



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
JUDICIAL REVIEW NO. 29 OF 2013

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND
MANDAMUS**

AND

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

AND

**IN THE MATTER OF KENYA GAZETTE NOTICE NO. 9794, SCHEDULE 12, DATED
17/07/2013**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....RESPONDENT

AND

NGECHU MOSES GICHUKI.....INTERESTED PARTY

EX PARTE SALOME KIRITO MUTUA

R U L I N G

1. The ex parte Applicant through a Notice of Motion dated 16th October 2013 brought pursuant to order 53 rule 3(I) of Civil Procedure Rules, 2010 and section 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya sought the following orders:
 1. *That an order of certiorari be issued calling into this court and quashing Gazette Notice No. 9794, Schedule 12, dated 17/07/2013, published by the respondent on 17/07/2013, only in relation to the gazettelement of the interested party, NGECHU MOSES GICHUKI, as a nominee by The National Alliance Party, in the category of Special Seats for the County Assembly*

Ward, within Meru County.

2. *That an order of mandamus be issued, compelling the respondent to forthwith include and gazette the name of the ex-parte applicant as the validly nominated representative for the National Alliance Party in the category of GENDER TOP-UP LIST for the Special Seats in respect of County Assembly Wards, to represent Tigania East and West sub-counties of Meru County.*
3. *That costs of this application and the ex-parte chamber summons for leave be paid to the ex-parte applicant by the respondent and the interested party jointly and severally.*

2. The application is premised on the matters set out in the statutory statements of facts and verifying affidavit sworn by Salome Kirito Mutua.
3. That before the Notice of Motion could proceed on to hearing the respondent through its Advocate Ms. Sisule Munyi Kilonzo Associates filed a Notice of preliminary Objection setting out 6 grounds of preliminary objection as follows:-

1. *The ex parte Applicant seeks inter alia, to have the decision by the Respondent gazetting the Interested Party as the marginalized nominee to the Meru County Assembly Ward quashed by way of Judicial Review.*
2. *As admitted by the ex parte Applicant, the Interested Party was gazetted as the marginalized nominee of the Meru County Assembly on 17th July, 2013 thereby making him a member of the Meru County Assembly Ward.*
3. *According to Section 75 (1A) of the Elections Act, 2011, a question as to membership to a County Assembly shall be heard and determined by a Resident Magistrate's Court designated by the Chief Justice.*
4. *Further, according to Section 75 (1A) of the Elections Act, 2011, a question as to membership to a County Assembly can only be the Resident Magistrate Court designated by the Chief Justice by way of an Election Petition and not by way of a Judicial Review.*
5. *It is trite law that where a statute establishes a dispute resolution procedure, then that procedure must be strictly followed in resolving the dispute.*
6. *The Application before this court is therefore bad in law for having contravened express statutory provisions and should be struck out with costs.*

4. On 20/11/2014 counsel agreed to dispose of the Notice of Motion by way of written submissions within 14 days from 20/11/2014 and highlight on their submissions. The Respondent filed submission of Preliminary Objection on 10th December, 2014 and when the matter came up on 16th December 2014 the Applicant had not filed respondents consequently the matter was set down for ruling on 26/02/2015 and Applicant given an opportunity to file their submissions before then.

5. Having stated the nature of the application before this court and Preliminary Objection raised it is now time for the court to consider the respondent's Preliminary Objection in light of various objections raised.

6. The issues for determination arising out of the Preliminary Objection can be summarized as follows:-

- a. *Whether the Applicants Notice of Motion Dated 16th October, 2013 is competent?*
- b. *Whether the prayers sought by the Applicant are amenable in an application for Judicial Review?*

7. The Respondent in its Preliminary Objection raised issues on the jurisdiction of this Honourable Court to entertain the ex-parte Applicant's application based on Judicial Review, on whether the application as it is properly before the court and secondly whether, the ex-parte applicant should have moved the court by way of Judicial Review.

The first issue that I shall consider is whether the applicant's application is competent or properly before this court.

8. The Applicant in this application is clear is challenging the matter in which the interested party was nominated to the position of Meru County Assembly Representative under the marginalized category. The ex-part Applicant in addition to that seeks to have the gazette notice gazetting the interested party quashed in these proceedings and if allowed would in essence result in loss of a Meru County Assembly seat by the Interested party.
9. In this Application there is no dispute that the respondent caused the interested party to be gazetted on the 17th July 201 as duly nominated to the position of Meru County Assembly Representative representing the marginalized.
10. The Respondent's submission is that by the virtue of such gazettment, the interested party became a member of Meru County Assembly, and can only be removed by way of an election petition. In support of that proportion the Respondent relied on the case of:-

NATIONAL ALLIANCE PARTY & ANOTHER VERSUS INDEPENDENT ELECTROL AND BOUNDARIES COMMISSION (2013) EKLK, PETITION NO. 175 OF 2013 where it was held:-

“An order quashing the gazette notice will result into the loss of seats of persons already members of County Assemblies. Flowing from the fact that they are already members as such, flawed or otherwise the Appellants can only, as a matter of law, 'regain' their claim to those seats if those members whose election they challenge lose their seats. This must be done only in the manner in which the court is permitted to intervene and that manner is through an election petition.”

