



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 8 of 2013

**IN THE MATTER OF: IN THE MATTER OF AN APPLICATION BY IBRAHIM HUSSEIN
WASHENGA**

FOR LEAVE TO APPLY FOR ORDERS CERTIORARI MANDAMUS & PROHIBITION 2010

AND

**IN THE MATTER OF: THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION ACT**

BETWEEN

REPUBLIC

VERSUS

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST
RESPONDENT**

**THE SECRETARY GENERAL, THE NATIONAL ALLIANCE (TNA).....2ND
RESPONDENT**

**THE NATIONAL CHAIRMAN, THE NATIONAL ALLIANCE (TNA).....3RD
RESPONDENT**

SAID BAKARI MWAKAMA.....INTERESTED PARTY

EX-PARTE:

IBRAHIM HUSSEIN WASHENGA.....APPLICANT

RULING

(1) This is a ruling on an application for leave to commence judicial review proceedings to challenge the decision of the Independent Electoral and Boundaries Commission (IEBC) to recognize and admit the nomination certificate of the Applicant's competitor (the Interested Party) in respect to the Member of Parliament election for Jomvu Constituency and to compel the IEBC to admit the nomination certificate of the Applicant for the forth-coming General Election of March 4, 2013.

(2) The Applicant filed the application for leave by way of a Chamber Summons dated 31st January 2013 and filed in court on 5th February 2013 and supported by the “**verifying affidavit**” of the Applicant sworn on the 5th February 2013. Ahead of the Chamber Summons was a Notice to the Registrar dated and filed the 4th February 2013 but no statement was filed pursuant to Order 53 Rule I of the Civil Procedure Rules. On 6th February 2013 the court directed that the application be served and granted leave to file a further affidavit to demonstrate urgency, which he did on the 8th February 2013.

Whether leave to file Judicial Review will be granted.

(3) The Applicant alleges that following nomination elections for his The National Alliance Party which “**were marred by massive voter bribery and rigging**” and at which the Interested Party, the Applicant and another aspirant participated, the Applicant was declared the party's nominated candidate and issued with a interim certificate of nomination and later a certificate of nomination on 18th January 2013. Events taking place thereafter involving the Interested Party, the IEBC and his own party, The National Alliance (TNA) gave rise to his grievance the subject of these proceedings.

(4) The Applicant's case is set out in paragraphs 14-20 of his verifying affidavit of 5th February 2013 as follows:

14. ***THAT on the 30th of January 2013, when I presented my nomination papers to the 1st Respondent, I was shocked when I was told that the Interested Party had also visited their offices claiming to have a nomination certificate for the National Alliance, although for some reasons they did not admit it.***

15. ***THAT the Interested Party without my knowledge lodged a complaint before the 1st Respondent and without me being given a hearing, the Interested Party was cleared to run on the party ticket. (Annexed hereto and marked “IH 6” is a copy of the said decision.)***

16. ***THAT the party duly lodged a complaint with the 1st Respondent declaring that I was the duly nominated candidate. (Annexed hereto and marked “IH 7” is a copy of the said letter.)***

17. ***THAT I was told to discuss with the Interested Party and agree on who will be the candidate, yet I had valid papers, by virtue of being issued with a nomination certificate by my party which have never been revoked or challenged.***

18. ***THAT I know of my own knowledge that if the 1st Respondent does not admit my papers by close of business on the 1st February 2013, I will not be able to vie for the post of National Assembly.***

19. ***THAT the 1st Respondent is acting unreasonably and illegally by recognizing the Interested Party yet I have valid papers which have never been challenged to date, and the Interested Party has not presented anything from the party to warrant that decision.***

20. ***THAT the decision of the 1st Respondent is in breach of the rules of natural justice and the same is bound to cause me irreparable loss and damage as I have invested heavily to this cause.***

(5) The 1st Respondent filed a Notice of Preliminary Objection dated 11th February 2013 seeking the dismissal or striking out of the application on the grounds that:

(a) ***the application for leave to apply for orders for Judicial Review is fatally incompetent in that it does not comply with the mandatory provisions of Section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules;***

