



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 80 OF 2015

**IN THE MATTER OF AN APPLICATION BY THE FEDERAL PARTY OF KENYA
FOR ORDERS OF MANDAMUS**

AND

IN THE MATTER OF REGISTRAR OF POLITICAL PARTIES

REPUBLIC.....APPLICANT

VERSUS

REGISTRAR OF POLITICAL PARTIES.....RESPONDENT

EX PARTE: FEDERAL PARTY OF KENYA

JUDGEMENT

Introduction

1. By a Notice of Motion dated 20th March, 2015, the *ex parte* applicant herein, **Federal Party of Kenya**, (hereinafter referred to as “the Party”) seeks the following orders:

1. That an order of Mandamus compelling the Registrar of Political Parties to effect changes in the Applicants record in her custody as per the Applicants NDC meeting of 3rd August 2014.

2. Costs.

Applicant’s Case

2. According to the applicant, on 30th September 2014 the Applicants filed an appeal against the decision by the Registrar of Political Parties, the Respondent herein (hereinafter referred to as “the Registrar”) to refer the complaints by and between the Party and a faction lead by the **Hon Peter Safari Shehe**, the interested party herein, to the Political Party Dispute Tribunal (hereinafter referred to as “the Tribunal”) and the Tribunal made delivered its judgment on 22nd December 2014 in which it directed the Registrar to make a decision with regards to the matter before her.

3. The appeal, according to the Party arose from the Party's NDC meeting held on 3rd August 2014 seeking the Registrar to effect the changes to the Party's records in the custody of the Registrar as duly ratified by the Party's NDC which meeting related to gross violation of the party constituted by a fiction led by the interested party.

4. According the applicant, section 20(1) of the **Political Parties Act** (hereinafter referred to as "the Act") gives powers to amend its records viz; Constitution, rules and regulations, title, name or address of any party official or name, symbol, slogan and colour and that under subsection 2 and 3 thereof, the registrar cannot override such a political party's decision. On 23rd May 2024, the Party's National Executive Council NEC resolved to form a Disciplinary Committee in line with its constitution to probe the allegation of gross violation of the party constitution by Interested party and his accomplice and duly invited the Interested party to answer the allegations levelled against. However the Interested party refused and or failed to honour the summons and the committee members voted to proceed with the hearing of the complaint in his absence and after duly considering the evidence against the interested party the committee found that he was in gross violation of the Party's constitution and thereby recommended his expulsion. On 3rd August, 2014 the Party's highest decision making organ, the National Delegates Conference (NDC) meeting at St. Anna Guest House in Kisumu ratified the recommendations of the Disciplinary Committee to wit the expulsion of the Interested party as permitted by section 1(1) of the Act, where member is in violation of the party constitution and after such member has been afforded a fair opportunity to be heard in accordance with the internal dispute mechanisms as provided in the constitution of the party.

5. It was contended that on 4th August 2014 through its secretary general, the Party duly informed the Registrar of the decision by the Party's NDC meeting of 3rd August 2014 with a view of the Registrar updating the Party's records in her custody as it was obligated to do. To the Party, all its decisions were arrived at procedurally and there has never been issue of lack of quorum raise for any of the Party's meetings. However, the Registrar has refused, failed and or abdicated from making a decision with regards to the Party's NDC meeting of 3rd August, 2014 which failure is *ultra-vires* the Political Parties Act, an error of law and abuse of power and is against the principle of legitimate expectations.

6. It was further disclosed that on the 2nd August 2015, a group led by the interested party held at NEC meeting at the Bonds Hotel attended by three bona fide members of the Party's NEC officials and other non-party officials and purportedly suspended the Party's Chairman and Secretary General. Prior to the purported meeting on 9th May 2015 the interested party conducting himself as the party leader of the Party wrote a letter to Kithi & Co. Advocates stating serious allegations against the Party and its senior officials despite having attended several of the Party's meetings without raising any queries as to the validity of the Applicants officials and despite being aware of well procedures in the Party's Constitution of seeking redress within the party structures.

