



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR APPLICATION NO. 439 OF 2017

REPUBLIC.....APPLICANT

VERSUS

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....RESPONDENT

ZACHARIA OKOTH OBADO.....INTERESTED PARTY

EX PARTE: GEORGE MBOGO OCHILO AYACKO

JUDGMENT

1. The *ex parte* applicant, George Mbogo Ochilo Ayacko, by his Motion dated 11th July 2017 seeks the judicial review orders of *certiorari* and prohibition against the respondent herein. The *ex parte* applicant targets proceedings commenced against him in the respondent's Electoral Code of Conduct Committee (hereinafter referred to as the Committee) in Complaints Nos. 13 and 14 of 2017. He would like the charge sheets filed in the complaints, the proceedings conducted in those cases and the decision of the Committee in those cases made on 6th July 2017 quashed. Subsequent to that, he prays that the the respondent be barred from continuing with the said complaints.

2. The *ex parte* applicant's case is that the interested party had lodged complaints against him with the relevant Committee of the respondent. Charges were drawn against him, and summonses issued for his attendance before the Committee. He complains that the interested party's complaint and the respondent's charge sheet violated the respondent's Electoral Code of Conduct Enforcement Rules, in that the complaint did not give particulars as required by rules 20 and 23, and he was not afforded forty-eight (48) hours to respond contrary to rule 25. He raised a preliminary point of law on those matters, but his objection was dismissed on 6th July 2017. He complains that the respondent acted in contravention of statute, its conduct was illegal, unconstitutional, irrational, and unreasonable and was actuated by bad faith and ulterior motives, was attended by procedural impropriety, unfairness and arbitrariness. The principal argument is that the Committee had usurped the powers of the court and the Directorate of Public Prosecutions.

3. The Motion has been responded to by both the respondent and the interested party. The response of the respondent is vide an affidavit sworn by one of its officers in the Electoral Code of Conduct Committee. He contends that the *ex parte* applicant had sufficient time to respond to the summons. He contends that the respondent was not both the judge and jury in the matter as there is a complainant, and in any event the Committee could proceed on its own motion, and was free to craft its own procedure. He asserts that the *ex parte* applicant's constitutional rights had not been infringed. On his part, the interested party states that the respondent acted within the jurisdiction granted to it by the Electoral Code of Conduct Enforcement Rules.

4. The proceedings herein were triggered by a letter that the interested party wrote, through counsel, to the respondent, which is undated, alleging that the *ex parte* applicant's supporters had visited violence on his supporters on diverse dates. There is a catalogue of various reports made to various police stations by the said supporters. The interested party also personally wrote to the respondent on 23rd June 2017. The respondent then announced through a press statement issued on 4th July 2017 that *ex parte* applicant had been summoned for a hearing on 6th July 2017. A formal summons issued in the hand of an officer of the respondent called Chrispine O. Owiye, giving the *ex parte* applicant twenty-four (24) hours to respond to the complaint. The said Chrispine O. Owiye also issued two charge sheets accusing the *ex parte* applicant of contravening the Electoral Code of Conduct contrary to section 20 of the Election Offences Act by using the symbols of a political party and violence being visited on the interested party's supporter by his supporter.

5. The actions impugned are those of the Committee which is established under the 2nd Schedule of the Elections Act, Act No. 24 of 2011, which establishes the Electoral Code of Conduct. The powers of the Committee are set out in Clause 15; to issue summons, to examine the person summoned, to punish violators of the Electoral Code of Conduct and to deliver verdicts. The Electoral Code of Conduct does not carry detailed provisions on the making of complaints and their prosecution by or before the Committee. There is provision that the Committee may punish any person who infringes the Code, the sanctions it may impose are stated in Clause 7 of the Electoral Code of Conduct. Committee are set out in Clause 16 of the Electoral Code of Conduct, and include political parties, candidates, officials and agents. Section 110 of the Elections Act requires all political parties and candidates to subscribe to the Electoral Code of Code, which is then enforced through the Committee.

6. The details of procedure to govern the business of the Committee are set out in the Electoral Code of Conduct Enforcement Rules. Rule 3 thereof states that the Rules are to provide a procedure and mechanisms for the enforcement of the Electoral Code of Conduct, while rule 4 thereof provides that the Rules are to apply to disputes arising from violation of the Electoral Code of Conduct.

7. The charges against the *ex parte* applicant are brought under the Election Offences Act, Act No. 37 of 2016, and the 2nd Schedule of the Elections Act. The preamble to the Election Offences Act states that it is a statute to provide for election offences. Several election offences are defined under this statute. Section 21 of the Act vests the Director of Public Prosecutions with power to mount prosecutions of the offences created under it. The offences defined under this law are prosecutable before special magistrates to be appointed for that purpose by the Chief Justice under section 23 of the Act. The magistrates are special in the sense that they are enjoined by section 23(2) of the Act to handle trial of the offences under the Act on a day-to-day basis. The Committee of the respondent has no jurisdiction under the Election Offences Act to prosecute the offences created under that law, and to try them at the same time.

8. For avoidance of doubt, sections 21 and 23 of the Election Offences Act provide as follows-

'21. Powers of prosecution

The Director of Public Prosecutions shall have the power to order investigations and to prosecute offences under this Act.

22 ...

23 Power to appoint special magistrates

(1) The Chief Justice may, by notification in the Gazette, appoint as many special Magistrates as may be necessary to hear and determine matters relating to offences under this Act.

(2) Notwithstanding anything contained in the Criminal Procedure Code (Cap 75), a special Magistrate shall, as far as practicable, hold the trial of an offence under this Act on a day-to-day basis until completion.'

9. The charge sheets as framed charge the *ex parte* applicant with offences allegedly committed under section 20 the Election Offences Act and the 2nd Schedule. From what I have set out above, it is clear that the offences created or defined under the Election Offences Act can only be prosecuted by the Director of Public Prosecutions and are only triable by a court of law, to wit by a special magistrate. The offences defined by this Act are criminal in nature, to be prosecuted only by the Director of Public Prosecutions in discharge of his mandate under Article 157 of the Constitution and section 21 of the Act. Clearly, the two charges, the subject of the proceedings before the Committee of the respondent, have been brought under section 20 of the Election Offences Act by someone other than the Director of Public Prosecutions contrary to section 21 of the Election Offences Act, before a tribunal other than the special magistrates contemplated under section 23 of the Act.

10. Violations of the Electoral Code of Conduct can be handled by both the courts and the Committee; however the Committee can only handle charges stated to be brought under the Electoral Code of Conduct, as set out in the 2nd Schedule to the Elections Act, while the court handles criminal charges framed as brought under section 20 of the Election Offences Act. There is no jurisdiction at all in the Committee to try anyone of the offence created under section 20 of the Election Offences Act.

11. I agree with the *ex parte* applicant that the actions of the respondent's Committee are in excess of the powers conferred upon it by the statute that has brought it into being. The said conduct, of exercising power that it does not have, indicates that the Committee has acted with irrationality and unreasonableness, and there is procedural impropriety, unfairness and arbitrariness. There has been usurpation of the powers of the court and of the Director of Public Prosecutions.

12. In the end I find that there is merit in the Motion dated 11th July 2017. I shall allow the same in terms of prayers 1, 2 and 3 thereof.

DATED, SIGNED and DELIVERED at NAIROBI this 26TH DAY OF JULY, 2017.

W. MUSYOKA

JUDGE