(b) ***this Honourable Court lacks the jurisdiction to entertain the Judicial Review Proceedings and are premature and an abuse of the court process on account of the provisions of Article 88 (4) of the Constitution of Kenya, Section 74 of the Elections Act (No 24 of 2011) and Regulation 99 of the Election (General) Regulations promulgated to L.N. 139 of 2012; and***

(c) ***entertaining the Ex-parte Applicants' application herein would be tantamount to an abuse of the principle of the separation of powers doctrine as the court would usurp the powers of the tribunal vested with the dispute resolution process.***

(6) The application was argued inter partes pursuant to the proviso to Order 53 rule (1) (4) of the Civil Procedure Rules which permits inter partes hearing of “**ex parte**” application for leave where necessary. Counsel for the parties, Mr. Onjoro for the Applicant and Mr. Khagram for the 1st Respondent, made oral submissions on 13th February 2013 and ruling was reserved for 15th February 2013. There was no appearance for the 2nd and 3rd Respondents and the Interested Party although duly served.

(7) I have considered the submission by counsel and I find that three issues arise for determination in this application for leave to file judicial review proceedings, namely:

(a) ***Whether an Order 53 application is competent without a Statement filed as required by the provisions of Order 53 rule 1 (2) of the Civil Procedure Rules;***

(b) ***Whether the court has jurisdiction to deal with the application for judicial review based on matters of nomination of candidates whose resolution is conferred to another tribunal by virtue of Articles 88 of the Constitution and section 74 of the Elections Act and***

(c) ***Whether leave to file judicial review proceedings will be granted in the circumstances of the case.***

Whether Order 53 Application Competent without Statement.

(8) Counsel for the 1st Respondent submitted that the provisions of Order 53 Rule 1 (2) of the Civil Procedure Rules were mandatory and that the Statement is an integral part of the application for Judicial Review. The importance of the Statement, which sets out among other things the reliefs sought and the grounds on which it is sought, was underscored by reference to Order 53 rule 4 of the Civil Procedure Rules which requires that the Statement be served along with the Notice of Motion and that the hearing

proceeds on the basis only of the grounds set out in the Statement, save where other grounds are added with leave of the court. Counsel likened the Statement to a Complaint and submitted that its requirement is not a mere technicality which could be excused. Counsel relied on the decision of Makhanda J, (as he then was) in **Peter Gitahi Kamaitha v. Public Service Commission Nyeri HC Misc. Application No. 22 of 2009** in which a Statement which did not set out the reliefs and grounds on which they were sought was struck out with the court rejecting a plea to use the overriding objective principle under section 1A and 1B of the Civil Procedure Act to save the case.

(9) For the Applicant, it was contended that the default in filing the Statement could be excused under the Article 159 principle of the Constitution for the court to do justice without regard to technicality of procedure. Counsel contended that the decision of the court in **Peter Gitahi Kamaitha's case** was delivered on 25th January 2010 before the promulgation of the Constitution of Kenya 2010 whose provisions on substantial justice under Article 159 should therefore prevail. Counsel further contended that the Respondents suffered no prejudice as the applicants' case including the reliefs and grounds on which they were sought were set out in the application and the **"verifying affidavit"** filed in support of the application. Counsel contended that the matter was only at the stage of seeking leave and the Applicant would demonstrate clear merit of the case if granted leave to file the Notice of Motion.

(10) Although counsel for the 1st Defendant suggested that the requirement for a Statement was statutory under sections 8 and 9 of the Law Reform Act, my reading indicates the sections as only prescriptive of the procedure for the institution of the judicial review proceedings without expressly providing for the requirement of a Statement which is prescribed under the rules of civil procedure set out in Order 53. Section 9 (1) of the Law Reform Act, so far as material, provides:

"Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court -

(a) Prescribing the procedure and fees payable on documents filed or issued in cases where an order for mandamus, prohibition and certiorari is sought."

I agree with Counsel for the Applicant that in an appropriate case, the court may pursuant to the Article 159 permit the ex parte Applicant upon the grant of leave to file a Statement which has been omitted and to serve the same with Notice of Motion in accordance with Rules. I am satisfied that this is a proper case for the exercise of such discretion in view of the nature and circumstance of the subject matter of Parliamentary nominations.

