



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 25 of 2013

IN THE MATTER OF AN APPLICATION BY MICHAEL WACHIRA NDERITU FOR LEAVE TO APPLY FOR A JUDICIAL REVIEW ORDERS OF PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF SECTION 13 OF THE ELECTIONS ACT NO 24 OF 2011, LAWS OF KENYA

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT NO. 11 OF 2011

AND

IN THE MATTER OF THE MARCH 4TH 2013 GENERAL ELECTIONS FOR MEMBERS OF THE NATIONAL ASSEMBLY, OTHAYA PARLIAMENT SEAT

MICHAEL WACHIRA

NDERITUAPPLICANT

VERSUS

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST RESPONDENT

SABA SABA ASILI PARTY 2ND RESPONDENT

JAMES GICHUKI MUGAMBI3RD RESPONDENT

AND

THE NATIONAL ALLIANCE PARTY1ST INTERESTED PARTY

THE REGISTRAR OF POLITICAL PARTIES2ND INTERESTED PARTY

REASONS FOR THE DECISION

1. The ex parte applicant herein, **Michael Wachira Nderitu**, moved the Court by way of Chamber Summons dated 29th January 2013 seeking the following orders:
 1. **That this Application be certified Urgent and heard on an ex-parte basis, as urgent as possible for the reasons of urgency stated in the certificate herein.**
 2. **That the applicant, Michael Wachira Nderitu be granted leave to apply for an order of Prohibition directed at the 1st respondent, its servants and agents and more specifically the returning Officer of the Othaya Constituency to restrain, prohibit, bar and/or in any other manner stop them from accepting, receiving, acknowledging or in any other manner whatsoever recognizing the nomination of the 3rd respondent as a candidate for the Othaya Parliamentary seat in the coming General elections under the ticket of the 2nd Respondent.**
 3. **That the Applicant, Michael Wachira Nderitu be granted leave to apply for an Order of Mandamus directed at the 1st Respondent compelling it to strike off, delete, erase and/or remove the list of the nominees submitted to it by the 2nd Respondent and more specifically that the 3rd Respondent both of whom have committed an electoral offence under the law.**
 4. **That the leave granted do operate as a stay order restraining the 1st Respondent and the Returning Officer, Othaya Constituency from receiving, accepting and/or acknowledging any nomination papers from the 3rd respondent, James Gichuki Mugambi as being a candidate duly and properly nominated to vie for the Othaya Parliamentary Seat in the March 4th 2013 General Elections, under the ticket of the 2nd Respondent or any other party for that matter.**
 5. **That to support the granting of prayer 4 above, the Honourable court be pleased to grant leave to the Applicant at both the Ex parte and Inter partes hearing to replay electronic tapes by way of Flash Disk or any other manner before the court and/pr to produce evidence and clips in court showing the 3rd Respondent's public Pronouncements on national Television of his allegiance to the 1st Interested Party's policies and his commitment to it days after his purported nomination by the 2nd Respondent.**
 6. **That the Honourable Court further be pleased to Order the 1st Respondent through its constituted Dispute resolution Tribunal to avail for inspection and perusal by this Court the proceedings and findings relating to the Petition filed to the Tribunal by Mary Wambui Munene against the 3rd Respondent and which was concluded in finality in her favour for the Othaya Parliamentary Seat on the 25th January 2013.**
 7. **That the costs of this application be provided for and/or be in the cause.**
8. 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.
9. The applicant's case is hinged upon the following facts:
 - a. **That the Applicant is a registered voter in Othaya, and is a registered member of the Interested Party and took part in the nominations pitting James Gichuki Mugambi, the 3rd Respondent against Mary Wambui Munene, her competitor in the race of the Othaya Parliamentary Seat.**
 - b. **That the 3rd Respondent is a Member Number 8138616 of the 1st Interested Party and still**

such a registered member at the time of filing this reference a fact well known to the 2nd Interested Party who has all the records to that effect.

c. The Applicant is aware of the Provisions of Section 13 of the Elections Act which stipulate that anyone who runs on a party ticket must have been a member of that party 45 days before elections.

