



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Judicial Review 452 of 2012**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COMMISSION OF ADMINISTRATIVE JUSTICE.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**EX PARTE**

**JOHN NDIRANGU KARIUKI**

**JUDGEMENT**

**INTRODUCTION**

1. By a Notice of Motion dated 28<sup>th</sup> December 2012, the *ex parte* applicant herein, **John Ndirangu Kariuki**, seeks the following orders:

- 1) **An order of certiorari to remove into this Honourable Court and quash the recommendation made by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent on or about the 18<sup>th</sup> December 2012 to the effect that the applicant be disqualified from, barred from or disallowed to run for an elective public office.**
- 2) **An order of prohibition prohibiting the 2<sup>nd</sup> Respondent from acting on the recommendation of the 1<sup>st</sup> Respondent made on or about the 18<sup>th</sup> of December 2012 to the effect that the applicant be disqualified from, barred from or disallowed to run from any elective public office.**
- 3) **The cost of this application be provided for.**

**EX PARTE APPLICANT'S CASE**

4)The application is based on the Statutory Statement filed on 20<sup>th</sup> December 2012 and the verifying affidavit sworn by the *ex parte* applicant on 20<sup>th</sup> December 2012. The *ex parte* applicant's case as can be gleaned from the said documents is that the Chairperson of the 1<sup>st</sup> respondent on 18<sup>th</sup> December 2012 made a statement to the effect that the 1<sup>st</sup> respondent had recommended to the 2<sup>nd</sup> respondent that certain persons including the *ex parte* applicant be disqualified from running for elective public posts in the forthcoming general elections. It is his case that before the said recommendation, he was not afforded an opportunity to be heard and that the 1<sup>st</sup> respondent did not before making the said recommendation

supply him with any reasons or notice to that effect. According to the *ex parte* applicant that action flies in the face of sound administrative justice as it violates the principles of legality and natural justice. As there is real and present danger that the 2<sup>nd</sup> respondent may act on the recommendations of the 1<sup>st</sup> respondent to his detriment in the process of the ongoing nomination process. According to him the said recommendations are in breach of his legitimate expectations and are highly prejudicial of him. With leave of the Court the *ex parte* applicant on 16<sup>th</sup> January 2013 filed an affidavit exhibiting a copy of the letter dated 14<sup>th</sup> December 2012 in which according to him the 1<sup>st</sup> respondent recommended to the 2<sup>nd</sup> respondent that he be deemed ineligible to run for any elective office or to hold any public office. According to the said supplementary affidavit, he had also vide a Chamber Summons dated 20<sup>th</sup> December 2012 sought leave to appeal out of time against the said conviction.

### **RESPONDENTS' CASE**

5) In opposition to the application, **Otiende Amollo**, the Chairperson of the 1<sup>st</sup> respondent swore an affidavit on 11<sup>th</sup> January 2013 in which he deposed that the 1<sup>st</sup> respondent is a Constitutional Commission established by the Commission on Administrative Justice Act, 2011 mandated to promote constitutionalism and fair administrative action by public officers focusing on abuse of power, misbehaviour, improper conduct and unresponsive official conduct within the public sector complimentary to integrity issues under *inter alia* the Constitution and the Public Officers Ethics Act 2003. Pursuant to the foregoing the 1<sup>st</sup> respondent has come up with a register of persons who are not suitable to hold public office under Article 75(3) of the Constitution based on information obtained from the Ethics and Anti-corruption Commission, the Office of the Director of Public Prosecutions and the Chief Registrar of the Judiciary. From the information received the *ex parte* applicant was indicated as having been charged and convicted with the offence of abuse of public office and that no appeal was lodged against the said conviction. It is therefore deposed that the *ex parte* applicant is barred by Article 99(2)(g) of the Constitution and the Elections Act from holding any public office. Based on the said information, the 1<sup>st</sup> respondent wrote to the 2<sup>nd</sup> respondent forwarding the names of persons disqualified from holding office and reasons therefor. According to the deponent the letter to the 2<sup>nd</sup> respondent constitutes a recommendation and not a decision which is yet to be made by the 2<sup>nd</sup> respondent hence cannot form the subject of an order for certiorari. In his view, the 1<sup>st</sup> respondent only drew the 2<sup>nd</sup> respondent's attention to factual matters respecting the *ex parte* applicant's conviction and neither undertook any hearing nor sentencing hence the requirements of natural justice are inapplicable. Without a decision and/or proceedings capable of being quashed and as the *ex parte* applicant has neither lodged a copy of the decision sought to be quashed nor accounted for the failure to do so coupled with prematurity of the application, conviction of the applicant and his ineligibility to hold any public office the application is bad in law and ought to be dismissed with costs.