Whether the court has jurisdiction in view of the provisions of Article 88 of the Constitution.

(11) Counsel for the 1st Respondent pointed to Article 88 (4) (e) of the Constitution and section 74 of the Elections Act (which is in similar terms to Article 88 (4) (e)) to demonstrate that it is the IEBC which is mandated to deal with any disputes relating to nomination of candidates for Parliamentary elections. Counsel relied on the decision of the High Court (Majanja, J) in **Michael Wachira Nderitu & 3 Others v. Mary Wambui Munene & 2 Others Nairobi Pet. No. 549 of 2012** that matters relating to nomination and qualification of candidates for Parliamentary elections are not matters for determination by the High Court.

(12) In reacting to this objection, counsel for the Applicant set up breach of the rule of natural justice requiring a fair hearing says:

"The 1st Respondent has raised a Preliminary Objection stating that the proceedings are premature and abuse of court process on account of Article 88 (4) of the Constitution and section 74 of the Elections Act. It is the Interested Party who was the aggrieved party and instead of appealing [under the party dispute resolution process] he rushed to the IEBC. The IEBC failed to invite the Applicant and the Interested Party has a duty to notify the Applicant of the proceedings so that the Applicant may be given a fair hearing. The Applicant only became aware of that there were proceedings before the IEBC when he presented his papers before the IEBC for nomination. The Rules of natural justice

have been breached as the Applicant was not given a fair hearing. Legal Notice No. 139 of 2012 of Election Regulations provide by Regulation 8 that once a complaint has been initiated, the party should notify the Commission and the adverse party in writing.”

(13) Article 88 (4) (e) of the Constitution, so far as material, provides that:

“The [IEBC] is responsible for conducting or supervising referendum and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for:

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to declaration of results.”

Section 74 (1) of the Elections Act is in the same terms as the Article 88 (4) (e) of the Constitution.

(14) I agree that the jurisdiction of settlement for electoral disputes including disputes relating or arising from nominations lie with the IEBC in terms of Article 88 of the Constitution. However, that jurisdiction does not, in my view, bar the court's supervisory jurisdiction under Article 165 (6) because the IEBC Committee which determine these disputes is a body subordinate to the High Court. I hold therefore that the Applicant's Chamber Summons for leave to file judicial review proceedings to challenge the decision of the IEBC for breach of the rules of natural justice is properly before the court.

(15) An important distinction to be made is that while the High Court may review the decision of the IEBC for breach of the principle of fair hearing, it cannot substitute its decision as to who is validly nominated; that remains the business of the IEBC; the court order would only effect the process of the decision making by the IEBC but the decision remains with the IEBC. This is consistent with the Judicial Review principle that Judicial Review concerns itself only with the process of decision making not with the merits of the decision.

(16) For the 1st Defendant objection was taken that the court has no jurisdiction to determine who runs on a party ticket and that therefore the application for mandamus to compel IEBC to accept a nomination certificate would be illegal. The counsel for the 1st Defendant also took issue regarding the validity of a newspaper cutting attached to the Applicants' further affidavit of 8th February 2013 with a view to demonstrating that the printing of ballot papers had not been completed and there was still time for the IEBC to accept the Applicant's certificate of nomination which he claimed had not been revoked. Counsel also pointed out that the decision of the IEBC was reached upon a consent involving the Applicant's party, The National Alliance, and that the schedule of the decision attached to the Applicant's verifying affidavit showed the complaint to be the same as one numbered 150 which the Applicant had not disclosed.

(17) Counsel for the Applicant emphasized the lack of provisions for appeal from a decision of the IEBC and contended that in the circumstances the Applicant, being aggrieved with the decision of the IEBC taken without giving him an opportunity to be heard, could only approach the court for review.

(18) As held in the Court of Appeal decision of **Meixner & Another v. A.G. (2005) 1 KLR 189**, the leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal of leave involves an exercise of judicial discretion and the test to be applied is whether the Applicant has an arguable case. An ex parte Applicant is also obliged to make full and frank disclosure of the case and where the Applicant conceals material facts, the court will refuse to deal with the merits of the case and discharge any order or remove any benefit that an ex parte Applicant would have received on a account of the concealment or non-disclosure of material facts. (**R. v. The Kensington General Commissioners for Purposes of Income Tax Ex parte Princes Edmund de Polgnac (1917) 1 KB 486**).

