



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**MISC. CIVIL APP. JR NO. 24 OF 2013**

**REPUBLIC**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (IEBC).....RESPONDENT**

**AND**

**MUTUA MICHAEL MULWA**

**FATUMA SALIM N'CHIZUMO.....INTERESTED PARTIES**

**EX PARTE**

**ROBERT K. NYENYE**

**REHEMA KALUMU MWANYAMAS.....APPLICANTS**

**JUDGMENT**

**BACKGROUND**

1. The Constitution of Kenya, 2010 has facilitated a mechanism to ensure that no one gender occupies more than two thirds of elective, nominative or appointive positions at any level. Article 90 of the Constitution provides for the proportional allocation of party seats to cater for the historical disadvantage of vulnerable members of society including women, the disabled, minorities and the youth. Accordingly, the constitution sees to it that no more than two-third membership of the County Assembly are of the same gender by offering Political Parties the opportunity to nominate eligible members for gender top-up. Political Parties are therefore required to prepare a list of nominees to represent the interests of the minorities and marginalized groups in the county assemblies including the youth and persons with disabilities. The Independent Electoral and Boundaries Commission (IEBC) allocates these positions, referred to as special seats, to political parties in proportion to the total number of seats won by candidates of the political party at the general election based on the submitted party lists.
2. On 22<sup>nd</sup> February 2013, The National Party (TNA) Party Secretary General, Onyango Oloo, submitted a list of proposed nominees for the special seats (in order of priority) to the Respondent, IEBC, for allocation in accordance with the constitutional criteria. On this list, Fatuma S. N'chizumo – First Interested Party (Women/ Gender Top-Up), Mutua Michael Mulwa –

Second Interested Party (Youth) and Robert Nyenye – First Ex Parte Applicant (Category was left blank) were listed as the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respectively. The Second Ex Parte Applicant – Rehema Kalumu Mwayamas was not on the Party List forwarded by TNA to IEBC.

3. Following the outcome of the general elections, the IEBC published on 20<sup>th</sup> April 2013 the allocation of nominees to the county assembly special seats. On that list, with regard to the TNA Party, Kwale County, the First Ex Parte Applicant – Robert K. Nyenye was nominated to represent Marginalized Persons, while the Second Ex Parte Applicant – Rehema Kalumu Mwayamas was nominated for Gender Top – Up. The Notice publishing the list advised the public that the IEBC had constituted a Dispute Resolution Committee (the Committee) for purposes of settling disputes arising from the nomination to the special seats in respect of the county assemblies, and that any person aggrieved by the nomination may lodge a complaint with IEBC between 21<sup>st</sup> and 23<sup>rd</sup> April 2013. The notice indicated that the Committee would conduct its hearings on 24<sup>th</sup> and 25<sup>th</sup> April 2013. The Notice cited a constitutional reference, Petition No. 147 of 2013 which had been filed in the High Court at Nairobi challenging the manner in which the IEBC had allocated the special seats. The High Court in that matter on 15<sup>th</sup> April 2013 had directed the IEBC to put in place a mechanism to resolve any disputes emanating from the list in accordance with Article 88 (4)(e) of the Constitution, and to finalize the settlement of all disputes within seven days from the date of the publication of the party lists. It was therefore in compliance to this that the IEBC published the list of allocation of nominees on 20<sup>th</sup> April 2013 in The Standard Newspaper inviting complaints from the public.
4. This publication elicited written complaints from the Interested Parties both dated 21<sup>st</sup> April 2013. A list of all the complaints received was published by IEBC on 24<sup>th</sup> April 2013 in The Standard Newspaper including the two complaints by the Interested Parties. The publication included a notice that the published list would serve as service to all interested parties, and also that the complainants must before hearing, provide evidence of prior service on the respondent. The notice did not however, list by name the Respondents against whom the complaints were made (in this case the Ex Parte Applicants). The Committee gave a decision on the two complaints on or around 4<sup>th</sup> May 2014 replacing the Ex Parte Applicants with the Interested Parties and this amended list was published sometime thereafter on the IEBC website. The Ex Parte Applicants were prompted by this publication on the website to file the present Judicial Review Application on 10<sup>th</sup> May 2013 under Certificate of Urgency.