6) On the part of the 2<sup>nd</sup> respondent, **Mohamud Jabane**, it's Manager, Legal Services swore an affidavit on 14<sup>th</sup> January 2013 in which he deposed that the 2<sup>nd</sup> respondent is a Constitutional body established under the Constitution and is independent in the discharge of its functions and obligations and is not subject to direction or control of any person or authority. As part of its mandate the 2<sup>nd</sup> respondent is responsible for conducting and supervising elections to any elective body or office established by the Constitution and any other elections prescribed by legislation. According to him the criteria for qualification and disqualification for election as a Member of Parliament is provided for under the Constitution and the Elections Act which is the criteria the 2<sup>nd</sup> respondent shall apply in determining the qualification or disqualification of a candidate as a Member of Parliament a determination which the 2<sup>nd</sup> respondent is yet to make. According to him the decision under inquiry is not the 2<sup>nd</sup> respondent's and there is no evidence that the 2<sup>nd</sup> respondent has acted or intends to rely thereon in order to invite the supervisory jurisdiction of the Court. According to hi, in exercising its independent functions aforesaid, the 2<sup>nd</sup> respondent has not, shall not and has no intention of abdicating the said mandate any other body, person or Commission including the 1<sup>st</sup> respondent. In the deponent's view the prayers sought herein are based on speculation and conjecture in order to obtain orders aimed at mischievously restraining the 2<sup>nd</sup> respondent from exercising its constitutional and statutory mandate aforesaid, an act that would be

unconstitutional and a gross, unjustified and unlawful violation of the 2<sup>nd</sup> respondent's independence. It is therefore the deponent's contention that the application is frivolous, vexatious, ill conceived, gravely incompetent and amounts to abuse of the Court process and discloses no cause of action against the 2<sup>nd</sup> respondent.

### **SUBMISSIONS IN SUPPORT OF THE *EX PARTE* APPLICANT'S APPLICATION**

7) While reiterating the contents of the Motion, the Statement and the affidavits, the *ex parte* applicant submitted that the existing jurisprudence on the subject of natural justice demands that no party should be condemned unheard whenever a decision that is adverse or adversely affects a party is being made which duty is in-built in every statute vesting in any person/body exercising decision making powers. This is more so in the case of the 1<sup>st</sup> respondent – a superintendent of this duty. Having taken an issue with the right of, among others, the applicant to contest for an elective office, it is submitted that that was clearly a decision by the 1<sup>st</sup> respondent and whether or not it is ignored by the 2<sup>nd</sup> respondent is a different issue since the recommendation is a decision independent of any whether it is acted upon and is hence capable of being quashed if it fails the basic test of sound administrative action. Since the *ex parte* applicant was not given a hearing and was not supplied with the reasons for the decision, it is submitted that the decision ought to be quashed. Since it is a decision upon which the 2<sup>nd</sup> respondent is asked to act, there is danger that it might be acted upon. Contrary to the contention that the *ex parte* applicant seeks to stop the 2<sup>nd</sup> respondent from exercising its constitutional mandate, it is the applicant's position that it only seeks to prohibit the 2<sup>nd</sup> respondent from making such decision based on the impugned decision of the 1<sup>st</sup> respondent which will be a wrong decision. In support of the submissions the *ex parte* applicant relies on **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR, Republic vs. Judicial Commission of Inquiry into The Goldenberg Affair, Ex Parte George Saitoti [2007] 2 EA 392; [2006] 2 KLR 400, David Onyango Oloo Vs. Attorney General Civil Appeal No. 152 of 1986 [1986] KLR 711, and Charles Orinda Dullo vs. Kenya Railways Corporation.**

