REPUBLIC OF KENYA

High Court at Kisumu

Miscellaneous Application 10 of 2013

IN THE MATTER OF AN APPLICATION BY: SAM RATENG OKOTH KOTIENDE

FOR LEAVE TO APPLY FOR AN ORDER OF PROHIBITION, MANDAMUS AND CERTIORARI

AND

IN THE MATTER OF THE ELECTION ACT (NO. 2 OF 2011 OF THEE LAWS OF KENYA)

AND

IN THE MATTER OF INDEPENDENT ELECTORAL AND BOUNDERIES COMMISSION, NOMINATION DISPUTES RESOLUTION COMMITTEE DISPUTE NO. 197 OF 2013

AND

FRANKLIN BETT.....1st INTERESTED PARTY

JUDITH PARENO.....2nd INTERESTED PARTY

JANET ONG'ERA ….....3rd INTERESTED PARTY

JOSEPH B. MAGUANGA ….....4th INTERESTED PARTY

JUDGMENT

The Notice of Motion dated 31st January 2013 prays for the following reliefs:-

1. THAT an Order of Certiorari made hereby the order of the Independent Electoral and Boundaries Commission, Nomination Dispute Resolution Tribunal Committee, Dispute No. 196 of 2013 are deemed removed to this Court and quashed.

2. THAT an Order of Mandamus made hereby the Independent Electoral and Boundaries Commission is hereby ordered to reinstate the applicant's name to the list of candidates dated the 21st day of January 2013.

3. THAT service of this application upon the interested parties be by way of advertisement in the daily newspaper.

4. THAT the court does give direction as to which of the parties is to bear the costs of this application.

summary of the case

The gist of the matter is that on 17th January 2013 the applicant and the 4th interested party both being members of the Orange Democratic Party (ODM) participated in the party's nomination for the Kasipul parliamentary seat. In his affidavit, the applicant has deponed *interlia* that he emerged victorious and was awarded the party's nomination certificate on 18th January 2013. On 21st January 2013 the 1st, 2nd and 3rd interested parties being members of the party's National Election Board wrote to the Commission and forwarded a list of nominees for the various elective seats and his name was on the list. On 29th January 2013, he learnt through the IEBC website that a dispute had been lodged by the 4th interested party herein and the commission had vide Dispute Number 197 of 2013 allowed the complaint and further that a consent had been recorded between ODM and the complainant that the complainant be issued with the nomination certificate and the name be included in the list.

It was argued for the applicant that he had never been served with a hearing notice to that effect and neither was the matter cause listed. The rules of natural justice and specifically *Audi Alteram Partem Principle* was not adhered to. The decision of the Commission was therefore a nullity and should be quashed.

On the other hand, the 4th interested party deponed in his replying affidavit that the applicant was duly served with the hearing notice and an affidavit of service was duly filed as is required by the law. The 4th interested party further alleges that the matter was duly cause listed in the Commission list of Saturday the 26th of January 2013. **Mr. Kanjama** submitted that the applicant was aware of the complaint having been informed via Short messages (sms) but failed to appear. He further argued that the Commission was on a timely tight schedule and had to give its verdict. He further submitted that the Commission was mandated to deal with nomination disputes under Article 88 (4) of the constitution and the court would be usurping the mandate of the Commission in deciding the matter. The only jurisdiction the court had was to refer the matter to the Commission.

On behalf of the commission, **Mr. Gumbo** submitted that the commission satisfied itself that there was service. In fact ODM as one of the parties was present at the hearing and entered into a consent with the 4th interested party. He submitted that this court cannot refuse that fact as then it will be entering the realm of an appeal. The jurisdiction of a Judicial Review court is not to determine the facts, it is merely to determine whether the Commission followed the right process.

Analysis of the issues arising

From the pleadings filed and the submissions by counsel for both sides, one major question begs determination: were the rules of natural justice and especially the ***Audi Alteram Partem Principle*** adhered to? Before addressing the issue at hand the Court need to answer whether it is the decision to allow the 4th interested party's complaint which is under attack or the process which led to the termination. From the submissions by the Counsel for the Applicant, it would appear that both the process and the decision are under attack. From the foregoing the question that begs is what then is the scope of judicial review? ***The Supreme Court practice 1997 vol 53/1-14/6*** states:-

"**The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substituted by law the decision in the matter in question."**

The court in ***Republic v Vice Chancellor Jomo Kenyatta University Of Agriculture and Technology [2008] EKLR at pg 5*** has stated:-

