



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. CIVIL NO. 406 OF 2014

**IN THE MATTER OF AN APPLICATION BY PETRONILA WERE FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT NO. 11 OF 2011

BETWEEN

REPUBLIC.....APPLICANT

AND

THE POLITICAL PARTIES DISPUTES

TRIBUNAL1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

HON. MUSALIA MUDAVADI.....1ST INTERESTED PARTY

HON. JEREMIAH KIONI.....2ND INTERESTED PARTY

KASSIM SAWA.....3RD INTERESTED PARTY

UNITED DEMOCRACY FORUM PARTY.....4TH INTERESTED PARTY

WYCLIFF OYONDI, CAROLYNE MUTHONI BOY &

PAULINE ACHIENG ABETTO.....5TH INTERESTED PARTIES

JUDGEMENT

Introduction

1. By a Notice of Motion dated 1st December, 2014, the ex parte applicant herein, **Petronila Were**, seeks the following orders:
 1. That by way of Judicial Review, this honorable court be pleased to issue an order of Certiorari to remove to this honourable court for purposes of being quashed, and to forthwith quash the 1st Respondents' decision and/or orders issued on 17th October 2014 in the Political Parties Disputes Tribunal Civil Case No. 10 of 2014 Wycliffe Oyondi Okeo & 2 Others versus Hon. Musalia Mudavadi & 3 Others affirming the appointment of Muma & Kanjama Advocates, and dismissing the appointment or notice of appointment filed by Kithi & Company Advocates to act for United Democratic Forum Party, the Interested Party therein or any other such related decision.
 2. That by way of Judicial Review, this honorable court be pleased to issue an order of Prohibition, prohibiting the 1st Respondent from hearing and/or determining Political Parties Disputes Civil Case No. 10 of 2014 Wycliffe Oyondi Okeo & 2 Others versus Hon. Musalia Mudavadi & 3 Others.
 3. Any other orders that this honorable court may deem fit and just to grant in the circumstance.
 4. That costs of this application be provided for.
2. On 14th October, 2015, the 1st and 2nd interested parties were granted leave to withdraw from these proceedings.

Ex Parte Applicant's Case

3. The applicant was supported by a verifying affidavit sworn by the applicant who deposed that she was the CEO-Secretary of the National Executive Committee and sits in the United Democratic Forum Party's (hereinafter referred to as "the Party") Governing Council, the Party's National Executive Council and the National Delegates Congress.
4. According to the Applicant, on or about the 16th October, 2014 suspended officials known as **Abraham Limo** and **Hassan Osman** filed affidavits purporting to give **Muma & Kanjama Advocates** (hereinafter referred to as the Firm) authority to act on behalf of the Party in **Political Parties Disputes Tribunal Civil Case No. 10 of 2014 - Wycliffe Oyondi Okeo & 2 Others versus Hon. Musalia Mudavadi & 3 Others** (hereinafter referred to as "the Cause"). However the issue of representation was in serious contest as the firm of **Kithi & Company Advocates** were tussling over the same and the Tribunal directed that the Registrar of Political Parties be summoned to present the Register of the Party.
5. On 17th October, 2014 an official presented a register of political parties on which the Tribunal relied to make a decision. However neither the applicants nor the Respondents in the said Cause were given an opportunity to respond to the same and the orders affirming the said Firm as the legal advocates for the Party openly favoured the claimants in the said Cause since the crux of the matter touches on their continued stay in office after being suspended by the party organs.
6. It was contended that the Tribunal proceeded to give final orders in dismissing the Notice of Appointment filed by **Kithi & Company Advocates** without hearing the Applicant which is against the Rules of Natural Justice.

