



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
JUDICIAL REVIEW NO. 25 OF 2013

IN THE MATTER OF AN APPLICATION BY JALDESA TUKE DABELO TO APPLY OF ORDER
OF CERTIORARI

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 74 OF THE ELECTIONS ACT 2011

AND

IN THE MATTER OF COMPLAINT TO IEBC NO.97 ON ALLOCATION OF NOMINEES TO
COUNTY ASSEMBLIES

J U D G M E N T

The ex parte applicant through a notice of motion brought pursuant to Order 53 Rule 3 and 4 of the Civil Procedure Rules, Section 8 and 9 of the Law Reform Act(Cap.26) Laws of Kenya sought the following orders:-

1. ***That this honourable court do grant the ex-parte applicant an order of Judicial Review in the nature of certiorari to bring up and quash the decision of the Independent Electoral & Boundaries Commission dated 16th August, 2013 placing the 1st interested party Hassan Guyo Shano as the marginalized nominee No.2 Isiolo County.***
2. ***Costs of this application be borne by the respondent.***

The grounds in support of the application are found on the face of the Notice of Motion where they are not supposed to be but should be in accompanying statement of facts setting out the name and description of the applicant, the relief sought and the grounds on which it is sought. The 1st interested party filed a replying affidavit dated 9th October, 2013 whereas the respondent filed notice of preliminary objection dated 14th November, 2013. That before the ex-parte applicant's application could be heard and determined on merits the counsel agreed that the preliminary objection be heard and determined first.

The notice of preliminary objection is premised on the following grounds:-

1. *The ex parte applicant seeks to have the decision by the respondent gazetted the 1st interested party as the marginalized nominee to the Isiolo County Assembly quashed by way of a Judicial Review application.*
2. *As admitted by the ex parte applicant, the 1st interested party was gazetted as a nominee to the Isiolo County Assembly on 16th August, 2013 thereby becoming a member of the Isiolo County Assembly.*
3. *According to Section 75(1A) of the Election 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, a question as to membership to a County Assembly can only be presented to 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 Honourable court is therefore bad in law for having contravened express statutory provisions and should be struck out with costs.*

Mr. Kiget learned counsel appearing for the respondent submitted that the applicant seeks to have the gazetting of the interested party as a member of Isiolo County Assembly quashed after gazetting on 16th August, 2013 as a nominated member of Isiolo County Assembly. He referred to Kenya Gazette attached and marked "JTD". He submitted that by virtue of Section 75(1A) of the Elections Act a question as to validity of the election of a County Assembly shall be heard and determined by the Resident Magistrate's court designated by the Chief Justice being designated for that purpose. He further submitted that the question of validity of an election of a member of county should be presented to the Resident Magistrate's court designated by the Chief Justice by way of an election petition but not to the High Court by way of Judicial Review as in the present application.

Mr. Kiget learned advocate for the respondent reiterated that it is a trite law that where a statute establishes a dispute resolution procedure, then that procedure must be strictly followed in resolving the dispute. He was further of the view that the application before the court was bad in law for contravening express statutory provision of the statute and pleaded for the application to be struck out with costs. He referred the court to list of authorities attached in support of the preliminary point of law and further argued that indeed the authorities furnished to the court by the ex parte applicant supported his preliminary points of law. He concluded by arguing that what the applicant had in his supportive affidavit was a mere complaint on the procedure which was followed during the party nominations and the same would have been ventilated in the Resident Magistrate's court by way of filing a petition referring the case of **ROSE WAIRIMU KAMAU & 3 OTHERS V IEBC C.A 169 OF 2013(Nrb).**

Mr. Lekoona learned advocate for the 1st interested party associated himself with the submissions by learned counsel for the respondent Mr. Kiget, and urged the court to struck out the judicial review application with costs.

Mr. Omari learned advocate appearing for the ex parte applicant strenuously opposed the preliminary point of objection submitting as follows:- That the IEBC in dealing with the ex parte applicant's complaints was exercising quasi-judicial function when it dismissed the ex parte applicant's case being No.IEBC/DRC/PL/97/2013. That in dismissing the application he submitted the IEBC stated that the law on nomination was followed and Section 34(8) of the Election Act was not violated. He submitted that the applicant is proper in challenging the decision by way of Judicial Review as Section 8 and 9 of the Law Reform Act vests High Court with jurisdiction as first court to deal with Judicial Review application. That under Article 165 of the Constitution of Kenya, 2010 he submitted the High Court has unlimited jurisdiction to deal with all matters and has also supervisory jurisdiction over subordinate court and anybody exercising quasi-judicial functions. He further submitted that the IEBC under Section 74(1), (2) and (3) of the Election Act was exercising quasi-judicial function consequently the matter is properly before the High court, pointing out that if the decision of the IEBC was unreasonable, under Section 74 of the Election Act, the only remedy available to the ex parte applicant is under judicial review as he had

exhausted all available remedies under Article 88(4)(e) of the Constitution. He countered the preliminary objection by further submitting that the Section under which the preliminary objection is brought, that is to say, Section 75(1A), of the Election Act deals with election but not nominations. That the exparte applicant is challenging the nomination by IEBC and not the election as contained in Section 75(1A) of the Election Act. He prayed that the preliminary objection be dismissed with costs to the applicant. The learned counsel in support of this position referred the court to his list of authorities.

