



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 28 of 2013

IN THE MATTER OF: AN APPLICATION BY GIDEON KAUMBUTHU MEENYE, THE APPLICANT, FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF AN ORDER OF CERTIORARI DIRECTED AT THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION NOTIMNATION DISPUTE RESOLUTION COMMITTE

AND

IN THE MATTER OF: THE ELECTIONS ACT (NO. 24 OF 2011)

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE NATIONAL ALLIANACE NOMINAITON RULES AND PROCEDURES

AND

IN THE MATTER OF: THE POLITICAL PARTIES ACT (NO. 11 OF 2011)

BETWEEN

REPUBLIC

VERSUS

**INDEPENDENT NOMINATION DISPUTE RESOLUTION COMMITTEE1ST
RESPONDENT**

**MATHEW ADAMS KARAUARI..... 2ND
RESPONDENT**

**THE NATIONAL ALLIANCE (TNA) 3RD
RESPONDENT**

EX PARTE

GIDEON KAUMBUTHU

MEENYE..... APPLICANT

REASONS FOR THE DECISION

1. The ex parte applicant herein, **Gideon Kaumbuthu Meenye** by his Notice of Motion dated 31st January 2013 sought the following orders:
 - a. **That orders of Certiorari do issue to remove into the High Court and quash the proceedings, and decision of the 1st respondent dated 28th January, 2013 in respect of dispute reference IEBC/NDRC/161/2013.**
 - b. **That the costs of this Application be provided for.**
2. On 31st January, 2013 we dismissed the said Motion with no order as to costs. We now give our reasons for the said decision.
3. According to the ex parte applicant he was nominated by The National Alliance Party (hereinafter referred to as the Party) as the Party's Senatorial candidate for Meru County for the purposes of March 4 General Elections in Kenya. The 2nd respondent, being aggrieved by the decision of the Party filed a Complaint with the Independent Electoral Commission Nomination Dispute Resolution Committee (hereinafter referred to as the Committee) being IEBC/NDRC/161/2013 which was heard and determined on 28th January 2013 by which decision the Committee ruled that the 2nd respondent be issued with a Nomination Certificate by the Party to contest in the said elections. According to the applicant the said decision was based on the erroneous view that the applicant had been a member of the party for less than one month which decision was a travesty of justice. In his view he was not given a proper hearing and the rules of the party were flouted.
4. On behalf of the party, the petition was not opposed since the Party's view was that the applicant was validly nominated and there being no voting in the area the applicant was issued with direct nomination pursuant to the Party's rules hence the Committee's action was *ultra vires*.
5. The 2nd respondent naturally opposed the application. In his view the applicant was not a member of the party and the proceedings before the Committee were clear on that point. Since the Tribunal has a mandate to deal with such disputes under section 13 of the Elections Act, the matter was properly before the Tribunal. In his view the evidence presented before this Court was not presented before the Tribunal.
6. The Commission's view on the other hand was that the parties were duly heard by the Tribunal and no objection to the jurisdiction was raised. The Committee was dealing with pre-declaration dispute which it had the jurisdiction to deal with.
7. We considered the pleadings, the material before us both in support of and in opposition to the application. It is clear that there is no allegation that the ex parte applicant was not given a hearing. As was rightly pointed out by learned counsel for the Commission, the applicant did not object to the jurisdiction of the Tribunal. In our view the Tribunal was properly seised of the dispute since this was a pre-declaration dispute and whereas the Tribunal in its discretion would have referred the matter back to the party for the same to be dealt with under the party machineries, the fact that it did not deprive it of the jurisdiction to determine the dispute. The applicant's complaint as we understood it was that the Tribunal's decision was contrary to the evidence with respect to the period of his Party membership. That is a complaint going to the merits of the decision rather than the process. 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. It follows that the ex parte applicant's Motion did not meet the threshold for review of the decision of the Tribunal hence the same was not merited thus the decision to dismiss the same with no order as to costs.

Dated at Nairobi this 5th day of February 2013

**D S MAJANJA
JUDGE**

**W KORIR
JUDGE**

**G V ODUNGA
JUDGE**