



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JR APPLICATION NO. 467 OF 2017

REPUBLIC.....APPLICANT

VERSUS

JOHN OBURA ATIENO.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION....3RD RESPONDENT

EX PARTE: JOHN OBURA DIMO

JUDGMENT

1. The *ex parte* applicant, John Obura Dimo, by his Motion dated 27th July 2017 seeks the judicial review orders of *certiorari* and *mandamus* against the 1st respondent herein. The *ex parte* applicant targets the gazettelement of the 1st respondent as the person nominated to contest as Member of County Assembly (MCA) for Kobura Ward in Nyando Constituency, Kisumu County, on the ticket of the 2nd respondent. He seeks that the *Gazette* Notice dated 27th June 2017 be quashed and the 3rd respondent be compelled to correct the error in the name of the nominee from John Obura Atieno to John Obura Dimo.

2. In his statement in support of the application, he avers to be a valid member of the 2nd respondent and a registered voter. He contested in the 2nd respondent's party primaries for nomination for the MCA slot as cited above. He alleges that he won in the primaries, but the returning officer declared the 1st respondent as winner instead on account of similarity of their first names. He complained and the error was corrected and he was eventually declared the winner and was issued with the 2nd respondent's provisional nomination certificate. Thereafter, the 1st respondent, who had also been issued with a provisional nomination certificate, declined to surrender the same to the returning officer, was issued with the final nomination certificate by the 2nd respondent, which he used to obtain clearance by the 3rd respondent, culminating in his gazettelement as stated in paragraph 1 herabove. The *ex parte* applicant complained to the 2nd respondent and was prevailed upon not to move to the Political Parties Disputes Tribunal as the 2nd respondent was to look into the matter. He complains that there was collusion between the respondents to lock him out of the process. He has attached several documents to the affidavit to support of his allegations.

3. The 1st and 3rd respondents have appeared, but the 2nd respondent did not appear despite being served.

4. In response to the application, the 1st respondent has filed grounds of opposition and two replying

affidavits. His second affidavit was, however, withdrawn at the hearing after it was pointed out that it had been filed without leave of the court, and was served minutes to the hearing of the matter. The grounds are general. It is argued that the *ex parte* applicant was at the wrong forum, the Motion had been overtaken by events, there was abuse of the court process, no grounds existed to warrant grant of the orders sought and that the application was procedurally bad in law. In the replying affidavit, it is averred that the 1st respondent was properly nominated in the primaries conducted by the 2nd respondent, was issued with a provisional nomination certificate by the returning officer of the 2nd respondent and a final nomination certificate by the 2nd respondent, which he used to obtain clearance by the 3rd respondent, culminating in his being gazetted as the candidate for the 2nd respondent for the ward in question. It is averred that the *ex parte* applicant failed to take advantage of the dispute resolution mechanisms allowed by the law, being the party internal dispute resolution mechanisms and the Political Parties Disputes Tribunal, before coming to court. It is also argued that the delay in bringing these proceedings has not been sufficiently explained.

5. On his part, the 3rd respondent filed grounds of opposition, wherein it argues that the court lacks jurisdiction over the matter given that jurisdiction to handle original party nomination disputes lay with the Political Parties Disputes Tribunal according to section 40 of the Political Parties Act (Act No. 11 of 2011), and that the application is defective on account of Article 88(4)(e) of the Constitution, section 74 of the Elections Act (Act No. 24 of 2011) and section 4 of the Independent Electoral and Boundaries Commission Act (Act No. 9 of 2011).

6. The application was urged orally before me by counsel for the *ex parte* applicant, the 1st respondent and the 3rd respondent on 1st August 2017.

7. There is no doubt that the instant dispute arises from a party primary nomination carried out by the 2nd respondent. Two of the candidates came out of the exercise with provisional nomination certificates, but at the end only one was issued with the final party nomination certificate, which facilitated his clearance and gazettement by the relevant national electoral agency as the valid candidate to contest for the position in issue. The issues that I have to determine are whether the application is validly before me and whether the orders sought are available on the facts laid out in the application.

8. Resolution of disputes relating to nomination of candidates to various electoral positions is governed by various statutes depending on the stage at which the disputes arise. There are two nomination stages in the scheme of Kenya's national elections. The first is by political parties, while the other is by the 3rd respondent. Nomination of candidates by political parties is regulated by the Elections Act. Disputes emanating from that process are resolved by the Political Parties Disputes Tribunal, which is a body established under the Political Parties Act, to determine disputes between a political party and its members, among others, according to section 40 thereof. A complaint arising from a nomination exercise conducted by a political party is a matter between the party and its member. A right of appeal is available under section 42 of the Act. Clearance of candidates nominated by political parties, and of independent candidates, which is also referred generally as a nomination by the 3rd respondent, is also governed by the Elections Act. Resolution of disputes arising from that process is regulated by the Elections Act, the relevant provision being section 74 thereof, as read with Article 88(4) (e) of the Constitution.