"The Supreme Court commentary has made the position even clearer by stating in the same paragraph cited above:- The Court will not, however, on a judicial review application act as a "Court of Appeal" from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the Court is to see that lawful authority is not abused by unfairtreatment. If the Court were to attempt itself the task entrusted to that authority by the law the court would under the guise of preventing the abuse of power be guilty itself of usurping power. Lord Bringtman in Chief Constable of *North Wales Police v Evans [1982] I WLR 1155 P 1173."*

From the above principles, it is clear to the Court that its function is to decide on whether the process leading to its decision was proper and not to adjudicate on the merit of the same. From the supporting Affidavit of the applicant, it is clear that ODM which was a party to the dispute was present at the hearing. This can be evidenced by the fact that it actually entered into a consent with the 4th Interested party that his name be included in the list and he be issued with a certificate. It therefore goes to show that ODM was aware of the meeting and how else would it have become aware but by service?

As has already been established the Court will not on a judicial review application act as a "Court of Appeal" from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction. The commission proceeded to hear and decide the matter in the absence of the applicant. Ours is not to question why the commission proceeded in that manner but to ask whether the right procedure was followed. The commission exercised its discretion within its timely schedule and it indeed was satisfied with the service. The court cannot now come back and ask the commission why it exercised its discretion the way it did. If it did so then it would be usurping the power of an appellate jurisdiction.

Right to be heard

The rules of natural justice dictate that a party should not be condemned unheard. Where the principles of natural justice have been breached, the Court will readily grant an order of certiorari to quash any such decision arrived at in disregard of such principles. In the case of ***General Medical Council V Spackman [1943] 2 Aller 337***, Lord Wright at Page 345 stated:-

"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared no decision. Similar sentiments were expressed by Lord Reid in the case of RIDGE v BALDWIN [1963] 2 ALLER 66 at page

One thing however that the court must address its mind to is that the Commission had a limited period of which it had to hear and decide all disputes before. It was stated by the interested party that the applicant was aware of the hearing having been informed by via a short message. This fact was not disputed. The court in the ***Republic V Vice Chancellor Jomo Kenyatta University Of Agriculture and Technology [2008] EKLR*** has stated**:-**

"A public body or a local authority while formulating a decision in circumstances to which the principles of natural justice apply need not observe the strict procedures of a court of law."

In the case of **THE BOARD OF EDUCATION v RICE [1911] AC 179 at page 182** Lord Loreburn LC stated:-

"In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath and need

not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those parties in the controversy for correcting or contradicting any relevant statement."

It is therefore my view that the information via short messages was enough considering the time restriction. The commission did not have to follow the strict court procedure and they could obtain information and proceed in anyway they thought best. The applicant can therefore not argue that he was not allowed a chance to be heard.

The affidavit of service dated 15th January 2013, of one **Johnstone Kioko Nzivu** that was presented to the Commission has not been controverted. In the said affidavit it is evidently clear that the applicant spoke to the deponent and even agreed to meet at Milimani Commercial Court where he would receive the pleadings. This buttresses my above findings.

The other issue that was raised by the respondent is the absence of ODM as a party in this proceedings. The parties namely **Franklin Bett, Judith Pareno** and **Janet Ongera** are its officials who signed the certificate.

Section 16 of the Political parties Act No. 11 of 2011 States:-

"16(1) A political party which has been fully registered under this Act shall be a body corporate with perpetual sucession and a common seal and shall be capable, in its own name of

(a) ….....
(b) Suing and being sued and."

Clearly on this ground the applicant by suing the parties officials went against the said Act.

I note equally that looking at the reading of the application the IEBC is not a party. Although **Mr. Gumbo** filed response on its behalf nowhere is it mentioned as a party.

Mr. Ogejo pleaded the provision of Section 159 of the Constitution but I do not respectfully agree that the provisions therein can aid the applicants case. This is not a small techanically but a fundamental one where in my opinion goes to the root of the suit.

My finding therefore is that this application ought to fail. The applicant was duly served via short message to attend commisison by the process server but he chooses not do. I do not find that the rules of natural justice were breached by the Commission or at all.

I shall therefore disallow the application and order that each party shall bear respective costs.

Dated, signed and delivered at Kisumu this 12th day of February 2013.

H.K. CHEMITEI

JUDGE

In the presence of:

….....for the applicant

….....for the respondent

HKC/aao