7. According to the Party, the said meeting was illegal *ab initio* since it *inter alia* was convened unprocedurally and lacked the requisite quorum for a valid NEC meeting of the Party as per its constitution which is 50%+1 and was convened in outright violation of the Party's constitution.

8. According to the Party, under section 12(b) of the **Political Parties Act**, 2011 as read together with Article 260 of the Constitution of Kenya, 2010, a public officer shall not hold office in a political party and the said Act gives duly ratified party constitutions primary importance in the management of internal party affairs and violation thereof is met with defined punitive measures as per Section 7 of the Act. Under the Party's constitution, the responsibility of convening all meetings of the Party lies with the secretary general, or in absence thereof, the deputy secretary general, who is not aware of the meeting, held by the Interested party. Further, the Party's spokesperson is its secretary general and not the party leader and the interested party thus usurped and abrogated to himself duties that are not his in blatant disregard to the Party's constitution hence his actions are tantamount to a coup which is not part of the objectives of the Party and are utterly detrimental to the Party's political image and reputation.

9. According to the Party, it was this state of affairs that provoked the convention on 23rd May 2015 of a meeting of the Party's NEC at the Party's head office at Annex House, Limuru Road at which it was resolved to form a Disciplinary Committee in line with its Constitution to deliberate on alleged violation of the Party's constitution by the interested party who is a member of the Applicant's party.

10. It was reiterated that there is a binding obligation on a political party to notify the Registrar of all its duly effected changes and the Registrar is bound to gazette the changes within thirty days subject to public complaints. The Party has informed the Respondent through various letters which the Respondent acknowledged with a view to effect the changes ratified by the Party's NDC but the Respondent has either ignored, neglected and or effused to effect the said changes and is in such perpetual negligence, and or refusal.

11. It was further disclosed that on 6th September 2014 the Party's NEC meeting resolved to change their Bank details including but not signatories to their bank account minutes whereof were duly and promptly notified to the Respondents but the Respondent has up to date refused to effect. To the Party, the Respondent's inaction as stated in paragraph 25 herein has subjected the Party to serious financial strain since they cannot access party funds for the running of the party and or implementing its various activities. The Party asserted that since under Article 36 of the Constitution of Kenya, 2010 every person has a right to freedom of association, by declining to effect the Party's preferred changes, the Respondent is forcing the Party to associate with persons it does not want to associate with in gross violation of the Party's fundamental rights and freedoms. To the Party, the contention by the registrar that the Party's request is a dispute within Section 40 of the Act, is erroneous since she is the one supposed to effect changes within Section 20 of the Act. It was averred that the process taken by the Party in expelling the interested party is lawful both procedurally and substantially and the Respondent cannot therefore purport to whittle them away for expediency's sake.

12. The Party therefore moved the Tribunal vide Appeal No. 3 of 2014 which appeal was allowed directing that the Respondent do make a decision with respect to the Party's NDC meeting minutes whereof were well served to the Respondent. Despite service of the orders, the Respondent has either refused, neglected and or deliberately ignored the same hence the orders sought herein.

Respondent's Case

13. In opposition to the application, the Respondent contended that the office of Registrar of Political Parties is established and given its specific functions under Section 34 of the Act and she is cognizant of her duties under the Act in general and in regulation, monitoring and supervision of Political Parties.

14. The respondent disclosed that the political party herein in question has had long standing internal wrangles regarding the change of its party governing officials that has posed a challenge to the Respondent's office in implementing Section 20 of the Act which deals with change of political party officials. These internal wrangles were evidenced when the Respondent's office received two separate lists of officials simultaneously from two different groups within the party with a unison expectation that the Respondent invoke Section 20 of the Act and effect the changes in their respective preferred manner. The Respondent also received a complaint via a letter dated 18th June 2014 from other party officials who had been purportedly removed by the two lists submitted to the office, challenging the legality of the procedure. To this end, in accordance with the law, the Respondent through a letter dated 19th June 2014 advised the party and the affected party members to settle the emerging disputes through the laid down internal mechanisms to avert looming crisis in the party operations.