9. From the material before me it would appear that there was confusion after the 2nd respondent's nomination of process for Kobura Ward as the 2nd respondent's returning officer issued provisional nomination certificates to two candidates. That would mean that there was a dispute as to who had been validly nominated in the party primary. The *ex parte* applicant asserts that he was the person properly nominated and therefore the provisional nomination certificate issued to the second candidate, the 1st respondent, ought to have been cancelled. He laments that despite that the 2nd respondent went ahead and issued a final nomination certificate which was then presented to the 3rd respondent, who then nominated the 1st respondent as the candidate for Kobura Ward. To my mind that meant that there was a dispute between the *ex parte* applicant and the 2nd respondent over the nomination conducted by the latter. Such a

dispute no doubt falls within the purview of section 40(1) (b) of the Political Parties Act, and was therefore within the jurisdiction of the Political Parties Disputes Tribunal.

10. It is common ground that the *ex parte* applicant did not file any complaint with the Political Parties Disputes Tribunal. The explanation he gives is that he filed a complaint with the internal dispute resolution mechanism of the 2nd respondent, and was assured that the matter would be resolved and was prevailed upon not to move to the Political Parties Disputes Tribunal. I have closely perused the documents attached to the *ex parte* applicant's affidavit, I have come across some documents which suggest that the *ex parte* applicant did place a matter before the National Elections Board of the 2nd respondent, but there is nothing to show that he was given any assurances or prevailed upon not to move the Political Parties Disputes Tribunal. The documents availed do not appear to be in the nature of a complaint, and there is nothing to show whether there were any proceedings conducted leading up to a determination.

11. It is also common ground that the 1st respondent was issued with a final nomination certificate by the 2nd respondent, which he then presented to the 3rd respondent for clearance. He was cleared, issued with a nomination paper and his name gazetted as per the laid down rules. Any person unhappy with that process was entitled to move the 3rd respondent appropriately, under section 74 of the Elections Act. The *ex parte* applicant was, no doubt, unhappy that the 1st respondent had been cleared by the 3rd respondent; he ought to have availed himself of the remedy in section 74 of the Act. He did not at all do so, or, at least, he has not provided any proof thereof.

12. It would appear that the *ex parte* applicant chose to come to court straight without first moving the Political Parties Disputes Resolution Tribunal and the 3rd Respondent. He bypassed these statutory bodies. Was he entitled to do so? Without belabouring the point, there is wealth of judicial opinion on the matter to the effect that a party aggrieved by the party nomination processes ought to exhaust the avenues for dispute resolution availed by the various statutes governing such processes before moving to court. The first port of call ought to be the bodies set up in those statutes to resolve such disputes. The oldest decision on this was by the Court of Appeal in *Speaker of the National Assembly vs. James Njenga Karume* (1992) eKLR, which has been followed with approval thereafter by various courts. One of the more recent decisions on that is that by Lenaola J. in *Isaiah Gichu Ndirangu & 2 Others vs. Independent Electoral and Boundaries Commission & 4 Others* (2016) eKLR. An applicant who bypasses such tribunals ends up in a situation where the court is bereft of jurisdiction to handle the dispute that he presents to it.

13. Even if I were to look at the merits of the application, I doubt whether I would grant the orders sought. In the first place, the fault of the 3rd respondent has not been brought out. The 3rd respondent only clears such persons as are presented by political parties as validly nominated by them to contest the available seats. In this case, it would appear that the person that the 2nd respondent presented to the 3rd respondent was the 1st respondent. In such a scenario there was little the 3rd respondent could do save to clear and nominate the person presented to it by the political party. The *ex parte* applicant has not demonstrated that he was in fact the person that the 2nd respondent presented to the 3rd respondent as the validly nominated candidate. He does not plead that the 2nd respondent had issued him with a valid final certificate of nomination; in converse, he admits that it was in fact the 1st respondent who was given the final certificate of nomination by the political party.

14. The *ex parte* applicant claims the 3rd respondent gazetted the 1st respondent as candidate by error, given that their first names were similar. Two things arise from this submission. One, the *ex parte* applicant has not demonstrated, as stated above, that he had been issued with a final nomination certificate by his party, or that he had presented a final nomination certificate issued by the 2nd respondent in his name to the 3rd respondent to warrant his clearance, to justify the argument that the 3rd respondent then made an error of sorts. Quite obviously an error could not arise at the point of gazette relating to the *ex parte* applicant when he had not been issued with a final nomination certificate which would have

facilitated his clearance and gazettelement by the 3rd respondent. The second thing is that the final nomination certificate only states the name of the person nominated, one would wonder where the 3rd respondent would have gotten the name of the 1st respondent if the certificate before him bore only the name of the *ex parte* applicant.

15. I need not say more. I have not found merit in the Motion dated 27th July 2017. I hereby dismiss the same with costs to the 1st and 3rd respondents. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 2ND DAY OF AUGUST, 2017.

W. MUSYOKA

JUDGE