



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

JUDICIAL REVIEW NO. 4 OF 2017

JR.MISC.APPLICATION NO. 327 OF 2017 (NAIROBI)

**IN THE MATTER OF APPLICATION TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS
AGAINST THE RESPONDENTS**

AND

**IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT, CAP 26 AND ORDER 53 OF THE CIVIL PROCEDURE
RULES, 2010**

AND

IN THE MATTER OF ARTICLE 10, 23, 38, 47, & 177 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ELECTION ACT, 2011

AND

IN THE MATTER OF ELECTIONS (GENERAL) REGULATIONS, 2012

AND

**IN THE MATTER OF DISPUTE RESOLUTION COMMITTED OF THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION AT NAIROBI**

AND

IN THE MATTER OF RETURNING OFFICER KITUI EAST CONSTITUENCY, ZOMBE/MWITIKA WARD

BETWEEN

EDWARD ILANDI KITHEKA.....EX-PARTE APPLICANT

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....1ST RESPONDENT

(MWANGI KANYORIA STANLEY) RETURNING

OFFICER, KITUI EAST CONSTITUENCY.....2ND RESPONDENT

RULING

1. By Notice of Motion dated 16th June, 2017, the Exparte Applicant herein, **Edward Ilandi Kitheka** seeks the following orders:

· **THAT** this Honourable Court be pleased to grant Judicial Review Order of Certiorari to quash the decision by the 1st Respondent's Dispute Resolution Committee dated the **7th June, 2017**.

· **THAT** this Honourable Court be pleased to grant Judicial Review Order of Prohibition to prohibit and restrain the 1st Respondent whether by itself, agents, employees, representatives or anybody whomsoever from in any way implementing the Order of the Dispute Resolution Committee of the 1st Respondent dated **7th June, 2017**.

· **THAT** this Honourable Court be pleased to grant Judicial Review Order of Mandamus to compel the 2nd Respondent to receive, the nomination papers of the Ex-parte Applicant past the 1st Respondent's deadline and to clear and include the Ex-parte Applicant's name on the ballot in respect of the election for the member of County Assembly of Kitui for the seat, **Zombe/Mwitika Ward** in the General Elections scheduled on the **8th August, 2017**.

· **THAT** costs of the application be in the cause.

2. The Application is premised on grounds that; the Ex-parte Applicant having complied with **Section 13, 22, 25 and 34** of the **Elections Act** was the Nominee of **Jubilee Party** for the Member of County Assembly for **Zombe/Mwitika Ward; Kitui East Constituency**. He submitted his nomination documents to the 1st Respondent's office in **Kitui East** on the **31st May, 2017** at noon. The 2nd Respondent who received the documents declined to clear him for the reason that he (Ex-parte Applicant) had double listing as an aspirant in different political parties namely: **Maendeleo Chap Chap Party** and **Jubilee Party**.

3. That he had duly resigned as a member of **Maendeleo Chap Chap Party** on the **22nd March, 2017** prior to joining **Jubilee Party**. He was directed to sort out the issue of double listing and report back to the 2nd Respondent on the **1st June, 2017** for clearance. Being a holiday he was only able to sort out the double listing issue on the **2nd June, 2017**, therefore was time barred.

4. That he had not foreseen the misfortune that was likely to infringe on his right to be a candidate for the membership of the County Assembly of Kitui as envisaged under **Article 38(3)(c)** of the **Constitution of Kenya, 2010**.

5. That the 1st Respondent's committee comprising of commissioners are obliged to make a decision based on logic, reasonableness and procedural fairness as espoused in **Article 47(1)** of the **Constitution of Kenya** and **Fair Administrative Action Act, 2015** and find that the delay in submitting nomination papers within the stipulated timelines was an excusable error as nomination are to be conducted at least **forty Five (45) days** to the General Elections.

6. That the 1st Respondent being an independent body established under **Article 88** of the **Constitution of Kenya** ought to adhere to the principle of good governance and the national values under **Article 10** of the **Constitution**. The 2nd Respondent ought to ensure national values and principles of good governance which include human dignity, equality, social justice, inclusiveness, equality, human rights, non discrimination, protection of the marginalized, good governance, integrity, transparency and accountability are upheld.