7. On lodging a complaint with the Registrar of Political Parties on the open bias exhibited by the official who presented the information on behalf of the Registrar, the later respondent by stating *inter alia* that the officer who presented the information to the Tribunal did not take the Tribunal through the summary of the Party correspondences regarding the Party's National Executive Council and that he was not the one who deals with Party matters thus confirming that the official was not conversant with the Party matters and hence did not give sufficient information to enable the Tribunal make an informed and just decision.
8. It was further contended that the 1st Respondent unilaterally issued orders of affirming the firm of Muma & Kanjama Advocates as the legitimate advocates for the United Democratic Forum Party and that the said firm has been purportedly given authority to act for the party by suspended officials, **Abraham Limo & Hassan Osman**, and whose continued stay in office forms the crux of the cause as such their action is void *ab initio*.
9. It was reiterated that the Tribunal relied on an incomplete register presented by an official of the Registrar of Political Parties in arriving at the decision to dismiss the notice of appointment filed by Kiithi & Company Advocates, and affirming the appointment of Muma & Kanjama Advocates as legitimate advocates on record for the Interested Party. To the Applicant, the 1st Respondent relied on evidence presented by an official from the Registrar of Political Parties Office as had been suggested by the Claimants therein but neither the Applicant nor the Respondents in the suit were afforded a right to be heard, and present their position regarding the contested issue. This was in total breach of the express provision of Article 50(1) of the Constitution of Kenya which guarantees for a fair hearing.
10. It was submitted on behalf of the applicant that the Tribunal did not afford the firm of Kiithi & Company an opportunity to explain their position and demonstrate how they were appointed hence its order was illegal, unreasonable and amounted to denial of fair hearing. It was further submitted that the Tribunal blocked the parties from responding by way of cross-examination of the official from the Registrar of Political Parties who was summoned to bring records and testify as to who were the officials of the Party. It was disclosed that when the Tribunal made its decision on 17th October, 2014, Counsel holding brief for Mr Kiithi sought for time to enable Mr Kiithi appear but the Tribunal proceeded to make its order. To the applicant the Tribunal seemed to have a fixed mind-set on how they were going to determine the issue.
11. To the applicant where parties desire to be heard on an issue the Tribunal ought to afford them an opportunity of being heard before arriving at its decision since the right to be heard is constitutionally guaranteed in Article 50 of the Constitution and based on **Republic vs. City Council of Nairobi & 3 Others [2014] KLR** and **Onyango Oloo vs. Attorney General [1986-89] EA 45**, it was submitted that it is irrelevant whether the Tribunal would have arrived at the same decision after hearing the parties.
12. In the applicant's view the procedure that was adopted by the Tribunal's violated the provisions of section 41(4) of the ***Political Parties Act***, No. 11 of 2011 hence its members acted ultra vires the said provision. It was submitted based on **Republic vs. Public Procurement Administrative Review Board & 2 Others exp Suzan General Trading JLT [2014] eKLR** that it is incorrect to contend that where a Court or Tribunal raises a matter *suo moto*, the right to hear parties is thereby dispensed with.
13. According to the applicant, it is imperative that in any contentious matter parties have an absolute right to cross-examine any witness who testifies and gives evidence since the right to cross-examination in appropriate circumstances is a component of the right to a fair hearing. In support of this submission the applicant relied on **Bhandari vs. Gautama [1964] EA 6606 at 6609** and ***Halsbury's Laws of England*** 3rd Edn. Vol. 15 para 443. To the applicant the denial of the right to cross-examine the said officer amounted to breach of the rules of natural justice and that the evidence was inadmissible.

1st and 2nd Respondents' Case

14. In opposition to the application the 1st and 2nd Respondents filed the following grounds of opposition:

1. That the Notice of Motion application is defective, has no merit and is based on a misconception of the law, vexatious and an abuse of the court process.

2. That the matter is not within the purview of Judicial Review court neither does it meet the basic tenets of a Judicial Review application.

3. That the grant of orders of Certiorari & Prohibition is not efficacious in the circumstances.

4. That the application is an abuse of court process and lacks merit.

15. In the Respondent's view the matter herein is a challenge to the merits of the case rather than the process. It was submitted that the present application is an attempt to have a second hearing on the issue why the firm of Kiithi & Company ought to have been heard. It was contended that the affidavit filed by the interested party was clear that both parties were afforded an opportunity of being heard and the Respondent based its decision on the representations. To the Respondents any party not satisfied with the decision ought to have appealed against the decision since judicial review proceedings are special proceedings.

