



REPUBLIC OF KENYA

High Court at Nakuru

Judicial Review 3 of 2013

IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDERS IN THE NATURE OF MANDAMUS AGAINST THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC)

AND

IN THE MATTER OF THE ELECTION GENERAL REGULATION, KENYA GAZETTE SUPPLEMENT 161 OF 2012

BETWEEN

REPUBLIC.....APPLICANT

AND

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....RESPONDENT

AND

CHARLES OLARI CHEBET.....EX PARTE APPLICANT

RULING

The action herein was commenced by way of an Application for leave to commence Judicial Review proceedings for an order of mandamus to compel the Independent Electoral and Boundaries Commission to accept the Nomination of Certificate of Charles Olari Chebet, (*the Applicant*) and clear him to vie for the County Representative seat of Solai Ward, Nakuru County.

When the application came before me on 4/02/2013 I certified it as urgent and granted the Applicant's counsel leave to file and serve the substantive Motion upon the Respondent. The substantive Motion ("*the Application*") is dated 4th February 2013 and was served upon the Respondent on 6.02.2013 for hearing on 7.02.2013.

When the matter came up before me for hearing on 7.02.2013, Mr. Munge learned counsel for the Respondent sought one clear day to enable the Respondent to reply to the Application. I allowed an adjournment and granted leave to the Respondent's counsel to file their Replying Affidavit which was promptly done on 11th February 2013.

In addition to granting leave to the Respondent to file their Replying Affidavit, I also directed

counsel for the respective parties, to file and exchange written submissions for and against the Notice of Motion by the ex parte Applicant. Both counsel duly complied with that order and filed their respective submissions on 11.02.2013 (*for the Respondent*) and 12.02.2013 for the Applicant.

However in addition to the Replying Affidavit, the Respondent took out a Preliminary Objection on a Point of Law, dated 6.02.2013 in these terms -

(a) that the High Court has no jurisdiction to entertain the suit or the application in view of the provisions of Regulation 99 of the Elections (General) Regulations 2012 and the RULES of PROCEDURE ON SETTLEMENT OF DISPUTES promulgated under Legal Notice Number 139 of 2012 (on 3.12.2012), and in particular Regulation 13 thereof and that the Applicant has not exhausted the set out mechanisms and hence seeks the High Court to usurp those powers, and

(b) the Applicant's purported nomination was done in violation of the provisions of Section 13 of the Elections Act read together with the provisions of (Legal Notice No. 132 of 2012).

In our law, and indeed as noted in Black's Law Dictionary 8th Edn, in international law, in a case before an international tribunal, a preliminary objection **“is an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary – an objection to the court's jurisdiction is an example of a preliminary objection.”**

In MUKISA BISCUITS LTD VS. WEST-END MANUFACTURING CO. LTD [1969] E.A. 696 Sir Charles Newbold P. said at p. 701 -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

In GEORGE ORARO VS. BARAK ESTON MBAJA [2005]eKLR, Ojwang J (*as he then was, now Justice of the Supreme Court of Kenya*) put it thus -

“I think the principle is abundantly clear. “A preliminary objection” correctly understood, is now well identified, and declared to be a part of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle a true Preliminary Objection which the court should allow to proceed.”

The question or issue here is whether the Respondent's Preliminary Objection, is a true preliminary objection in law as defined above. The Respondent's principal ground is that the court lacks jurisdiction, despite the mandate granted to it under Article 163(3)(a) and (b) of the Constitution, that the High Court shall have unlimited original jurisdiction in civil and criminal matters. Counsel for the Respondent advanced two grounds where jurisdiction may be limited-

(a) where Parliament has specifically and expressly prescribed a procedure for handling alleged grievances suffered by an aggrieved person such as the ones pleaded by the Applicant in this suit, and

(b) the alleged grievances do not constitute justiciable controversies as defined by the court.”

The above two grounds are in my humble two sides of the same coin, jurisdiction. Jurisdiction is everything in law, if a court of law has no jurisdiction its orders, however lofty, however well argued or reasoned, are of no effect, and are null and void if the court does not have, or is not invested with the requisite authority to adjudicate the dispute or matter in question.

The Court of Appeal in **OWNERS OF MOTOR VESSEL “LILIANS” VS. CALTEX OIL KENYA LTD [1989] KLR 1**, put the question of jurisdiction as follows -

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means.”

If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.”

