



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

MISC NO. 89 OF 2014 [JR]

FORMERLY BUSIA JR CASE NO. 5 OF 2013

IN THE MATTER OF AN APPLICATION BY BEATRICE PHEMY KANOTI THE LABOUR PARTY OF KENYA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE ELECTIONS ACT. NO. 24 OF 2011

VERSUS

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

BETWEEN

REPUBLIC APPLICANT

VERSUS

BATHLET A. ODUMA 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION..... 2ND RESPONDENT

AND

IN THE MATTER OF THE LABOUR PARTY OF KENYA 1ST EX-PARTY APPLICANT

BEATRICE PHEMY KANOTI 2ND EX-PARTE APPLICANT

JUDGMENT

1. The Ex-parte applicants moved the court by way of Notice of Motion on the 5th of September 2013 pursuant to Order 53 rules 3 (1) (2) & (4) of the Civil Procedure Rules and Sections 3, 3A and 63 (e) of the Civil Procedure Act. The orders sought for were;

1. That an order of certiorari do and is hereby issued to call into the High Court and quash the decision of the Independent Electoral and Boundaries Commission prohibiting them from publishing in the Kenya Gazette, in the print media or in any forum whatsoever the name of the 2nd Respondent Bathlet A. Oduma as the nominee from the Gender list for Busia County on the ticket of the Labour Party of Kenya and or that such gazettment if already done be suspended

and declared null and void.

2. That an order of certiorari be and is hereby issued to call into the High Court and quash the decision and proceedings and ruling of the Nomination Dispute Committee dated 7.6.2013 relating to the dismissal of the complaint by the Ex-parte applicants herein against the nomination of BATHLET A. ODUMA as the nominee from the gender list for Busia on the ticket of Labour Party of Kenya and

3. Costs.

2. The application is based on the grounds that the Respondents acted outside jurisdiction by purporting to forward names of prospective nominee; the act was a violation of the political parties Act; the 2nd Respondent is not a party member of LDP and that the preferred candidate is the 2nd Ex-parte applicant.

The application was not accompanied by an affidavit or a statement.

3. On their part the 1st Respondent filed a replying affidavit of Moses Kipkegei dated 23rd September 2013. Therein he deponed that the 2nd Ex-parte applicant (LDP) forwarded to it its party list on 25.11.2013 for those to take up special sits and that the 2nd respondent's name was on the list and the name of the 2nd Ex-parte applicant was not on the said list and that however in a suit filed by the National Gender and Equality Commission against the 1st Respondent and the Attorney General the court ordered the 1st Respondent to publish a list in respect of special seats of County Assemblies, which it did and there followed a dispute on the lists submitted and a Dispute Resolution Committee was formed, the committee deliberated on issues of lists and 1st Respondent serialized the original list and submitted lists, reconstituted the dispute Resolution Committee and on 21.5.13 published a revised list and Parties aggrieved were given 3 days to file a complaint and thereafter the committee gave its ruling. That the Ex-parte applicants having been aggrieved with the list of 21.5.2013 lodged a complaint on 23.5.2016 which was heard by the committee and its decision not favouring the Ex-parte applicants read on 7.6.2013, that the Ex-parte applicants have filed this matter in the wrong forum, as only an election court can remove the 2nd Respondent.

4. The 2nd Respondent on her part filed a replying affidavit dated 11th September, 2013 stating that she is a registered member of LDP and holder of a gold and an ordinary members card since 2007, she denied being a member of Ford Kenya, she stated that she was nominated by her party and has already taken oath of office as representative of the said party, she argued that the application against her is incompetent.

5. The above are the only "pleadings" in the court file save for submissions filed by the Ex-parte applicants and the 2nd Respondent.

6. The Ex-parte applicants in their written submissions filed on 18.11.2011 state that they are disputing the nomination of the 2nd Respondent as a gender top up nominee for the Busia County Assembly by LPK, and that dispute the issue being affirmed by the leader of LPK, the Respondent went ahead to gazette the 2nd Respondent and as the nominee in their view issues for determination are;

1. Whether the 2nd Ex-parte applicant was eligible for nomination by LDP.

2. Whether the 2nd Respondent was lawfully nominated

3. Whether the Respondent was right to gazette the 2nd as the nominee.

4. Whether the IEBC Dispute Resolution Committee disregarded rules of natural justice in failing to consider the 2nd Ex-parte applicant's evidence and dismissing the same.