(19) Having considered the ex parte Applicant's case, I do not consider that the ex parte Applicant has demonstrated an arguable case because:

(a) The prayer for mandamus to compel the IEBC to admit his certificate of nomination is not legally available to the Applicant as the High Court would only determine the legality of the process and not the merit of the decision and it therefore cannot determine who of the two competing candidates was lawfully nominated that being the constitutional mandate of the IEBC, under Article 88 (4) (e).

(b) The prayers for certiorari and Prohibition against the IEBC relating the admission of the Interested Party as the duly nominated candidate are not supported by evidence apart for the mere allegations made in the “verifying affidavit.” The Applicant did not attach the full decision and proceedings of the IEBC to demonstrate that these proceedings were conducted in his absence and that he had not been notified of the proceeding.

(c) The ex parte Applicant did not disclose particulars and documents referred to in some of his own documents, for instance, the complaint No. 150 before the IEBC which the schedule of the decisions of the IEBC of 28th January 2013 state as being the same as the complaint by the Interested Party the subject of these proceedings, and “the ruling delivered on 30th January 2013 by the IEBC Nominations Committee” referred to in the National Alliance Party’s letter of 31st January 2013 allegedly declaring the Applicant as the party’s nominated candidate.

(d) There also exists gaps and inconsistencies in the ex parte Applicant’s application, as follows:

i. The Applicant claims that his party (TNA) complained to IEBC declaring that he was duly nominated yet the decision of the IEBC attached by the Applicant shows that the Interested Party’s complaint was settled with the consent of the party that the Interested Party be issued with a nomination certificate.

ii. The ex parte Applicant states that he raised the issue of massive voter bribery, rigging and other irregularities by the Interested Party and TNA deliberated on the issue and he was declared the party’s nominated candidate and issued with a certificate. However, no evidence of complaint, the deliberations and decision was produced to lend credence to the allegation that TNA had lodged a complaint with IEBC declaring that the ex parte Applicant was duly nominated candidate.

iii. Although the Applicant’s Ground (b) of the grounds of application set out in the Chamber Summons dated 31st January 2013 indicate “that the decision of the 2nd and 3rd Respondents (TNA Officials) to award a subsequent nomination certificate is wrongful, illegal and ultra-vires and will severely prejudice the Applicant”, what is sought to be challenged by judicial review is not that decision but the consequent one of the IEBC admitting, as it is bound by law to do, the certificate of nomination issued by the TNA party.

(20) As stated above, the grant of leave to file judicial review proceedings as well as the ultimate grant of the orders of certiorari mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought to be initiated. Although the Applicant alleges that the printing of ballot papers has not been concluded, there is no reliable evidence in that regard other than the press cutting of the 6th February 2013, more than a week old. It is today barely 20 days to the General Election date of 4th March 2013. Even assuming that the Applicant had presented an arguable case for the grant of leave and leave granted to commence judicial review proceedings, the entire process of hearing the substantive Notice of Motion and if successful the rehearing before the IEBC would leave no time for the printing of the ballots for the affected constituency to enable the elections to be held as scheduled. The General Election 2013 is a matter of great public interest to the voters of Jomvu Constituency and the country as a whole and it may not be allowed to be derailed. I consider that this is a proper case where the balance between individual interest and public interest tilts in favour of the latter and even if I had found that the ex parte Applicant had an arguable case, which is not the case, I would have, in discretion, refused the leave to commence judicial review proceedings.

(21) For the reasons set out above, I decline to grant the leave to commence judicial review proceedings against the decision of the IEBC in admitting the certificate of nomination of the Interested Party herein

and as the 1st Respondent participated in these ex parte proceedings on the order of the court, there shall be no order as to costs.

Dated and delivered this 15th day of February 2013.

EDWARD M. MURIITHI
JUDGE

In the presence of:

Mr. Onjoro for the Applicant

Mr. Khagram for the 1st Respondent

N/A for the 2nd & 3rd Respondents

N/A for the Interested Party

Mr. Matano Court Clerk