### **1<sup>ST</sup> RESPONDENT'S SUBMISSIONS**

8) On the part of the 1<sup>st</sup> respondent, it is submitted that on the basis of its Constitutional and legislative functions, the 1<sup>st</sup> respondent is empowered to investigate complaints of abuse of office within the public sector and take appropriate remedial action. It is further submitted that whereas the applicant makes reference to recommendations made on or about 18<sup>th</sup> December 2012 against the *ex parte* applicant, no such recommendation exists. It is however submitted that what the 1<sup>st</sup> respondent did vide the letter dated 14<sup>th</sup> December was to recommend to the 2<sup>nd</sup> respondent the matter at hand which recommendation based on ***Black's Law Dictionary 6<sup>th</sup> Edn*** and ***Concise Oxford English Dictionary*** was not a decision. It is further submitted that the 1<sup>st</sup> respondent in drafting the said letter was exercising its statutory duty or obligation hence the applicant cannot challenge that exercise especially when the 1<sup>st</sup> respondent duly satisfied itself and performed its duty before forwarding the said names. In the 1<sup>st</sup> respondent's view, it is like a conveyor belt and has to ensure that the process moves to the next authority. By failing to disclose to court that he was convicted and sentenced, it is submitted that the applicant has come to court with unclean hands. It is the 1<sup>st</sup> respondent's case that the recommendation was made on the basis of an accurate and verified report obtained from concerned authorities in consonance with the 1<sup>st</sup> respondent's statutory mandate and obligations. From the information received and gathered by the 1<sup>st</sup> respondent it is contended that the applicant is in any event ineligible to run for elective office or to hold any other Public Office hence is disqualified from being elected a Member of Parliament. In support of its submissions the 1<sup>st</sup> respondent relies on **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others** (supra), **Paul Kiplagat Birgen & 25 Others vs. Interim Independent Electoral Commission & 2 Others Nbi High Court Miscellaneous Application 156 of 2011.**

### **2<sup>ND</sup> RESPONDENT'S SUBMISSIONS**

9) On behalf of the 2<sup>nd</sup> respondent, it is submitted, while reiterating the contents of the replying affidavit filed on its behalf that the application is based on recommendation made by the 1<sup>st</sup> respondent and not any decision made by the respondent hence what is sought is a decision based purely on a recommendation made by the 2<sup>nd</sup> respondent and on conjecture that the 2<sup>nd</sup> respondent will rely thereon without evidence that the 2<sup>nd</sup> respondent intends to act thereon. It is reiterated that what the applicant seeks is to pre-empt the 2<sup>nd</sup> respondent's constitutional and statutory duty. It is submitted that the 2<sup>nd</sup> respondent has the jurisdiction and is the only statutory body specifically mandated both constitutionally and statutorily to independently discharge its functions more specifically to apply, in an independent manner, the criteria for the qualification or disqualification of election of Member of Parliament. Since the applicant's application is based on speculation, the same is mischievous and an irregular attempt to have the Court, unconstitutionally usurp the constitutional mandate of the 2<sup>nd</sup> Respondent and irregularly exercise it. To grant the orders would amount to directing the 2<sup>nd</sup> respondent on how to carry out its mandate for the purposes of achieving self-satisfaction. Since the decision complained of was not made by the 2<sup>nd</sup> respondent, it is further submitted that it would be inimical to public interest and public policy to intervene in the manner sought and the cases of **Kipkalya Kiprono Kones vs. Republic & Others Ex parte Kimani Wanyoike Civil Appeal No. 94 of 2005 [2006] 2 EA 158; [2006] 2 KLR 226** and **The Kenya National Examination Council and Republic, Ex parte Regina Ouru Civil Appeal No. 127 of 2009** are cited for this proposition. Since the 2<sup>nd</sup> respondent has not made any decision certiorari cannot be granted since certiorari can only quash a decision already made. Again prohibition does not lie since the decision making process is yet to be carried out and it is the 2<sup>nd</sup> respondent's view that the application ought to be dismissed.

