



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
MISCELLANEOUS APPLICATION NO.358 OF 2017

REPUBLIC.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL

AND

BOUNDARIES COMMISSION.....
RESPONDENT

AND

JUBILEE PARTY.....1ST INTERESTED
PARTY

CHARLES MONGARE ONGOTO.....2ND INTERESTED
PARTY

EVANS OMWOYO MENGE.....3RD INTERESTED
PARTY

AND

JOHN KENNEDY ACHOKI.....EX-PARTE
APPLICANT

RULING

The ex-parte Applicant, John Kennedy Achoki, the 2nd Interested Party Charles Mongare Ongoto and the 3rd Interested Party Evans Omwoyo Menge contested in the primaries held by the 1st Interested Party to determine its nominee for the West Mugirango Constituency National Assembly seat. According to the ex-parte Applicant, he secured most votes and was thus duly nominated as the nominee for the 1st Interested Party for the said seat. He was however not given the nomination certificate and was surprised when he learnt that the 2nd Interested Party had been issued with the nomination certificate. From the exhibits annexed to the affidavit in support of the application seeking the leave of this court to institute judicial review proceedings, it was clear that the ex-parte Applicant has been to various forums seeking to be awarded the nomination certificate as a candidate for the 1st Interested Party for the said National

Assembly seat.

It is important for this court to set out the chronology of events that have taken place in regard to the resolution of the nomination dispute for the above political seat. According to the pleadings filed, the 1st Interested Party held primaries on 26th April 2017 to determine its nominee for the Member of Parliament seat for West Mugirango Constituency. According to the ex-parte Applicant, he was declared the winner by the Returning Officer. The 2nd and 3rd Interested Parties were aggrieved by the said decision. They filed a complaint before the 1st Interested Party's Internal Dispute Resolution Mechanism. The said party organ ruled in favour of the 2nd and 3rd Interested Parties provoking the ex-parte Applicant to lodge a complaint before the **Political Parties Disputes Tribunal in Complaint No.218 of 2017**. In its determination, the Tribunal set aside the nomination certificate issued to the 2nd Interested Party and instead directed the 1st Interested Party to issue a nomination certificate to the ex-parte Applicant.

Aggrieved by this decision, the 2nd and 3rd Interested Parties lodged an appeal before the High Court. The appeal was registered as **Election Petition Appeal No.33 of 2017**. The appeal was heard by Tuiyot J. In his considered decision delivered on 17th May 2017, he observed that the issue in dispute actually related to whether proper elections had been conducted in a polling station known as Miruka. This is what the Learned Judge held in paragraph 18 of his decision:

“In my analysis, I am unable to arrive at the same conclusion as the Tribunal. I do not find the results of Miruka to be completely free of doubt. There are not entirely credible. These are not the type of results that can be permitted to tilt the outcome of the entire election. The result may have the effect of torpedoing the will of the members of the party who participated in the entire election at West Mugirango and this should not be allowed to happen. Measuring the election at Miruka on the propositions set out by Lord Denning in Morgan –vs- Simpson [1974] 3ALL ER 722, this court is unable to uphold it.”

The Learned Judge directed the 1st Interested Party to conduct a repeat election in the said polling station. Again, another dispute arose from it. The 2nd and 3rd Interested Parties filed a complaint before the 1st Interested Party's Internal Dispute Resolution Mechanism seeking the nullification of the results on the grounds that there was violence and irregularities in the conduct of the said repeat nomination exercise at the said polling station. The Tribunal dismissed the complaint. That being the case, the 1st Interested Party called a meeting in which the results from Miruka Polling Station were tallied together with other results from other polling stations in the constituency. It was clear from the submission made before court that the ex-parte Applicant participated in the tallying process. The 2nd Interested Party emerged as the winner and was issued with the nomination certificate.

The ex-parte Applicant was aggrieved by this decision. He filed a constitutional petition before the Constitutional and Human Rights Division of the High Court in **Petition No.269 of 2017** seeking, *inter alia*, a declaration from the court that he should be the 1st Interested Party's nominee for the said National Assembly seat instead of the 2nd Interested Party. During the pendency of this petition, the ex-parte Applicant filed a complaint before the Independent Electoral and Boundaries Commission Nomination Disputes Resolution Committee. This complaint was filed on 6th June 2017. In it, the ex-parte Applicant challenged the nomination of the 2nd Interested Party on the grounds that he won the nomination during the primaries and should thus be recognized as the rightful nominee. The committee dismissed the complaint noting that the 1st Interested Party had entered the name of the 2nd Interested Party in the Electoral Commission's Candidate Registration Management System (CRMS) and therefore the Returning Officer had no option but to accept the nomination of the 2nd Interested Party as the 1st Interested Party's nominee for the said National Assembly seat. It is this decision that provoked the present application for judicial review.

Meanwhile, the ex-parte Applicant went back before the Constitutional and Human Rights Division of the High Court and canvassed the application. Mativo J dismissed the application for want of jurisdiction on

21st June 2017.

The ex-parte Applicant argued before this court that he should be granted leave to institute judicial review proceedings in the nature of certiorari, mandamus and prohibition so as to compel the Respondent to accept his nomination papers as the nominee of the 1st Interested Party. He further sought stay of the decision of the Respondent's Returning Officer to accept nomination of the 2nd Interested Party as the 1st Interested Party's nominee for the said National Assembly seat for West Mugirango Constituency. The Respondent, through counsel told the court that it would accept whatever decision that the court rendered. On their part, the 1st and 2nd Interested Party urged this court to dismiss the appeal on the grounds that the ex-parte Applicant had placed no evidence before the Respondent's Committee, and also before this court, to justify his acceptance by the Respondent as the 1st Respondent's nominee for the said seat.

This court has carefully considered the facts of this application. The issue for determination by this court is whether the ex-parte Applicant placed sufficient material before this court to enable the court grant him the leave and stay that he is seeking. From the above chronology of events, it is clear that the rightful nominee of the 1st Interested Party for the said West Mugirango Constituency National Assembly seat is the 2nd Interested Party. The results of the repeat nomination for Miruka Polling Station was tallied by the 1st Interested Party who established that the 2nd Interested Party had attained the most votes and therefore entitled to be its nominee for the said National Assembly seat. Although the ex-parte Applicant attempted to persuade this court that he was the actual nominee, the truth of the matter is that the members of the 1st Interested Party at West Mugirango Constituency nominated the 2nd Interested Party as its nominee. There is validity in the claim by the 2nd Interested Party that the ex-parte Applicant, upon realizing that he would not secure the nomination certificate from the 1st Interested Party, engaged in forum shopping with a view to chancing which forum would rule in his favour. That is abuse of the due process of the court.

This court finds no merit with the ex-parte Applicant's application seeking leave to be allowed to institute judicial review proceedings in the nature of certiorari, mandamus and prohibition. There is nothing to be reviewed by way of judicial review proceedings. The 2nd Interested Party's nomination by the 1st Interested Party is above board. The application seeking leave is hereby dismissed. There shall be no orders as to costs. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF JUNE 2017

L. KIMARU

JUDGE