11. The Respondent further submitted an election of a member of County Assembly cannot be challenged by way of Judicial Review but by an Election Petition referring this court to section 75 (1A) of the Elections Act 2011 which provides:-

“A question as to validity of a County Assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.”

12. Having considered the authorities relied upon by the Respondent and in the absence of any by the exparte applicant and there being no dispute to the fact that the interested party is a member of Meru County Assembly by virtue of his gazettment I agree with the respondent that the mode that the Applicant ought to have applied in challenging a duly gazetted member of a County Assembly is by way of an Election Petition and not by way of Judicial Review as is the case in the present application.

The second issue of consideration is whether the prayers sought by the Applicant are amenable in an application for Judicial Review?

13. In his application the ex-parte Applicant as stated earlier on is attempting to challenge an election of a member of County Assembly which can only be done by way of an Election Petition. It is therefore clear that the applicant should have approached court by way of an Election Petition but not by way of Judicial Review.
14. The Respondent submitted that where a statute has established a dispute resolution procedure, then that procedure must be strictly followed in resolving the dispute. In support of that proposition the respondent refers to case of:-

SPEAKER OF THE NATIONAL ASSEMBLY VERSUS KARUME (1992) which was quashed formerly by Majanja Judge in the case of FRANCIS GITARU PERSIMEI AND 2 OTHERS VERSUS NATIONAL ALLIANCE PARTY & 4 OTHERS (2012) EKLK that:-

“where a dispute procedure is provided for in statue, and where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or statute, that provision ought to be strictly followed”.

The same principle was emphasized by Hon. Majanja Judge in the **CASE OF BERNARD SAMUEL KASINGA VERSUS THE ATTORNEY GENERAL & 7 OTHERS PETITION 402 of 2012** where the judge stated:-

“The petitioner’s case is largely a complaint against the manner in which the committee runs its affairs and in view of the statutory scheme, it is most appropriate that the mechanisms established by the legislature be allowed to work as contemplated. This is the principle enunciated in a long line of cases; the Speaker of the National Assembly versus the Hon James Njenga Karume, Civil Application No. 92 of 1992 (unreported), Kipkalya Kipromo Kones versus Republic and Another ex-parte Kimani Wanyoike and 4 others, (2008) 3 KLR (EP) 291, Wanyoike versus Electoral Commission of Kenya (No. 2) (2008) 2 KLR (EP) 43.

15. I had earlier on reproduced section 75(1A) of the Elections Act 2011 which specifically states the statutory forum with the jurisdiction to hear Election Petition in respect of matters relating to members of the County Assembly to be Resident Magistrate’s Court as designated by Chief Justice. In view thereof this court does not have jurisdiction to entertain an Election Petition or question as to the validity of the election of a member of County Assembly even one that is erroneously clothed as a Judicial Review Matter.

16. The court is very much alive to the fact that the issue of jurisdiction is a substantial question and not a mere procedural technicality. This position was taken by Supreme Court of Kenya in the case of **SAMUEL KAMAU MACHARIA AND ANOTHER VERSUS KENYA COMMERCIAL BANK AND 2 OTHERS (2012) EKLR** where the court agreed that:-

“ We agree with Counsel for the first and second respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in the matter of Interim Independent Electoral Commission(Applicant), Constitutional Application Number, 2 of 2011. Where the constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the constitution. Where the Constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

17. In view of the foregoing I find that the ex-parte Applicant should have challenged the validity of the nomination of the interested party by way of an Election Petition before Resident Magistrate’s Court and not through the present application by Judicial Review. The ex-parte Applicant moved to the wrong court through wrong procedure. I find this court lacks requisite jurisdiction to entertain the application. The application is misconceived, bad in law for having contravened express statutory provisions and is otherwise an abuse of the court process.

18. The upshot is that the Application dated 18th October, 2012 is incompetent and prayers sought are not amenable in an application for Judicial Review . The Preliminary Objection is succeeded with costs to the Respondent against the ex-parte Applicant.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY FEBRUARY, 2015

J. A. MAKAU

JUDGE

Delivered in open court in presence of:-

1. Mr. C. Mbaabu for ex-parte applicant

2. Mr. Kiget for Respondent

3. No appearance for Interested Party

4. CC Penina/Mwenda

J. A. MAKAU

JUDGE