### **DETERMINATIONS**

10) In order to understand the real issue in dispute herein it is important to recapitulate the grounds upon which the Motion is grounded. According to the statement which contains the grounds the Motion is based on the breach of the rules of natural justice and legitimate expectation. It is therefore not contended that the respondents are guilty of want of jurisdiction. I have found it necessary to clarify this issue due to the fact that a lot of energy has been expended by the parties in addressing the issue of want of jurisdiction hence it is important to focus the Court's attention to the real issue in dispute before the Court.

11) That what provoked these proceedings is a recommendation made by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent is not in doubt. This is made clear from the Motion itself where the applicant is clear in its mind that what is impugned is not a decision but a recommendation. The central issue that the Court is called upon to decide is therefore whether a recommendation as opposed to a decision or proceedings is capable of being quashed. It must be pointed out that a recommendation may take two forms. Where the Commission making the recommendation is acting judicially it must act in accordance with its mandate and if it arrives at a recommendation after an inquiry has been made in which the recommendation is final in nature that would amount to a determination for the purposes of judicial review. That was the position in **Republic vs. Attorney-General Ex parte Biwott [2002] 1 KLR 668, Republic vs. Judicial Commission of Inquiry into The Goldenberg Affair, Ex parte George Saitoti** (supra). However in **Njoya & 6 Others vs. Attorney General & Another [2004] 1 KLR 232** it was held that as regards the justiciability, recommendations or report of any other commission (whether established by an Act of Parliament or administratively) are not justiciable for it is a long standing principle of administrative law that only decisions impacting on the rights of individuals (and not recommendations) are amenable to judicial review if they do not confer or take away anyone's rights. Dealing with the issue **Warsame, J** (as he then was) in **Paul Kiplagat Birgen & 25 Others vs. Interim Independent Electoral Commission & 2 Others** (supra) expressed himself as follows:

**“It is clear that the letter dated 12<sup>th</sup> July 2011 was written by the 1<sup>st</sup> respondent in its statutory capacity. It is also clear the letter as rightly pointed out by the applicants was requesting or recommending the revocation of the nomination of the applicants and others not before court. .. It is therefore my decision that there is no decision capable of being challenged and which is amenable**

**to judicial review that was made by the 1<sup>st</sup> respondent against the applicants herein.”**

12) Similarly, it is not contended that the 1<sup>st</sup> respondent had no statutory duty to undertake what it did. The applicant’s contention is simply that it was undertaken in breach of the rules of natural justice. It is not disputed that the applicant was convicted and that by the time of the recommendation he had not lodged an appeal. In fact it was only after these proceedings were instituted that the applicant applied to appeal out of time. Based on the material on record I, am not satisfied that the recommendations of the 1<sup>st</sup> respondent amounted to a determination for the purposes of judicial review. They were simply recommendations and the 2<sup>nd</sup> respondent was not under any obligation to act upon them since the 2<sup>nd</sup> respondent is expected to undertake its Constitutional and statutory mandate independently and without any directions from any person. Without the 2<sup>nd</sup> respondent admitting them as part of the material upon which it would determine the *ex parte* applicant’s eligibility, the 1<sup>st</sup> respondent’s views remain just that – recommendations.

13) However, it is expected that when it decides to make determinations which are likely to adversely affect the rights of a person the rules of natural justice would be adhered to. However at the time these proceedings were instituted there is no evidence that the 2<sup>nd</sup> respondent had commenced the process of determining the eligibility of the applicant to hold public office and that there was imminent danger that the *ex parte* applicant was going to be denied the opportunity of being heard before a determination was made. Courts do not issue orders at large in judicial review applications. Whereas such orders may be granted in declaratory suits, the Court is not expected to go to a fishing expedition in an application for judicial review unless it is shown that the applicant’s rights and fair hearing have been or are in imminent danger of being contravened.

14) At the time of the institution of these proceedings there was no such threat hence the occasion had not arisen for the invocation of the Court’s supervisory jurisdiction.

## **ORDER**

15) In the result I find no merits in the Notice of Motion dated 28<sup>th</sup> December 2012 which I hereby dismiss with costs to the respondents.

**Dated at Nairobi this day 28<sup>th</sup> of January 2013**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

*Mr Wasia for the applicant*

*Ms Nungo for the 1<sup>st</sup> respondent*

*Mr Murugu for the 2<sup>nd</sup> respondent*