THE APPLICANT'S CASE

The Applicant's complaint or case is that he holds a Certificate of Nomination from a registered Political Party called the **National Rainbow Coalition – NARC**, and that despite holding and presenting such a certificate to the Returning Officer for the seat of Bahati Ward Representative, the Returning Officer refused to accept his certificate and therefore nominate him as one of the contestants for that seat in the forthcoming and impending general elections.

The Applicant contends that he has a right to come to the High Court in view of the court's unfettered original and unlimited jurisdiction in criminal and civil jurisdiction. Whereas this is undoubtedly so, Section 8 of the Law Reform Act (*Cap. 26, Laws of Kenya*) specifically prohibits this court from issuing any orders of a civil or criminal nature in exercise of its judicial review jurisdiction. This is another instance where the court's original and unlimited jurisdiction under the Constitution is severely restricted, and actually denied. So we revert to the question of jurisdiction. In matters relating to Elections the court's jurisdiction is subordinated to the resolutions of Electoral Disputes (*in this case nomination disputes*), **firstly** to the Returning Officer, (Regulation 13 of the Elections (General) Regulations 2012 (LN. No. 139 of 2012 published on 3rd December 2012), and **secondly** to the Independent Electoral and Boundaries Commission (*IEBC or the Respondent*).

Under the Elections (General) Regulations 2012, and cited as the Rules of Procedure on Settlement of Disputes, a dispute means -

“...a complaint, challenge, claim or contest relating to any stage of the electoral process and includes an objection to the acceptance of the nomination papers of a candidate by the Returning Officer.”

The drafter of the Rules might have included the words “*or refusal*” after the words “*acceptance*” of the nomination papers of a candidate. It is the refusal by the Returning Officer to accept the Certificate of Nomination of the Applicant which is at the core of the Applicant's complaint. The question is, should the Applicant have come to court or should he have gone to the Returning Officer to lodge his complaint?

Though the Constitution donates to this court original and unlimited jurisdiction in civil and criminal matters, in light however of the clear statutory limitation set out in Section 8 of the Law Reform Act, this court is statutorily barred in exercise of its civil or criminal jurisdiction from issuing any of the Judicial Review orders of either certiorari, prohibition or mandamus.

So a candidate aggrieved by a decision of the Returning Officer refusing to accept a Nomination Certificate by a Political Party is required under Rule 5 of the Rules of Procedure of Settlement of Disputes, to lodge a complaint with the Returning Officer, and if a candidate is dissatisfied with the decision of the Returning Officer he may lodge an appeal to the Commission, under Rule 13 of the said Rules.

Although the Applicant has a right to come to this court on matters of Judicial Review even where

there are clear alternative remedies as stated above, the Applicant runs a real and actual risk of losing his action, not by coming to this court, but rather by failing to persuade the Judicial Review court that a Respondent (*such as the Commission or its agent, the Returning Officer*) has failed to do that which it was required to do (*the remedy of mandamus*), or threatened to do that which is prohibited to do in law (*the remedy of prohibition*), or done that which the law does not allow or is unlawful (*the remedy of certiorari*).

In the instant case, the Commission agent, the Returning Officer had done that which was within his mandate, to accept or reject any nomination certificate by a Political Party. The Applicant's Nomination Certificate had been rejected. The proper course of action as per the Rules for Settlement of Electoral Disputes was to refer to the Returning Officer who has a duty to determine the complaint in terms of Rule 11 of the said Rules. If not satisfied with the decision of the Returning Officer, the candidate has a remedy in an appeal to the Respondent in terms of Rule 13 of the Rules.

There are numerous decisions in our Law Reports to the effect that where a law provides for a procedure to be followed then the parties are bound to follow that procedure set out under the law **OL NAROK COUNTY COUNCIL VS. TRANSMARA COUNTY COUNCIL [2000] 1 E.A. 161, (a) SPEAKER OF THE NATIONAL ASSEMBLY VS. KARUME [2008] 1 KLR -**

“where there is clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of Parliament that procedure should be strictly followed.”

The same position is stated in **KIPKALYA KONES VS. REPUBLIC & ANOTHER [2006] eKLR** and **KIMANI WANYOIKE VS. ELECTORAL COMMISSION OF KENYA & ANOTHER [1995] eKLR**. Besides, this mode of alternative resolution, is clearly anchored in Article 88(4)(e) of the Constitution which mandates the Commission to inter alia supervise referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament and in particular -

(a) – (d)

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

And Section 74(1) of the Elections Act 2011 (No. 24 of 2011) provides -

“74. (1) Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for the Settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

(2) An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the dispute with the Commission,

(3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.”