### **THE APPLICATION**

5. The Ex parte Applicants accuse the Committee of entering the decision/judgment of 4<sup>th</sup> May 2013 in disregard of the TNA Party List of Nominees wherein the Ex parte Applicants had been nominated to the Kwale County Assembly Special Seats and instead re-allocating the seats to the Interested Parties without affording the Ex Parte Applicants an opportunity to be heard. It is claimed that the Committee's decision, being prompted by the complaints made by the Interested Parties was reached at a hearing held in the absence of the Ex Parte Applicants who were not served.
6. The Ex Parte Applicants argue that they had been nominated by the TNA Party under Articles 90 and 177 of the Constitution of Kenya, 2010 to represent special interest groups within the Kwale County (Marginalized Groups and Gender Top Up, respectively). They were allocated one special seat each to the Kwale County Assembly vide IEBC Publication in the Standard Newspaper (RKN – 2: Page 22, Chamber Summons dated 9<sup>th</sup> May 2013) made on 20<sup>th</sup> April 2013 to represent Ukunda Ward and Gombato/Bongwe Ward, respectively, both of Msambweni Constituency of Kwale County Assembly. It is submitted that the announcement of 20<sup>th</sup> April 2013 had invited any complaints from the public, directing that Notice of the said complaints should be served on the Respondents as well. The Ex Parte Applicants therefore expected to be served with any complaint on their nomination and it is their contention that the Interested Parties lodged a complaint against

the allocation and appeared at the hearing of the complaint some time on 24<sup>th</sup>/ 25<sup>th</sup> April 2013 before the Committee without serving notice to the Ex Parte Applicants. Owing to the lack of service, the Ex Parte Applicants failed to attend the hearing of the Complaints. Regardless of their absence, the Committee proceeded to hear the complaint and rendered a decision in favor of the complainants on 4<sup>th</sup> May 2013. The Ex Parte Applicants state that they got wind of the decision through the Member of National Assembly, Kinango Constituency, Hon. Gonzi Rai. They later obtained a copy of the amended allocation list from the IEBC website and proceeded on 28<sup>th</sup> May 2013 to file the Notice of Motion application for Judicial Review dated 27<sup>th</sup> May 2013.

7. The Notice of Motion dated 27<sup>th</sup> May 2013 seeks orders of certiorari and Prohibition to quash and to restrain the IEBC from enforcing the decision of its Dispute Resolution Committee which replaced the names of the Ex Parte Applicants with those of the Interested Party in the TNA Party Nomination List in the following terms:

1. *PROHIBITION/ INJUNCTION directed to the Respondent and interested parties herein, restraining them or whoever acting on their behalf from proceeding to implement and/or enforce the judgment of the Respondent's Dispute Resolution Committee made on 4<sup>th</sup> May, 2013, in re-allocating the Special Seats reserved for TNA Party in Kwale County to the interested parties, which had been allocated to the Ex-parte applicants as confirmed vide the Respondent's announcement or gazettelement of 20<sup>th</sup> April 2013 pending the hearing and final determination of this matter.*

2. *CERTIORARI directed to the Respondent to bring to the High Court to be quashed the Respondent's Dispute Resolution Committee's Decision and/or Judgment made on 4<sup>th</sup> May, 2013, in re-allocating the Special Seats reserved for TNA Party in Kwale County to the interested parties, which had been allocated to the Ex-parte Applicants as confirmed vide the Respondent's announcement or gazettelement of 20<sup>th</sup> April 2013.*

