



**REPUBLIC OF KENYA**

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

**Civil Miscellaneous Application 38 of 2013**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE POLITICAL PARTIES ACT 2012**

**AND**

**IN THE MATTER OF THE NOMINATION OF THE POSITION OF MEMBER OF NATIONAL ASSEMBLY OF MARAKWET EAST CONSTITUENCY BY THE NATIONAL ALLIANCE**

**AND**

**IN THE MATTER OF THE DECISION OF THE INDEPENDENT ELECTORAL AND BOUNDARY COMMISSION NOMINATION DISPUTE RESOLUTION COMMITTEE DATED 28<sup>TH</sup> JANUARY 2013-02-03**

**AND IN THE MATTER OF**

**REPUBLIC.....APPLICANT**

**VERSUS**

**INDEPENDENT ELECTORAL AND BOUNDARY COMMISSION NOMINATION DISPUTE RESOLUTION COMMITTEE.....RESPONDENT**

**AND**

**LINAH JEBII KILIMO.....1<sup>ST</sup> INTERESTED PARTY**

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

**AND**

**MARK BOWEN.....EX PARTE APPLICANT**

**REASONS FOR THE DECISION**

1. The ex parte applicant herein, **Mark Bowen**, moved the Court by way of Chamber Summons dated

31<sup>st</sup> January 2013 seeking the following orders:

- 1. That this application be certified as urgent.**
- 2. That leave be granted leave to the Applicant to institute judicial review proceedings to quash the decision of the Independent Electoral and Boundary Commission Nomination Dispute Resolution Committee issued on 28/1/2013 dismissing the complaint of the ex parte applicant and effectively confirming the nomination of the 1<sup>st</sup> interested party to contest for the seat of Member of Parliament of Marakwet East constituency (sic) under The National Alliance Party and to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> interested parties from presenting nomination papers to the Independent Electoral and Boundary Commission, nominating any person and or participating in the national elections for the election of Member of Parliament of Marakwet East Constituency pending the hearing of this matter.**
- 3. That leave be granted to operate as stay of the implementation of the decision of the Independent Electoral and Boundary Commission Nomination Dispute Resolution Committee issued on 28/1/2013 pending the hearing and final determination of this application prohibiting Linah Chebii Kilimo and The National Alliance from presenting nomination papers to the Independent Electoral and Boundary Commission and from nominating any person and or participating in the national elections for the election of Member of Parliament of Marakwet East Constituency pending the hearing of this matter.**
- 4. That pending the hearing and determination of this matter an order of stay be issued restraining interested parties their agents, servants and or employees from delivering any nomination papers for the position of Member of National Assembly for the Marakwet East constituency to the Independent Electoral and Boundary Commission.**
- 5. That the costs of this application be provided for.**

2. On 1<sup>st</sup> February, 2013 we dismissed the said Chamber Summons with no order as to costs and refused to grant leave to commence judicial review proceedings. We now give our reasons for the said decision.

3. The applicant's case is that although he had been cleared together with the 1<sup>st</sup> interested party herein to vie for the position of the Member of National Assembly for Marakwet East Constituency during the primaries for The National Alliance Party (hereinafter referred to as the Party), due to undisclosed reasons no such nominations were in fact held despite the applicant having extensively mobilised time, resources and manpower for a successful campaign. In his view the Party's Constitution as well as the Nomination Rules and Procedures do not provide for direct nominations by the Party and the Party had indicated that no direct nominations would be given to any candidate. However contrary to the foregoing the Party issued a direct Nomination Certificate for the said position to the 1<sup>st</sup> respondent to vie for the said position. An act which the applicant contends violated the constitutional right of the applicant and registered voters of the Party in the said constituency to nominate a candidate of their choice. The said action according to the applicant was against the provisions of the law and the Constitution hence the application ought to be allowed. The applicant's complaint to Independent Electoral and Boundaries Commissions Nominations Dispute Resolution Committee (hereinafter referred to as the Committee) was however dismissed and the party ordered to refund him his nomination fees without a hearing and without a determination being made on the aforesaid breaches. In his view the directive to refund his nomination fees was not an adequate remedy.

4. The application was opposed by the Commission. According to the Commission the complaint is between the applicant and the Party hence the Commission had no role in it. Although the decision of the Tribunal is impeached the process itself is not impeached hence the application should be dismissed.

5. The Party on the other hand contended that Rule 104 of the Party Rules provide for direct

nomination and this is permitted hence the refund of the nomination fee is adequate.

6. We considered the pleadings, the material before us both in support of and in opposition to the application. Although it is contended by the applicant that the Committee did not hear the complaint there are no proceedings before us to support the said contention. What is before us is the summary of the said Committee in which it is indicated that the complaint was dismissed for insufficient evidence and the party position upheld. It was further ordered that the Party refunds the nomination fees to the Applicant. We do not know from the record the nature of the evidence that was adduced or whether it was adduced at all due to the dearth of material before us. Accordingly in the light of conflicting versions as whether or not the applicant was actually heard we are unable based on the material before us to make a finding thereon. The Board seems to have found the evidence before it wanting. Whether or not that finding was correct does not justify interference by way of judicial review.

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. In the premises and based on the material before us we were not satisfied that a prima facie case had been established to justify the leave sought. Accordingly we dismissed the Chamber Summons in terms of the orders herein above.

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

**D S MAJANJA**

**JUDGE**

**W KORIR**

**JUDGE**

**G V ODUNGA**

**JUDGE**