My understanding of Article 88(4)(e) of the Constitution and Section 74 of the Elections Act (*in its entirety*) is that any disputes relating to nominations to any electoral post are required to be determined within the prescribed times, and those relating to nominations of candidates should be determined before the date of the nomination or election whichever is applicable.

Clearly because of the limited time spans for determination of nomination disputes, Political Party Nominations needed to be done well before the nomination dates to the Returning Officer/Electoral Commissions. As this did not happen aggrieved candidates must live with the choices of their political mandarins. Indeed, I associate myself with the decision of Majanja J, in **FRANCIS GITAU PARSIMEI**

& 2 OTHERS VS. THE NATIONAL ALLIANCE PARTY & 4 OTHERS [2012] eKLR, where the learned Judge in discharging orders restraining a party to the suit from forwarding their names to the IEBC for nomination expressed himself thus -

“It is also my view that Article 88(4) and Section 74(1) of the Elections Act, 2011 provide for alternative mode of dispute resolution specific to the nomination process. The court cannot entertain nomination disputes.”

Referring to the above case in **MICHAEL WACHIRA NDERITU & OTHERS VS. MARY WAMBUI MUNENE & OTHERS (Petition No. 549 of 2012 Nairobi)**, the court inter alia said -

“...it is against this background that the Court of Appeal established a principle that where the constitution or a statute establish a dispute resolution procedure, then the procedure must be used ...

I therefore find and hold that if there is any issue of qualification ... it is not a matter for determination by the High Court in terms of Article 88(4)(e). It is a matter to be determined according to the procedure and mechanisms provided by law applicable to the entire electoral process ...”

Similarly in **JANET NDAGU EKUMBE MBETE VS. HON. ATTORNEY-GENERAL & OTHERS (Petition No. 13 of 2013 (Nairobi))** it was held inter alia -

“First ... as parties are required by law to qualify for consideration to be nominated, the Returning Officer receiving the Papers will be required to address himself or herself on the issues raised by the Petitioners. Secondly, if any objection is lodged with IEBC, it constitutes a nomination dispute which IEBC is empowered to resolve under Article 88(4)(e) of the Constitution and Section 74 of the Elections Act 2011.”

Again, I entirely associate myself with the above reading of the law.

In summary therefore, I find and hold that where there is clear constitutional and statutory provision for resolution of disputes including qualification and nomination disputes this court's jurisdiction is precluded. This court's jurisdiction would only arise after the due exercise by the mandated bodies, the Returning Officer, and the Commission of their Statutory mandate.

The Respondent's Preliminary Objection on a point of law is therefore well-taken and succeeds. The ex parte Applicant's Notice of Motion dated 4th February 2013 and filed on 5th February 2013 is therefore struck out with costs to the Respondent.

Having come to this conclusion it is strictly not necessary for me to determine the Respondent counsel's ground of independence of the Commission, except to say this. There are many institutions established under the Constitution which are said to be independent and not subject to any direction by any other person, indeed very much like judges decisions. A Judge must however decide a dispute or case in accordance with the Constitution, written law, or custom and usage. In other words there must be grounds or reason for the Judge's decision.

Similarly decisions of any other body, quasi-judicial or otherwise – such public bodies whose decisions have great public impact on the citizenry at large, must be equally based on reason, on law, decisions which do not sound in reason or law, will be liable to be quashed on any of the grounds in which orders of certiorari may be issued, illegality, unreasonableness, legitimate expectation. I will cite one example, it is the constitutional duty of the Commission to ensure that Political Parties comply with the requirements of Articles 97(1)(c) (*membership of the National Assembly*) 98 (*membership of the Senate*) & 177 (*membership of County Assembly*) of the Constitution are adhered and implemented in terms of the letter and spirit thereof. See the case of **LEMEIGURAN & 3 OTHERS VS. ATTORNEY-**

GENERAL & 20 OTHERS [2006] 2 KLR 819 The Commission will be unable to rely on Article 249(2) *simpliciter*.

As of this matter, the ex Applicant has no leg to stand upon, and the Motion aforesaid is struck out with costs as already stated.

It is so ordered.

Dated, signed and delivered at Nakuru this 14th day of February, 2013

M. J. ANYARA EMUKULE
JUDGE