3. *THAT costs of this application be provided for.*

8. The Ex Parte Applicants were granted leave to file the Judicial Review Application on 10<sup>th</sup> May 2013. This was to operate as a stay of all proceedings including gazettelement and swearing in of the Interested Parties as nominated county representatives to the Kwale County Assembly Special Seats.
9. On 30<sup>th</sup> May 2013, the Interested Parties filed a Notice of Motion under Certificate of Urgency seeking to have the order for leave to file judicial review proceedings as well as the conservatory orders vacated. The application was grounded on the fact that firstly, the Ex Parte Applicants herein had been duly notified of the Complaint Proceedings; secondly, the Ex parte applicants had not exhausted the IEBC complaint procedure prior to making the application in court; thirdly, the Ex parte applicants did not qualify to be nominated as they were not at the time, TNA party members; fourthly the 1<sup>st</sup> Ex Parte Applicant did not fall under the category for special seats and fifthly, that the Ex Parte Applicants were guilty of material non-disclosure.
10. The orders for stay obtained on 10<sup>th</sup> May 2013 were vacated on 4<sup>th</sup> June 2013 and the matter set down for hearing. The Ex Parte Applicant sought by application dated 25<sup>th</sup> July 2013 to have the stay orders reinstated by way of review. The court directed that the main application instead be argued wherein the issue of stay would be ultimately determined by an expedited hearing. It later emerged that the Respondent had on 17<sup>th</sup> July 2013 by Gazette Notice No. 9794 already gazetted all the special seat members for all the 47 county assemblies, including those of the Interested Parties.

## SUBMISSIONS

11. The Respondent, IEBC, submitted that the present application was premature and fatally defective. Under Article 88 (4) (e) Constitution and section 74 Elections Act, the Respondent is responsible for conducting or supervising referendum and elections to any elective body or office

established by the constitution, and specifically, for the settlement of electoral disputes including disputes relating to or arising from nomination, but excluding election petitions and disputes subsequent to declaration of election results. According to the Respondents, the commission has therefore, exclusive jurisdiction to hear and determine disputes relating to nominations prior to the declaration of results, which is marked by gazettelement. It was pointed out that Article 159 of the Constitution provides for the promotion of alternative forms of dispute resolution. The Respondent accused the Applicants of failing to exhaust the readily available alternative dispute resolution mechanism and undermining the jurisdiction of the Respondent. The Respondent contended that the court would be usurping the Respondent's role and function should it proceed to hear the dispute. The Respondents further argued that under Section 75 (1A) of the Elections Act, "A question as to the validity of a member of a county assembly shall be heard and determined by the Residents Magistrate's court designated by the Chief Justice." Therefore, upon gazettelement and swearing in, the Interested Parties became members of the Kwale County Assembly, whose membership could only be challenged by lodging an election petition, urging that they cannot now be removed from office by way of judicial review. Counsel cited the case of National Gender and Equality Commission v IEBC & 4 others, Petition No. 147 of 2013, where it was pronounced by a three judge bench of the High Court as follows:

*"We have anxiously considered the position of members of the senate and national assembly nominated under Articles 97(c), 98(1)(b), (c) and (d) of the Constitution. They were Gazetted on 20<sup>th</sup> March 2013 by Gazette Notice No. 3508. Upon such gazettelement they became members of the respective houses of Parliament. Under Article 105 of the Constitution, a question of determination of membership can only be determined by way of an election petition."*

12. The Respondent also pointed out that as the Second Ex Parte Applicant had - as indicated in the Respondent's Replying Affidavit - been erroneously included in the first published list since she was not on the original party list received from TNA. The Committee's decision to substitute her name with that of the Second Interested Party, whose name had duly been submitted by TNA, was therefore *intra vires*. As for the First Ex Parte Applicant, it was submitted that the Respondent after receiving party lists, was required to ensure that no more than two third of the membership of the County Assembly was of the same gender, and that there should be a number of members from marginalized groups including the youth and persons with disabilities. It was for this reason that during the hearing, the committee noted that the First Ex Parte Applicant did not come from the minority/ marginalized group of Kwale County, and that the First Interested Party is a Kamba which is a minority community in Kwale. The First Interested Party was also given priority because he was a youth, and for these reasons, the Committee found him to be a more appropriate candidate for nomination. Further, the reasons for the Committee's decisions were published on the Respondent's website, within the reach of the Ex Parte Applicants, and satisfying the administrative requirement to give reasons.