15. However, to a surprise turn of events and as an indication that the internal wrangles persisted the Respondent received letters from two different law firms urging and demanding the Respondent to change the officials in their respective manner.

16. In the respondent's view, according to Section 40 of the Act it is only the Tribunal that is mandated to hear and determine any dispute within political parties since the functions of Registrar of

Political Parties as outlined in Section 34 of the Act, do not include arbitration and settling of dispute within political parties and it is on this legal basis that the Respondent in line with its statutory mandate, via a letter dated 3rd September 2014 advised the parties through their lawyers to invoke Section 40 of the Act and file the disputes before the Political Parties Disputes Tribunal to enable the matter be resolved by the relevant institution within the Act.

17. It was asserted that the Party's narration in paragraphs 3 to 16 of the verifying affidavit demonstrate clearly the existence of the said disputes within the said political party which to date has not yet been resolved. It was averred that even after the Tribunal referred the matter back to the respondent vide the Tribunal's Ruling on the Appeal No. 3 of 2014, the Party through its advocate wrote to the Respondent a letter seeking a complete different and contrary demand from its original position with regard to the changes.

18. To the Respondent, the issues herein were fully conversed before the honourable Tribunal which gave its decision, a decision of which has not been challenged. It is on the basis the said decision, that the Respondent invited the two factions for a meeting to chart the way forward but the Party declined to attend.

19. To the respondent, since the matter was brought to its attention, in exercise of its mandate the office has handled the same in chronological events and the respective correspondences over the matter. In the respondent's view, seeking for orders of mandamus by the Party is ill advised for the following reasons:

- i. From the table of the chronological events, it is evident enough how the Respondent has been on top of the matter and has acted within the law, has not failed in any way to carry out the official duties regardless of the endless wrangles within the party and constant change of goal posts by the Party for the unknown reasons.
- ii. The orders of mandamus is a special order that can only be issued by the High Court to a body with administration authority if the body has omitted to perform its peremptory duty. The Respondent has not omitted to perform its duty save for the said obstacles.
- iii. The matter herein was fully heard by the Tribunal in The Appeal No. 3 of 2014 and the Tribunal gave its decision which is still effective and in force. Hearing of the said matter is *Res judicata* hence amounts to abuse of the court process.
- iv. Since a decision had been made by the Tribunal over the same issues herein, the Party can only move to the High Court through an Appeal as stipulated under Section 41(2) of the Political Parties Act and not through an original Miscellaneous Application.

Interested party's case

20. According to the interested party, the Party has filed this motion in total breach of the mandatory provisions of the Constitution of the Party more particularly Article 47 forbidding them from so doing unless and until certain conditions are met, the motion is thus premature and bad in law, founded on behalf truths and innuendos, as such is an abuse of this honourable court's process.

21. It was contended that the matters raised by the Party in the instant motion were also raised before the Tribunal and the Tribunal in its decision directed that the same goes back to the Respondent herein for a decision to be made either way and no specific time lines were set for achieving this. In his view, contrary to the Party's assertions, the Tribunal made it quite clear in its judgment that it was not its business to direct the Respondent on how to execute the functions of her office.

22. In his view, the Party being dissatisfied with the decision of the Tribunal has now camouflaged this "Appeal" as Judicial Review matter yet for all intents and purposes the same is *res judicata*. The interested party averred that whereas the Party has had long standing disputes, the

Respondent has all along tried to assist them harmoniously resolve the differences currently obtaining in the party but the Party has always sought to antagonize such efforts. It was his position that the Party and his faction cannot claim legitimacy in the party yet there has not been any validly called meeting of the party to elect them into office. To the contrary, the deponent was suspended from the party courtesy of the meeting of the party's National Executive Council meeting held on the 2nd August 2014 and the decision communicated to him vide a letter of even date hence the foregoing puts into question the Party's capacity to institute the instant suit. In his view, if there are any meetings he attended wherefrom decisions were reached, the same were constituted as per the party's constitution and so far none was challenged as stipulated in the constitution of the party.

