notice was not complied with, unless the fact of non-giving of the notice is admitted so that the only question remaining for determination is the legal consequence thereof. It may also not be entertained in cases where the Court has discretion whether or not to grant the orders sought for the simple reason that an exercise of judicial discretion depends largely on the facts of each particular case which facts must be established before a Court may exercise the discretion…In this case both parties have adopted the unusual mode of arguing the preliminary objection by filing affidavits in support and in opposition thereof respectively. Accordingly part of the Court's task would be to determine what are the agreed facts contained therein whether expressly or by legal implication."** [Emphasis added].

19. In arriving at that decision, the Court relied on the celebrated case of **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 of 1969 [1969] EA 696** in which case **Law, JA** was of the following view:

> **"*A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit*. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."** [Emphasis added].

20. As for **Newbold, P**:

> **"A preliminary objection is in the nature of what used to be called a *demurrer.* It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily**

increase costs and, on occasion, confuse the issues, and this improper practice should stop".

21. Dealing with the same issue, **Ojwang, J** (as he then was) in **Oraro vs. Mbaja [2005] 1 KLR 141** expressed himself as follows:

> **"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop… The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point…Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent's very detailed "affidavit in reply to an affidavit in support of preliminary objection", which replying affidavit was expressed to be "under protest"…The applicant's "notice of preliminary objection to representation" cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute."**

22. It is therefore clear that a preliminary objection is an objection based on law that is argued on the assumption that the facts as pleaded are correct. In other words, a person raising a preliminary objection must be prepared to argue the same on the assumption that the facts as they are pleaded are correct. As long as that is done, it is not objectionable for the party raising the objection to refer to the facts on record. What the Court does not permit is the attempt to reconcile factual disputes in a preliminary objection.

23. In this case, one of the issues that the applicant intends to raise according to its pleadings is the propriety of the Respondent's entertainment of and presiding over the proceedings when it was the one against whom the blame for the applicant's woes were directed. Whereas the law permits the Committee composed of the Commissioners of the Commission to preside over decisions made by the Returning Officers who are themselves appointees of the Commission, in this case it is alleged that the gazettement of the ex parte applicant as an independent candidate was done by the hand of the Chairperson of the Commission, who from the decision being challenged in these proceedings was similarly the Chairperson of the Committee. In **R (Al-Hasan) vs. Secretary of State for the Home Department [2005] UKHL 13 [2005] 1 WLR 688 at [43]**, **Lord Brown** stated that:

> **"Once proceedings have been successfully impugned for want of independence and impartiality on the part of the tribunal, the decision itself must necessarily be regarded as**

tainted by unfairness and so cannot be permitted to stand.”

24. Therefore bias by an arbitral or administrative body is obviously one of the grounds for seeking judicial review remedies.

25. It is also contended that in light of the proceedings in Constitutional Petition No. 246 of 2017, the 3rd interested party herein had attempted to contest the same seat as an independent candidate. It goes without saying that one can only attempt to contest as an independent candidate when one has ceased to belong to a political party. This clearly was a relevant matter that ought to have been be taken into consideration by the Respondent’s Dispute Resolution Committee and if it was not so considered, it may well render the Committee’s decision unreasonable. In **Associated Provincial Picture Limited vs. Wednesbury Corporation [1947] 2 All ER 680; [1948] 1 KB 223** this principle was summarised 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...”**

26. In this case prayer one seeks the quashing of the decision of the said Committee. In my view if it is found that the Respondent ought not to have to have presided over the matter, the applicant’s case even if shaky cannot be dismissed offhand.

27. In the premises I agree that the matter ought to proceed to hearing on merits.

28. Consequently, the preliminary objection fails and is dismissed with costs to the ex parte applicant to be borne by the Respondent.

29. It is so ordered.

Dated at Nairobi this 27th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Bosek and Miss Okoth for the applicant

Mr Muchoki for Mr Muhoro for the Respondent

Mr Odhiambo for the 3rd interested party and holds brief for Mr Ayieko for the 4th Respondent

CA Mwangi