4th Interested Party's Case

16. According to the 4th interested party, the Party is a duly registered political party and a body corporate with perpetual succession and a common seal and is capable of suing and being sued in its own name as well as performing all such acts as appertain to a body corporate and that the National Executive Council authorised **Hassan Osman** and According to the **Abraham Limo** to represent the party and instructed advocates to act on their behalf hence they instructed the said Firm of **Muma & Kanjama** Advocates act for to represent the Party. According to the 4th interested party no other firm of advocates has been instructed to represent the Party.

17. According to the 4th interested party, the parties were duly afforded an opportunity of being heard and the Tribunal was justified in relying on the records from the Registrar of Political Parties. It was therefore contended that the issue of sufficiency of the evidence cannot be the subject of these judicial review proceedings.

18. It was therefore submitted that the Applicant failed to meet the threshold for the grant of judicial review orders.

19. It was submitted that all the parties were afforded an opportunity of being heard on the issue of representation after the Tribunal sought the opinion of the Registrar of Political Parties. After the parties were given the list the parties were again afforded an opportunity of being heard before the Tribunal made an informed decision thereon. To the 4th interested party, it is not true that the parties were never afforded an opportunity of being.

20. It was submitted that the matter which was pending before the Tribunal has been determined, these proceedings have been overtaken by the events.

5th Interested Parties' Case

21. According to the 5th interested party, on 18th December 2014, the 1st Respondent herein delivered its determination and hence prayer No. 2 in the Applicant's said application has been overtaken by events. From the said Judgment it is categorical clear that the firm of Messrs Kiithi & Company Advocates were on record for 2nd to 13th Interested Parties in the tribunal matter and the firm of Messrs Muma & Kanjama Advocates were on record for the 4th Interested Party thereto. It was disclosed that the 1st Respondent in the said decision held *inter alia*:

a. That the National Executive Council meeting for the 4th Interested Party (herein) held on 16th September was not properly convened and constituted and consequently the resolutions passed at the said meeting are illegal and of no legal effect.

- b. That the removal of the 4th Interested Party Chairman along with officials of the National Executive Committee was unlawful and irregular.
22. It was the 5th interested parties' case that the Applicant has never been the CEO- Secretary to the National Executive Committee as per the list that was submitted to the Political Parties Tribunal following an order on 17th October 2014 by the Registrar of Political parties as at 19th September 2014 that indicates the Applicant is/was Assistant Secretary General. It was contended that the appointment of the firm of Messrs Muma & Kanjama was done in accordance with the 4th Interested Party constitution by the validly elected chairman and the secretary General who have the mandate to appoint lawyers to act the party's behalf.
23. To the 5th interested parties, on 16th October 2014 when there arose a dispute as to who between the firms of Kiithi & Company Advocates and Muma & Kanjama Advocates in the tribunal, their representatives were given audience to submit on the same and upon perusal of the Registrar of Political Parties records, the honourable tribunal gave its directions the following day directing the latter firm as rightly being on record for the 4th Interested Party herein.
24. According to the 5th interested parties, the applicant has not met the requirements for the grant of judicial review orders. To the 5th interested party it has not been shown that the Tribunal's decision was irregular, unfair and contrary to the rules of natural justice. It was submitted that in order to resolve the issue the Tribunal asked the parties to make representations hence an opportunity was afforded to the parties to make representations. The Tribunal, it was submitted did not make a determination that the firm of Kiithi & Company Advocates was to cease acting in the matter.

Determinations

25. I have considered the positions adopted by the respective parties to this application.
26. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:
- “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 **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285 and ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
28. Therefore in these proceedings I will not embark on an investigations as to whether the Tribunal's decision was merited or not.
29. In my view the only issue before me is whether the Tribunal in arriving at its decision violated the rights of Kiithi & Company Advocates to be heard in the sense that the firm's version of the dispute was never heard and it was never afforded an opportunity to cross-examine the officer

from the Registrar of Political Parties' office and the consequences thereof.