7. In response, the Respondent relied on a replying affidavit sworn by **Stanley Mwangi Kanyoria**, the 2nd Respondent who deponed that under **Section 13** of the **Elections Act, 2011**, it is the duty of the political party to nominate its candidates for an election and not the 1st Respondent's responsibility. That the Ex-parte Applicant ought to have ensured that he was a member of one party from **February, 2017**. At the point of forwarding his papers he had not resigned from his original party, **Maendeleo Chap Chap Party** and the 2nd Respondent was already barred by the timelines issued therefore could not take action.

8. That by Gazette Notice dated **17th March, 2017**, the 1st Respondent notified all aspirants of what was expected of them and clearly indicated the timelines which were to be observed. The Ex-parte Applicant having delayed to meet the timelines the 2nd Respondent would not have gone against the rules and regulations.

9. That the letter relied on by the Ex-parte Applicant was not received by the 1st Respondent or the Registrar of Political Parties. Had it been received by the Registrar of Political Parties the same would have been recorded and changes made to reflect the actual status.

10. That the Ex-parte Applicant went to the 2nd Respondent's office on the **31st May, 2017**. When his name was keyed in it was indicated he had double listed as an aspirant in two (2) different political parties – **Maendeleo Chap Chap Party** and **Jubilee Party**. To be declared fit to vie for elections as a candidate one must belong to one party.

11. That the 2nd Respondent informed the Ex-parte Applicant to go and sort out the issue of double nomination within the gazetted timelines. The anomaly was corrected on **2nd June, 2017** when the stipulated timelines had lapsed.

12. That no evidence has been tendered to prove that the Ex-parte Applicant resigned as a member of **Maendeleo Chap Chap Party**. The letter he purports to rely on was not served/received by the Respondents. The timeline for submission of papers was held from **28th May, 2017** to **31st May, 2017** and the Applicant chose to submit his papers on the last day. The Ex-parte Applicant was required to comply with the checklist which he did not.

13. That the nomination process was online and the portal could only allow one to proceed after the first requirement was met, a process that failed in respect of the Ex-parte Applicant.

14. That the Dispute Resolution Committee dismissed the Exparte Applicant's complaint on grounds that are well prescribed within the law and in particular **Regulations 38 of the General Elections Regulations**.

15. It was submitted by **Mr. Nyamu**, learned Counsel for the Exparte Applicant that the Exparte Applicant's rights as espoused in **Article 38(3)(c) and 47 of the Constitution of Kenya** were violated, having been nominated by the **Jubilee Party** to represent the **Zombe/Mwitika Ward** in the County Assembly in line with **Article 77 of the Constitution**. The days set for nomination by the Respondent were purely Administrative Timelines for purposes of compliance with the provision of **Elections Act Section 13(1)**. That the Exparte Applicant was allocated the **31st May, 2017**, he did not choose the date. His letter of resignation was copied to the Registrar of Political Parties and presented to **Jubilee Party** where it was received on the **22nd March, 2017**. His name was erroneously presented by **Maendeleo Chap Chap Party**. He did not have control over the Political Party.

16. The Dispute Resolution Committee which heard his complaint and dismissed it failed to make a decision that is reasonable as required by **Article 47(1) of the Constitution** that having resigned to exercise his fundamental rights of being elected in a Public Office, the 2nd Respondent should have accepted his documents. The 1st Respondent's Dispute Resolution Committee would not have been prejudiced by allowing the Exparte Applicant to present his papers. It had the discretion to allow him to present his papers as no gazettment had been done.

17. In response **Ms. Karanja** learned Counsel for the Respondents submitted that the Exparte Applicant could not use Judicial Review application as the opportunity to prove the Respondents wrong. That the Exparte Applicant was informed of what was expected of him and therefore could not use Judicial Review to repair his deficiencies. The Exparte Applicant chose the date to appear and went at noon. His checklist had gaps. He was not seconded by anyone. The online system deterred the 2nd Respondent from proceeding because the Exparte Applicant had not uploaded the information online.

