



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 35 of 2013

IN THE MATTER OF AN APPLICAITON BY KEVIN LUNANI KWENA FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTUION OF KENYA, 2010

IN THE MATTER OF THE ELECTIONS ACT, NO. 24 OF 2011

AND

IN THE MATTER OF THE DECISION BY THE DISPUTES RESOLUTION TRIBUNAL

BETWEEN

KELVIN LUNANI KWENAAPPLICANT

AND

SULEIMAN SHABHAL 1ST RESPONDENT

UNITED DEMOCRATIC FORUM.....2ND RESPONDENT

WIPER DEMOCRATIC PARTY..... 3RD RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION4TH RESPONDENT

REASONS FOR THE DECISION

1. The ex parte applicant herein, **Kelvin Lunani Kwena**, by his Chamber Summons dated 30th January 2013 sought the following orders:

- a) **THAT this application be certified urgent and heard ex parte in the first instance.**
- b) **THAT leave be granted to the Applicant herein to apply for Judicial Review Orders, to wit:**
 - i) **An Order of certiorari to remove into this Honourable Court and quash the decision of the Committee of the Nomination Disputes Tribunal dated 27th January, 2013.**
 - ii) **An order of prohibition directed against the Independent Electoral & Boundaries**

Commission prohibiting it from accepting the nomination papers of one, Suleiman Shabhal to participate as a candidate for any elective seat in the upcoming general elections.

iii) **That leave so granted do operate as stay of the decision of the Committee of the Nomination Disputes Resolution Tribunal dated 27th January, 2013 allowing Suleiman Shabhal to contest in the upcoming general elections.**

c) **THAT the costs of and incidental to this application be provided for.**

d) **THAT such further or other relief as this Honourable Court may deem just and expedient.**

2. On 31st 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 ex parte applicant's complaint is that the 1st respondent was a member of United Democratic Forum Party (hereinafter referred to as (the Party) in which he was aspiring to be the Governor for Mombasa County in the March 4th 2013 general elections and secured a nomination from the said party and his name forwarded to the Independent Electoral Commission as the Party's nominee for the said position. The applicant, a member of the said party, later came to learn that the first respondent was in fact intending to contest the same position on Wiper Democratic Movement Party ticket in which he had secured a nomination certificate. Consequently the applicant lodged a complaint with the Dispute Resolution Tribunal of the 4th respondent (hereinafter referred to as the Tribunal) to bar the 1st respondent from participating in the said elections on the ground that the 1st respondent had violated the Elections Act. That the 1st respondent had been nominated by the said party was, according to the applicant, confirmed by the party's secretary general. However, the Tribunal disallowed the complaint and allowed the 1st applicant to contest on the ticket of Wiper Democratic Movement Party on the ground of lack of sufficient evidence without addressing the issue of the dual nomination, an omission which the applicant contends was incorrect hence the decision was irrational and unreasonable and failed to take into account relevant considerations.

4. On behalf of the 1st respondent, it was contended that the Commission's jurisdiction being Constitutional, the same is not amenable to challenge. It was further contended that the 1st respondent having been issued with nomination papers the order of prohibition cannot issue since the Tribunal's order had been effected and the application overtaken by events.

5. The Commission, on the other hand was of the view that the evidence was considered and that the decision of the Tribunal was based on the evidence hence the challenge to the decision is an attempt to appeal against the same. The Commission also adopted the position taken by the 1st respondent.

6. We considered the pleadings, the material before us both in support of and in opposition to the application. On the issue whether the decision by the Commission is amenable to challenge this Court stated in **Dennis Mogambi Mong'are vs Attorney General & 3 Others [2011] eKLR** as follows:

“The first issue for determination is that of jurisdiction. We disagree with the submissions made on behalf of the LSK that we do not have jurisdiction to hear and determine this matter. Article 165 (3) (b) vests in the High Court jurisdiction to ‘determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.’ The Petition before us seeks relief on behalf of judges and magistrates whose rights are allegedly threatened with violation as a result of enactment of the VJMA. We affirm that we have jurisdiction to deal with this Petition and to make a determination as to whether or not rights guaranteed under the Bill of Rights have been violated infringed or threatened. In addition to the enforcement jurisdiction stated above, the High Court under Article 165(3) (d) of the Constitution has jurisdiction to hear any question respecting the interpretation of this Constitution, including determination of any

question whether any law is inconsistent with or in contravention of the Constitution. The matter before us falls squarely within these provisions.”

7. Accordingly we reaffirm that we have jurisdiction in appropriate cases to supervise the actions and decisions of the Commission pursuant to Article 165(5) of the Constitution.

8. In this case it is however contended that by the time of the hearing of the Chamber Summons the 1st respondent had already been issued with nomination certificate. There was no attempt to deny that contention. An order of prohibition it has been held is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It looks to the future so that where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made since prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision. See Stanley Munga Githunguri vs. Republic Criminal Application No. 271 of 1985 (UR) and Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR.

9. It follows that the order of prohibition was not an efficacious remedy in the circumstances.

10. With respect to the order of certiorari, since the nomination of the 1st applicant had already been accepted, the quashing of the decision of the Committee alone without quashing the decision to issue the certificate would have similarly been in vain.

11. For those reasons we declined to grant the Chamber Summons hence the orders issued herein.

Dated at Nairobi this 5th day of February 2013

D S MAJANJA

JUDGE

W KORIR

JUDGE

G V ODUNGA

JUDGE