30. I have perused the proceedings before the Tribunal and it is clear that after the official from the office of the Registrar of Political Parties appeared before the Tribunal and produced the list of the Party's officials according to their records, a decision was made thereafter. Section 41(4) of the Act provides:

The Tribunal shall apply the rules of evidence and procedure under the Evidence Act (Cap. 80) and the Civil Procedure Act (Cap. 21), with the necessary modifications, while ensuring that its proceedings do not give undue regard to procedural technicalities.

31. Section 4(4) of the ***Fair Administrative Action Act, 2015***, an Act of Parliament enacted pursuant to Article 47 of the Constitution and therefore applicable to the proceedings before the Tribunal provides that the administrator shall accord the person against whom administrative action is taken an opportunity to cross-examine persons who give adverse evidence against him. However section 147 of the ***Evidence Act***, Cap 80, Laws of Kenya provides:

A person called to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross examined unless and until he is called as a witness.

32. It is clear that the official from the Registrar's office was not called by any of the parties. Nor is it clear whether the Tribunal called him as a witness. On the other hand, the said official in my view was not called to give adverse evidence against the Applicant. The issue before the Tribunal which gave rise to these proceedings was whether the firm of Kiithi & Company Advocates were duly instructed to represent the Party and not who the officials of the party were.

33. Whereas I appreciate that where an issue is raised *suo moto*, the parties who desire to be heard on the issue ought to be heard thereon, in this case from the records on 16th October, 2014, the Tribunal directed that the matter be mentioned on 17th October, 2014 to enable the Registrar of Political Parties avail the relevant file/register of the Party to confirm the current officials of the party as at 19th September, 2014. The purpose of the mention was very clear that it was for the confirmation of the Party's officials. Whereas it was called a mention, it is not the term that matters but the purpose for which the matter was scheduled. Whereas **Mr Kanjama** addressed the Tribunal briefly on the issue learned counsel who appeared for the firm of Kiithi & Company Advocates, **Mr Mutua**, sought for time to enable **Mr Kiithi** address the issue. It may well be correct that the Tribunal ought to have adjourned the matter to enable **Mr Kiithi** appear before it. However, the decision not to do so cannot be subject of judicial review proceedings as opposed to an appeal.

34. It is therefore my view that the issue of the firm of Kiithi & Company Advocates not being afforded an opportunity to cross-examine the officer who availed the records, even assuming such right was available in the circumstances of the case, does not arise.

35. In the premises I am unable to agree with the Applicant that the Tribunal's course violated the rules of natural justice.

36. Apart from that, during the pendency of these proceedings the Tribunal proceeded to hear and determine Political Parties Disputes Tribunal Civil Case No. 10 of 2014 which is the subject of these proceedings. By its decision delivered on 18th December, 2014, the Tribunal in effect allowed the complaint that was before it and nullified the resolutions made at the meeting of the National Executive Council held on 16th September, 2014.

37. The decision whether or not to grant judicial review reliefs is no doubt exercise of discretion. As is stated in ***Halsbury's Laws of England 4th Edn. Vol. 1(1) para 12 page 270:***

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct,

acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’ [Emphasis added].

38. This position was reiterated by this Court in Jocinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR where it was held that:

“... it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. The would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance.”

39. In prayer 2 of the Motion the Applicant seeks orders prohibiting the Tribunal from hearing and/or determining Political Parties Disputes Civil Case No. 10 of 2014. As the said cause has already been determined that prayer is incapable of being granted.

40. The Applicant also seeks an order of certiorari to quash the 1st Respondents’ decision and/or orders issued on 17th October 2014 in the Political Parties Disputes Tribunal Civil Case No. 10 of 2014. In effect the applicant seeks an order quashing the decision permitting the firm of Muma & Kanjama advocates to appear for the Party in the said proceedings. As the proceedings before the Tribunal are no longer alive the grant of the said order would serve no useful practical purpose. It would simply be academic.

41. In effect these proceedings have been overtaken by the events.

42. In the premises this Motion is disallowed but with no order as to costs.

Dated at Nairobi this 16th day of November, 2015.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kabugu for Mr Kiithi for the Applicant.

Mr Odhiambo for the Respondent.

Mr Anyona for Mr Kanjama for the 4th interested party.

Mr Ndege for Mr Lakicha for the 5th interested party.

Cc Patricia.