d. The 3rd respondent duly participated in the 1st interested Party's Party nominations which took place on 18th January 2013 and the results thereof were announced on 19th January 2013 when his competitor, Mary Wambui was declared the winner.

e. The Applicant is aware that the 3rd Respondent thereafter lodged Appeals to the 1st Interested Party Appeals Board which were duly dismissed on or about the 21st day of January 2013 and in these appeals he maintained that he was still a member of the 1st Interest Party.

f. Upon the dismissal of this Appeal by the 1st Interested party the 3rd respondent thereafter moved to the 1st respondents Dispute Resolution Tribunal where he again lodged a Petition when reiterating that he was still a member of the Interested Party.

g. The 3rd Respondent eventually withdrew his Petition on Friday 25th January 2013 by which time the period set by section 13 of the Elections act to switch parties had long expired.

h. The 2nd Respondent has now purported to forward the 3rd Respondent as its nominee for the Othaya Parliamentary Seat to the 1st Respondent which act amounts to an Election offence in that it is not practically possible for the 3rd Respondent to have been a member of the 2nd respondent for 45 days as stipulated by the Elections Act as he was a confessed member of the 1st interest party until he withdrew his appeal on the 25th January 2012.

i. That the Applicant has duly examined the list of nominees forwarded by the 2nd Respondent and noticed that the same was purportedly sent on 21st January 2013 to the 2nd Interested Party when the 3rd Respondent had not officially resigned from the 1st Interested party as he was still vigorously pursuing his remedies within the 1st interested Party as well as with the 1st Respondents Tribunal. The same has obvious errors that confirm it is a doctored document.

10. According to the applicant the 2nd and 3rd respondents have committed an election offence under section 72 of the Elections Act hence section 74 thereof does not apply. According to him no nomination was conducted and forged documents presented to the 1st respondent (the Commission) by the 2nd respondent bearing the 3rd respondent's name. According to the applicant since the 3rd respondent was not a member of the 2nd respondent, section 13(2) of the Elections Act was contravened.

11. On behalf of the 3rd respondent it was contended that this matter does not fall within the Commission's Disputes Resolution Tribunal's jurisdiction since the applicant is challenging nomination by a political party. According to the 3rd respondent this is not the Court of first reference for such matters but a matter which ought to be resolved in the first instance by the Commission. The 3rd respondent contended that the same applicant had filed Petition No. 549 of 2012 which was dismissed. He contends that he was nominated by the party to stand for elections in Othaya hence the applicant's allegations do not lie. It is further contended that the complaint before the Commission was lodged by **Mary Munene** and not the 3rd respondent hence the complaint was baseless.

12. On behalf of the 1st interested party it was stated that the 1st interested party's nominations were held on 18th January 2013 and announced on 19th January 2013 and that the 3rd respondent was a member of the 1st interested party.

13. For the Commission, it was contended that this was a nomination dispute which ought to have been dealt with under section 88(4)(e) of the Elections Act hence the Court ought not to entertain the dispute. With respect to commission of offences, the same ought to be dealt by the criminal court.

14. We considered the pleadings, the material before us both in support of and in opposition to the application. In our view the issues raised were issues which could be properly dealt with in a petition challenging the qualification of the 3rd respondent to view for the said Parliamentary seat. In other words there an alternative remedy available for redress of the matters complained of. We were also of the view that the dispute herein was a dispute between one political party and another which ought to have been dealt with in another forum before invoking the jurisdiction of the Court. It has been said time and again that there is considerable merit in the submission that where there is clear procedure for re-dress of any particular grievance prescribed by the Constitution or an Act of parliament that procedure should be strictly followed. See **National Assembly vs. Njenga Karume Civil Application No. 92 of 1992.**

15. For the foregoing reasons we found no merit in the Chamber Summons dated 29th January 2013 which we dismissed as aforesaid

Dated at Nairobi this 5th day of February 2013

D S MAJANJA

JUDGE

W KORIR

JUDGE

G V ODUNGA

JUDGE