Mr. J. G. Gitonga learned Advocate for the 2nd interested party associated himself with the submissions by the advocate for the exparte applicant and prayed the preliminary objection to be dismissed with costs.

Mr. Kiget, learned counsel for the respondent in his response submitted that jurisprudence is source of law and it gives procedure to be followed in litigation. He reiterated that Judicial Review cannot be relied upon to oust the provisions of the Constitution stating that he has no quarrel on the functions which were exercised by the IEBC but if any party was dissatisfied with the decision made by IEBC the best place for ventilating the complaint would have been filing an election petition before Resident Magistrate's court.

I have carefully considered the preliminary objection, oral submissions by counsel, and authorities relied upon and opposing positions by the respective counsel in support of their different positions. The issue for consideration in this preliminary objection is whether the objection has merits and whether it ought to be allowed or dismissed.

In the instant application there is no dispute that IEBC heard the exparte applicant's complaints and found that the law on nomination was followed as well as Section 34(8) of the Election Act. There is further no dispute that the 1st interested party was gazetted as a member of Isiolo County Assembly on 16th August, 2013 by virtue of Article 177 (1) and(2) of the Constitution of Kenya which provides:-

177. (1) A county assembly consists of—

(2) The members contemplated in clause (1) (b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90

That upon gazettement of members of the county assembly they are deemed to be elected members of the county assemblies(**SEE ROSE WAIRIMU KAMAU & 3 OTHERS V IEBC C.A NO.169 OF 2013 WHERE THE COURT OF APPEAL** where the court of appeal stated as follows:-

“In reaching this conclusion, we are alive to the fact that once the nominees to parliament and to the county assemblies under Articles 97(1)(c) and 177(2) respectively have been gazetted, as the High Court correctly observed in the National Gender and Equality Commission V the IEBC & Others, Petition No.147 of 2013;(2013) eKLR they are deemed elected members of parliament and the County Assemblies and any challenge to their membership has to be by way of election petitions under Article 105 of the Constitution or Part VII of the Elections Act as the case may be.”

Section 75(1A) of the Election Act clearly states what action should be taken once a member of county assembly is deemed elected. It provides:-

75. (1A) A question as to the validity of election of a Member of County Assembly shall be heard and determined by the Resident Magistrate's court designated by the Chief Justice.”

In the case of **HCP 147/2013 THE NATIONAL GENDER AND EQUALITY COMMISSION(NGE&IEBC V ASSOCIATION OF THE PHYSICALLY DISABLED OF KENYA & 4 OTHERS** Hon. I. Lenaola, M. Ngugi and Majanja, JJ quoting from the case of **KONES V R & ANOTHER EX-PARTE KIMANI WA NYOIKE AND OTHERS(2008) 3KLR EP 29** stated that the Court of Appeal considered whether the nomination of Hon. Kones to parliament under the former Constitution could be challenged by way of proceedings of Judicial Review and the court held:-

“We think we have said enough to show that a seat in National Assembly can only be declared vacant under circumstances stated in the Constitution and through the process set out therein.

Yet in the case of the Speaker of the **NATIONAL ASSEMBLY IN THE HON. JAMES NJENGA KARUME CIVIL APPLICATION NO.NAI 92 OF 1962(NAI 40/92 V R)** unreported the court of appeal consisting of Kwach, Cocker and Muli,JJA stated as follows in their ruling dated 29th May, 1992:-

“in our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

I have considered that Section 75(1A) of the Election Act is couched in a mandatory manner and cannot be circumvented by an application of this nature. The 1st interested party having been gazetted is deemed as duly elected member of Isiolo County Assembly and his election can only be challenged as set out under Section 75(1A) of the Election Act and before the Resident Magistrate’s court designated by Chief Justice and not by way of Judicial Review which I find and hold cannot oust the Constitution or the Election Act.

In view of the foregoing the preliminary objection is merited and the same is upheld. The ex-parte applicant’s notice of motion dated 20th September, 2013 is struck out with costs to the respondent and 1st interested party.

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF MAY, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mr. Omari for the exparte applicant
2. Mr. Kiget for the respondent
3. Mr. Lekoona for the interested party
4. Mr. J. G. Gitonga for the 2nd interested party

J. A. MAKAU

JUDGE