7. It was further submitted that the 2nd Respondent is not an LDP member, the 1st Respondent ignored

the 2nd list by the 1st Ex-parte applicant, the Respondent imposed the 2nd Respondent, and therefore the Ex-parte applicants seek for the 2nd to be reinstated as the nominee and for orders of mandamus directing the 1st respondent to de-gazette and revoke the nomination of the 1st Respondent.

8. On her part, the 2nd Respondent in her submission dated 10th December, 2016 faulted the Ex-parte applicants' application in that the Ex-parte applicants have not demonstrated why they want to invoke the courts special jurisdiction under Sections 8 & 9 of the Law Reform Act and Order 53 Rule 10 of the Civil Procedure Rules, and sought to have the court interrogate whether the Ex-parte applicants have the *locus standi*, and whether the remedies sought are available to the applicants in view of the facts placed before the court.

Further, that from the pleadings and submission of the Ex-parte applicants their only grievance is the nomination of the 2nd Respondent instead of the 2nd Ex-parte applicant, there is also an admission that the 1st Ex-parte applicant forwarded the list with the 2nd Respondent's name, the Ex-parte applicants lodged a complaint which was dismissed and the only complaint is that rules of natural justice were not observed by the nominal dispute resolution committee. However no evidence of any law breached was adduced

The 2nd Respondent also submitted that the application is incompetent as Order 53 of the Civil Procedure Rules was not complied within that the applicant ought to have obtained leave and filed a substantive motion within 21 days and no leave was ever sought for extension of time.

9. Having considered the pleadings and submissions by the parties I am of the considered view that the issues for determination are;

1. Whether there was compliance with Order 53 of the Civil Procedure Rules.
2. Whether this matter is in the realm of electoral law and
3. Whether the nomination of 2nd Respondent and whether the said was proper or not can be canvased in a judicial review application.

10. **Order 53 Rule 1** provides that the application for mandamus, prohibition or certiorari shall be made unless there has been leave, **Rule 2** requires that an application for leave will be accompanied by a statement setting out the description of the applicant, relief sought and the grounds on which it is sought and by affidavits verifying the facts relied upon.

Order 53 (3) (1) further states that upon a party being granted leave the party shall file a substantive Notice of Motion to the High court within 21 days.

11. As indicated earlier the only pleading by the applicant is a notice of motion dated 5.9.2013. Clearly therefore the requirements of **Order 53** as set above were not met. The Ex-parte applicants did not commence this case by seeking leave. The Notice of motion directly sought for the relief of certiorari and mandamus. No statements accompanied the Notice of Motion nor verifying affidavits.

12. The other next issue for consideration is whether the issues raised in this matter are properly before court.

The gist of this case is the decision of the 1st Respondent to use the 1st list sent on the 1st Ex-parte applicant giving the name of the 2nd Respondent as the nominee of the 1st Ex-parte applicant and the gazettment of the notice following the dismissal of the Ex-parte applicants complaint by the Nominal Dispute Resolution Committee.

The Respondents in their responses argued that this is not the right forum as there is a law governing aggrievements emanating from the electoral process. As the Ex-parte applicants sought for the order of

certiorari to quash the decision of the 1st respondent to gazette the name of the 2nd Respondent, meaning that this court they wanted to quash the decision of the Dispute Resolution Committee.

13. **In Municipal Council of Mombasa vs. Republic and UmoJa Consultants Ltd. Civil Appeal No. 185 of 2001** the Court of Appeal stated

“Judicial review is concerned with decision 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 person affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters..... The court should not act as a Court of Appeal over the decider which would involve giving into the merits of the decision itself- such as whether there was or there was not sufficient evidence to support the decision.”

14. From the above authority the Ex-parte applicants application is clearly misplaced as this court cannot in this forum interrogate the merit or otherwise of the decision of the Nomination Dispute Resolution Committee. The Ex-parte applicant ought to have appealed against the decision as their complaint is not in any way on the process.

15. For reasons enumerated above this application must fail with costs to the Respondents.

Dated at Bungoma this 28th day of July, 2016.

ALI-ARONI

JUDGE.