



**REPUBLIC OF KENYA**

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

**Miscellaneous Civil Application 58 of 2013**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR A JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF: THE ELECTIONS ACT, NO 24 OF 2011**

**AND**

**THE ELECTIONS (GENERAL) REGULATIONS, 2012**

**AND**

**IN THE MATTER OF: INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSIONS NOMINATIONS DISPUTE RESOLUTION COMMITTEE CONCERNING COMPLAINT NO. 65 OF 2013**

**ATTAS SHARIFF ALI.....APPLICANT**

**VERSUS**

**IEBC NOMINATIONS DISPUTE RESOLUTION COMMITTEE..... 1<sup>ST</sup> RESPONDENT**

**THE NATIONAL ALLIANCE PARTY..... 2<sup>ND</sup> RESPONDENT**

**EDWARD MCDONALD KARANI.....INTERESTED PARTY**

**REASONS FOR THE DECISION**

1. The ex parte applicant herein, **Attas Shariff Ali**, moved the Court by way of Chamber Summons dated 31<sup>st</sup> January 2013 seeking the following orders:

**1. That this Honourable Court be pleased to certify this matter as urgent and the same be heard ex parte in the first instance.**

**2. That this Honourable Court be pleased to grant leave to the Applicant to apply for an order of certiorari removing to this Honourable Court for the purposes of being quashed the decision of the Independent Electoral and Boundaries Commission Nominations Dispute Resolution Committee made on the 28<sup>th</sup> January, 2013 in Complaint No. 65/2012.**

3. **That this Honourable Court be pleased to grant leave to the Applicant to apply for an order of prohibition to prohibit and restrain the Second Respondent from acting upon the decision and/or removing, altering and amending the name of the Applicant from the list of nominees.**

4. **That the grant of leave do operate as a stay of the decision, directives and acts of the First Respondent until determination of the application herein or until the Honourable Judge orders otherwise.**

5. **That the costs of this application be provided for and/or be in the cause.**

2. On 1<sup>st</sup> February, 2013 we dismissed the said Chamber Summons with no order as to costs. We now give our reasons for the said decision.

3. The applicant's case is that he was a prospective candidate for the seat of National Assembly for Malindi Constituency on The National Alliance Party (hereinafter referred to as the Party). Arising from the nomination carried out by the Party he lodged a complaint with the Party's Nominations Appeal Tribunal as a result of which he was issued with a nomination certificate. However the Interested Party herein complained to the Independent Electoral and Boundaries Commissions Nominations Dispute Resolution Committee (hereinafter referred to as the Committee) which Committee allowed the Complaint and pursuant to the consent between the Party and the complainant directed that the Complainant be issued with a nomination certificate. In the applicant's view the said consent was illegal since the earlier decision of the Party's Appeals Tribunal was disregarded to the applicant's prejudice, hence injustice was visited upon him. Accordingly the applicant's position is that the Committee's decision was ultra vires the provisions of the Elections Act, 2011 and the Election (General) Regulations, 2012; that the Committee had no jurisdiction to entertain the dispute and that its decision went against the principles of justice and legitimate expectation.

4. On the part of the Party it was submitted that the Committee dealt with the matter and decided that there be a recount on the basis of which the interested party emerged the winner. The consent, according to the party was entered into on the basis of the Party's internal appeals which recognised the Interested Party. Further the candidate nominated for the purposes of section 13 was not the Petitioner.

5. On the part of the Commission it was contended that there is no basis for interference with the decision. Further the consent having been recorded it became the decision of the Committee.

6. We considered the pleadings, the material before us both in support of and in opposition to the application. We do not agree with the Commission's position that once a consent is recorded it becomes the Commission's decision and hence the Court cannot go behind it and interrogate how it was arrived at. If a decision which purports to have been entered by consent is no consent at all the Court is perfectly entitled to set it aside if the same is entered into in breach of the rules of natural justice.

7. However, in this case, it is not contended that the applicant was not afforded an opportunity to be heard before the Committee arrived at its decision allowing the Interested Party's complaint. His complaint is with respect to the subsequent consent. The effect of allowing the complaint meant that thereafter there was no candidate nominated by the party and the consent entered into subsequently cannot be said to have been in breach of the applicant's legitimate expectation since any legitimate expectation were diminished after the decision allowing the interested party's complaint. Thereafter a fresh nomination was to be conducted by the party which seems to have been the effect of the so called consent which was merely an endorsement of the party's subsequent position. In the premises we did not agree with the applicant that the endorsement of the Party's subsequent position was made in breach of the applicant's right to a hearing or that it contravened his legitimate expectations hence our decision dismissing the Chamber Summons dated 31<sup>st</sup> January 2013.

**Dated at Nairobi this 5<sup>th</sup> day of February 2013**

**D S MAJANJA**

**JUDGE**

**W KORIR**

**JUDGE**

**G V ODUNGA**

**JUDGE**