13. The Interested Parties submitted that the Respondent advertised on 15<sup>th</sup> and 16<sup>th</sup> May 2013, a revised (second) list of nominees and invited further complaints arising from the said list three days therefrom. This notice was repeated on 20<sup>th</sup> May 2013. The applicants therefore had ample opportunity to object to the nominations. The applicants, it was contended, rushed to court on 10<sup>th</sup> May 2013 prematurely before exhausting the dispute resolution mechanism that ended on 17<sup>th</sup> July, 2013 with the publication and gazettelement of the final list of nominees. In any event, it was submitted, the Respondent is by law at liberty to reject the Ex Parte Applicants for the following reasons set out in paragraph 39 of their submissions:

- i. *The applicants did not apply for nomination as required by rule 74(a) of the TNA nomination rules while the interested parties did as is approved by the receipt which are annexure FSN 16 and MMM2.*
- ii. *The applicants were not members of the TNA while the interested parties were as confirmed by the verification letters from the registrar of political parties marked as annexure FSN 15.*
- iii. *The 1<sup>st</sup> applicant Robert K. Nyeye was an employee of Kenya Ports Authority which is a*

- government parastatal making him a state officer and ineligible for nomination.
- iv. The 1<sup>st</sup> applicant's elective position is not indicated in the party lists.
  - v. The 1<sup>st</sup> applicant was not qualified to be nominated as he was not a woman, nor a person of disabilities or a youth.
  - vi. The 2<sup>nd</sup> applicant Rehema Kalumu Manyama's name was not in the original list send by TNA to the Respondent and the name was illegally sneaked into the subsequent list.

14. For the Ex Parte Applicants, it was submitted that the Dispute Resolution Committee does not have any Appellate powers under the Elections Act/ laws. In addition, it was pointed out that the decision of 4<sup>th</sup> May 2013 did not comment on a right to appeal or lodge further complaints. The subsequent publication dated 20<sup>th</sup> May 2013 was said to have been irrelevant and in any event issued after the commencement of this suit. It was further submitted that the swearing in of the Interested Parties was done after the filing of these proceedings and was therefore null and void, rendering Section 75(1A) of the Elections Act irrelevant. The applicants contended that the present issue was not an election dispute but a nomination dispute that arose after the elections and did not therefore require an election petition. The court was urged to examine the decision making process, as the issue at hand. In particular, the applicants were aggrieved by the failure to serve the complaint on the applicants whereas the complaint form clearly indicated that evidence of prior service was mandatory. The newspaper notices were discounted as being insufficient to qualify as service since the names of the applicants against whom the complaints were made were not indicated. It was therefore contended that by hearing the complaints without any proof that the applicants had received service was irregular. The court was urged to find that it is empowered to ensure that no public body and/or organ acts ultra vires its powers and violates the rights of any citizen in Kenya, therefore it would not be usurping the Respondent's powers. Reference was made to Judicial Review Misc Application No. 94 of 2012 in which a 5 judge bench of the High Court ruled that in law, there is no wrong without a remedy and that the court of law has powers to quash the decision of the IEBC which does not amount to usurping of its powers.

#### Issues

15. The issue for determination is therefore whether the court has through judicial review proceedings authority to determine the issue of validity nomination of members of county after the nominations have been duly gazetted.