18. That the resignation letter was not received by either I.E.B.C. or the Registrar of Political Parties.

19. Further, she submitted that there was no violation of fundamental rights of the Exparte Applicant who chose to sleep on his rights. And the nomination portal was now closed. It could not be accessed.

20. I have considered the affidavit evidence presented both in support and opposition of the application and rival submissions of both Counsels.

21. Judicial Review orders sought by the Exparte Applicant are discretionary in nature. In granting the orders sought or not the Court must consider the conduct of the Applicant, the irregularity complained of and whether the order granted will serve some purpose or if it will be an exercise in futility.

22. In the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants LTD Civil Appeal No. 185 of 2001**, it was held thus:

“Judicial review is concerned with the decision of making process, not with the merits of the decision itself. The court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters..... The court should not act as a court of Appeal over the decider which would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision It is the duty of the decision maker to comply with the law in coming to its decision.....”

23. In the case of **Republic vs. Kenya Power & Lighting Company Limited & Another (2013) eKLR** it was held that:

“It is not enough for an applicant in judicial review proceedings to claim that a tribunal had acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for Judicial Review remedies to be granted.”

24. It is conceded that the Exparte Applicant as an adult citizen of this Country has the right to be a candidate for a Public Office without being restricted unreasonably (**vide Article 38(3)(c) of the Constitution of Kenya, 2010**).

Initially the Exparte Applicant exercised his political rights by joining **Maendeleo Chap Chap Party**. Per the annexures to the affidavit in support of the application, the Exparte Applicant wrote a resignation letter to the **General Secretary Maendeleo Chap Chap Party** on the **20th March, 2017**. The letter has a stamp impression indicated as belonging to **Maendeleo Chap Chap Party** though not authenticated. It is copied to the Registrar of Political Parties. On **22nd March, 2017** he paid nomination and registration fee in the sum of **Kshs. 50,000/=** to **Jubilee Party** hence acquiring membership. On the **9th May, 2017** he was nominated and issued with a Certificate to vie for Member of County Assembly **Zombe/Mwitika Ward, Kitui East Constituency**.

25. On **23rd May, 2017** he appeared before the 2nd Respondent and he was notified of the double listing as an aspirant in two (2) different political parties – **Maendeleo Chap Chap Party** and **Jubilee Party**.

26. If indeed **Maendeleo Chap Chap Party** received the resignation letter dated **20th March, 2017** written by the Exparte Applicant, he ought to have been deemed a non-member of the party from the stated date and the Registrar of Political Parties ought to have been informed of the resignation.

27. The fact that he was deemed to be a member of **Maendeleo Chap Chap Political Party** as at **31st May, 2017** would be an indication of

the notice given having not been effected or received. The political party or member himself had the responsibility of notifying the Registrar of the resignation (**See Section 14(3) of the Political Parties Act**). The Respondents could not be blamed for having not acted.

28. It was incumbent upon the Exparte Applicant to prove that he was asked to appear before the 2nd Respondent on **31st May, 2017** as opposed to having made the election himself. There was absolutely nothing to prove that fact.

29. He sorted out the issue of double registration on the **2nd of June, 2017** but was time barred as the deadline for clearance was **31st May, 2017**.

30. This Court has been asked to quash the decision of the Dispute Resolution Committee of the 1st Respondent. The committee reached a finding that the Exparte Applicant failed to submit his nomination papers within the stipulated time and also to meet the requirements of **Regulation 38 of the Elections (General) Regulations, 2012** which required that nomination papers be submitted by a political party. Prior to reaching the decision the Exparte Applicant lodged a complaint that was considered by the committee. Prior to the decision being made the timelines set were published. It was upon the Exparte Applicant to comply. The checklist filed is incomplete therefore the process adopted cannot be faulted.

31. In the premises, I find the Notice of Motion filed herein unmeritorious. Accordingly, it is dismissed with costs to the Respondents.

32. It is so ordered.

Dated, Signed and Delivered at Kitui this 22nd day of June, 2017.

L. N. MUTENDE

JUDGE