23. According to the interested party, the issues raised in the instant motion do not meet the threshold for the grant of an order of mandamus since as admitted by the Party in the affidavits, there are clearly a number of unresolved issues affecting the membership of the party and an order compelling the Respondent to effect changes in the Party's records at the instance of fictitious would thus cause untold disharmony in the party and would be tantamount to condemning the other legitimate members of the party unheard. He averred that the Party has chosen to rely on the party's constitution only when it favours his antics and conveniently avoids making reference to it where it does not favour him. It is clear that all disputes involving members of the party or matters relating to party affairs and its management are resolved through arbitration. In deed the constitution relied upon by the Party forbids any member including the Party from filing any matter in court and that it is trite law that courts of law should be reluctant to interfere in the running and management of societies, parties and private members clubs unless of course there is breach of rules of Natural Justice or the said clubs, parties and or societies act outside their mandate.

Determinations

24. Having considered the application, the affidavits in support of the Motion and in opposition thereto, this is the view I form of the matter.

25. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...”

26. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil**

Appeal No. 185 of 2001 was held:

“Judicial review is concerned with the 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 persons 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 going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

27. In this case the Tribunal by its decision dated 22nd December, 2014 ordered the Respondent to make a decision on the applications filed before it and make a decision one way or the other. Had the Respondent proceeded in the manner directed, these proceedings would not have been necessary.

28. The Respondent now contends that when it invited the parties to appear before it the Party declined to do so. This in my view is with due respect a lame excuse for failing to comply with the decision of the Tribunal. The Respondent is aware of the action it ought to take in the event a party fails to appear before it and it cannot abdicate its role on the ground that a party has declined to appear before it.

29. Article 47(1) of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The inaction on the part of the respondent cannot be excused since under Article 169 of the Constitution, the Tribunal is a subordinate court hence its directions and orders must be complied with.

30. It is however clear that the decision whether or not to register any application by a political party is an exercise of discretion. However, public authorities are not entitled to abuse the discretion given to them since public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights donated to him or her by the Constitution or an Act Parliament in my view without proper reasons would amount to wrong exercise of discretion. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

31. Therefore there are circumstances under which the Court would be entitled to intervene even in the exercise of discretion. Whereas I appreciate the fact that the decision whether or not to register the resolutions or decisions of a political is an exercise of discretion this Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.**

32. In the instant case, the Party’s position is that the Respondent has not complied with the lawful order of the Court. As was held in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way. In my view the Respondent is under an obligation to consider an application made by the Party. However, this Court cannot by way of an order of *mandamus* compel the Respondent to act in accordance with the said application as that would amount to directing the Respondent to exercise its discretion in a specific manner. The

Court can only compel the Respondent to consider the same and make a decision one way or the other. However the Respondent is obliged under Article 47(2) to furnish the applicant with written reasons after considering the application where the decision is likely to adversely affect the applicant. Where no reasons are given and the decision arrived at adversely affects the applicants the Court would as well be entitled to conclude that there were no good reasons for exercising the discretion in the manner it was exercised. However, as was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd** (supra) the Court would be entitled to interfere where in making the decision the decision maker fails to take into account relevant matters or takes into account irrelevant matters.

33. In this case the Respondent has been lethargic in carrying out its statutory mandate for apparently no justifiable reason. It must be compelled to do so in order not to subject the Party to an indefinite anxiety.

Order

34. Accordingly the order which commends itself to me and which I hereby grant is an order of mandamus compelling the Respondent to consider the Party's application to effect changes in the Party's record in her custody as per the Party's NDC meeting of 3rd August 2014 and furnish the Party with reasons if its decision is adverse to the interest of the Party within 30 days from the date of service of this order. In default of such reasons, then the Respondent will be deemed not to have any reasons in which event an order of mandamus shall issue compelling the Respondents to register the said application.

35. The Party will have the costs of this application to be borne by the Respondent.

36. It is so ordered.

Dated at Nairobi this 26th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Agwara for Mr Ojienda for the Applicant

Mr Makolwal for the Respondent

Mr Ogutu for the interested party

Cc Patricia