#### DETERMINATION

16. Judicial Review concerns itself not with the merits of the decision in respect of which the application for judicial review is made, but rather with the decision making process itself. See **The Commissioner of Lands v. Kunste Ltd.**, CACA No 234 of 1995, and **Republic v. Communications Commission of Kenya ex parte East African Television Network Ltd.**, CACA No. 175 of 2000. See the Uganda High Court case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** This court has held before albeit in different circumstances, that the existence of a remedy of appeal is no bar for judicial review because judicial review is not concerned, as with the appeal, with the merits of the case but only with the legality of the process of determination of the case. See Mombasa HC Misc. Civil Application (JR) No. 58 of 2011, **Republic v. The Senior Resident Magistrate – Kwale and 3 Ors Ex Parte Said Ali Mwaleso.**
17. There is, however, an overriding principle that where the Constitution and or statute establishes a dispute resolution procedure, then that procedure must be used. This latter principle has been emphasized time and again in a plethora of cases, such as; **The Speaker of The National Assembly v The Hon James Njenga Karume**, Civil Application No 92 of 1992 (Unreported); **Kipkalya Kiprono Kones v Republic & Another ex-parte Kimani Wanyoike & 4 Others**, (2008) 3 KLR (EP) 291; and **Wanyoike vs Electoral Commission of Kenya** (No. 2) (2008) 2 KLR (EP) 43. **In the case of The Speaker Of The National Assembly Vs. The Hon. James Njenga Karume, Civil Application No. NAI 92 of 1992 [NAI 40/92 UR] (unreported) the court stated that,**

“...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.”

The Court concluded that, “The jurisprudence underlying these decisions is that the Constitution itself and the National Assembly and Presidential Elections Act deal with and set out in detail the procedure of challenging elections and nominations to the National Assembly. Those procedures ought to be followed and the judicial review process, which in Kenya is provided for in the Law Reform Act, Chapter 26 of the Laws of Kenya and in Order 53 of the Civil Procedure Rules cannot oust the provisions of the Constitution in particular.”

18. It is noteworthy that the reliefs sought herein have been overtaken by events. The complaints published on 24<sup>th</sup> April 2013 included a notice that it would constitute service to all interested parties. The reason behind this form of substituted service was put forth as the 7 day time-line for the conclusion of electoral disputes under the Elections Act. This first hearing of the committee was followed by subsequent sittings that culminated in the notices published in the newspapers on 15<sup>th</sup>, 16<sup>th</sup> and 20<sup>th</sup> May 2013 after this suit had been filed. The notice of 20<sup>th</sup> May 2013 specifically gave allowance for the ventilation of any further grievance, which they failed to make use of. Upon gazette of the Interested Parties, they became members of the County Assembly and their election and membership could only be challenged by way of an election petition. See the **National Gender and Equality Commission** case, *supra*.

19. The current situation is that the Interested Parties, having had no challenge on their nomination as published on 20<sup>th</sup> May 2013 were gazetted and are sitting members of the county assembly. The only legal recourse open to the Applicants would be through an election petition in accordance with the provisions of the Elections Act, and not in these judicial review proceedings. This court so held in the case of **R vs IEBC & Wilkister Kwamboka Onsando, ex parte Wilkister Kemunto Otochi**, Kisii HC Civil App JR No. 7 of 2013 adding that,

“...the challenge on the nomination of the interested party herein as a member of the Nyamira County Assembly should have been mounted by way of a petition pursuant to Article 87 (2) of the Constitution and in accordance with the Elections Act and the Rules made thereunder. The procedure by way of Judicial Review was not available to litigate election related matters whose special procedure has been determined as petition proceedings by the Constitution and the Election Act.”

20. Without jurisdiction, this court acts in vain and as was decided in the case of **Owners of the Motor Vessel Lillian “S” V Caltex Oil (KENYA) Ltd** (1989) KLR 1 at page 14, by the Court of Appeal: “Without jurisdiction a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings, pending other evidence. A court of law downs its tools in respect of the matter before it the moment, it holds the opinion that it is without jurisdiction.”

21. Accordingly, for the reasons set out above -

- i. The Notice of Motion dated 27<sup>th</sup> May 2013 for the judicial review orders of Prohibition/Injunction and Certiorari is hereby dismissed.
- ii. Costs to the Respondents and Interested Parties.

**Dated, Signed and Delivered this 31<sup>st</sup> day of July, 2014.**

**EDWARD M. MURIITHI**

**JUDGE**

**In the Presence of:**

Mr. Oloo for Mr Kenga for the Ex Parte Applicants

Mr. Adhoch for Mr. Iseme Kamau Advocates for the Respondent

Mr. Abubakar for the Interested Parties

Miss Moriasi - Court Assistant