



**REPUBLIC OF KENYA**

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

**Judicial Review 40 of 2013**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLE 23(3)(F)**

**AND**

**IN THE MATTER OF: THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA  
SECTIONS 8 AND 9**

**AND**

**IN THE MATTER OF: CHAIRMAN – INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION NATIONAL DISPUTES RESOLUTION TRIBUNAL**

**AND**

**IN THE MATTER OF: THE LAW REFORM ACT, CAP 26 AND ORDER LIII OF THE CIVIL  
PROCEDURE RULES, CAP 21.**

**AND**

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

**BETWEEN**

**JAMES ODHIAMBO OYOLO.....APPLICANT**

**AND**

**NATIONAL DISPUTES RESOLUTION COMMITTEE.. 1<sup>ST</sup> RESPONDENT**

**ODM NATIONAL ELECTIONS BOARD.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**REASONS FOR THE DECISION**

1. The ex parte applicant herein, **James Odhiambo Oyolo**, moved the Court by way of Chamber Summons dated 30<sup>th</sup> January 2013 seeking the following orders that:

1. **This Application be certified Urgent.**

2. **Leave do issue to the Applicant to apply for:**

a. **THAT an order of certiorari do issue to forthwith remove to the High Court so as to quash and annul the decision made by the 1<sup>st</sup> Respondent to dismiss the complaint for lack of evidence in IEBC/NDRC/2013 James Odhiambo Oyolo versus Isaiah Onyango and Orange Democratic Movement.**

b. **An Order of Prohibition directed at the 3<sup>rd</sup> Respondent to restrain the 2<sup>nd</sup> Respondent from forwarding the name of one Isaiah Onyango to the 1<sup>st</sup> Respondent who was fraudulently given the candidature of Railway Ward in Kisumu Central Constituency.**

3. **The leave so granted does operate as stay of the proceedings in Nairobi IEBC/NDRC/02/2013 James Odhiambo Oyolo versus Isaiah Onyango and Orange Democratic Movement pending the determination of the application.**

2. On 31<sup>st</sup> January, 2013 we dismissed the said Chamber Summons with no order as to costs. We consequently rejected the leave to institute judicial review proceedings. We now give our reasons for the said decision.

3. The applicant's case is that he contested the nomination to vie for the seat of County Assembly representative for Railway Ward in Kisumu Central and Kisumu County on the Orange Democratic Movement Party, won the said and was declared the winner thereof. However, the name that was forwarded to the 1<sup>st</sup> respondent was that of **Isaiah Onyango**. Being aggrieved by the said decision he lodged a complaint with the 1<sup>st</sup> respondent. Despite annexing an affidavit sworn by the Returning Officer confirming that he won, the Committee proceeded to dismiss his complaint citing lack of sufficient evidence. In his view the said decision was unfair and in bad faith, procedurally improper and in breach of the rules of natural justice.

4. The application was opposed by the 2<sup>nd</sup> respondent on the ground that the matter was dealt with by the 1<sup>st</sup> respondent in the presence of the applicant and the party and their versions were considered. According to the 2<sup>nd</sup> respondent the decision was properly grounded. According to them there is no evidence before the Tribunal to show that the Returning Officer's affidavit was before the Tribunal since it is stamped 30<sup>th</sup> January 2013 when the Tribunal was not sitting.

5. On behalf of the Commission, it was contended that the record of the Tribunal speaks for itself and the party having adopted a direct nomination due to the violence the matter before the Court is in effect an appeal.

6. We considered the material before us. Whereas it is alleged by the applicant that the Returning Officer's affidavit supported his claim that he was the winner in the said election, the copy of the affidavit exhibited bears no evidence that the same was filed with the complaint since it does not bear the date of the hearing. In the absence of a clear proof that the said document was before the Tribunal at the time it made its decision, the Court has no material upon which to find for the applicant. Since there is no allegation that the applicant was not heard, to interfere with the decision of the Tribunal would amount to a determination on the merits rather than on the process. It is not for us to determine the merits or otherwise of the process.

7. In **The Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995 [1995-1998] 1 EA 1** the Court of Appeal restated the underlying principle that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process and its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. It further held that the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court.

8. A fair trial in the Constitutional context does not refer to the merits or *bona fides* of the process case but deals with trial process; the decision making process sometimes referred to as “due process”. No recognised human right or fundamental freedom is contravened by a Judgement or order that is wrong and liable to set aside on appeal for an error of fact or substantive law. The remedy for errors of this kind is to appeal to a higher court and where there are no higher courts to appeal to, then none can say that there was an error. The fundamental right is not a legal system that is infallible but one that is fair. It is only errors of procedure that are capable of constituting infringement to the rights protection and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to failure to observe one of the fundamental rules of natural justice. The concept of fair trial is not an abstraction; it is contextual. Whether or not there has been a breach of right to fair trial will ultimately depend on the circumstances of each case. See **Kamlesh Mansuklal Damji Pattni & Another vs. R. Nairobi HCMA No. 322 of 1999; Maharaj vs. A.G. Trinidad and Tobago (1978) 2 WLR 902 At 912.**

9. For the foregoing reasons we found no merit in the Chamber Summons dated 30<sup>th</sup> January 2013 which we dismissed with the result that leave to commence the judicial review proceedings was rejected but with no order as to costs.

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

**D S MAJANJA**

**JUDGE**

**W KORIR**

**JUDGE**

**G V ODUNGA**

**JUDGE**