



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 644 of 2009

IN THE MATTER OF: AN APPLICATION FOR ORDERS OF CERTIORARI,
PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: THE LOCAL GOVERNMENT ACT, CHAPTER 265 LAWS OF
KENYA READ WITH SECTION 33 OF THE CONSTITUTION

AND

IN THE MATTER OF: THE POLITICAL PARTIES ACT, 2007

AND

IN THE MATTER OF: THE NOMINATION OF COUNCILLORS

BETWEEN

REPUBLIC.....APPLICANT

AND

INTERIM INDEPENDENT ELECTORAL COMMISSION OF KENYA.....1ST RESPONDENT

THE HONOURABLE MINISTER FOR LOCAL GOVERNMENT.....2ND RESPONDENT

PARTY OF NATIONAL UNITY.....3RD RESPONDENT

KENYA AFRICAN NATIONAL UNION4TH RESPONDENT

FORD ASILI.....5TH RESPONDENT

SISI KWA SISI.....6TH RESPONDENT

ORANGE DEMOCRATIC MOVEMENT FOR KENYA.....7TH RESPONDENT

SAFINA.....8TH RESPONDENT

PARTY OF INDEPENDENT CANDIDATES KENYA.....9TH RESPONDENT

FORD PEOPLE.....10TH RESPONDENT

FORD KENYA.....11TH RESPONDENT
CHAMA CHA UZALENDO.....12TH RESPONDENT
MAZINGIRA GREEN PARTY OF KENYA.....13TH RESPONDENT

EX PARTE:

NARC KENYA.....1ST APPLICANT
COUNCILLOR MUTHONI KIHARA.....2ND APPLICANT
COUNCILLOR FRED NGUKA.....3RD APPLICANT
H.W. GATAKA WANYAGA J.J.....4TH APPLICANT
MS. MAUA BAKARI.....5TH APPLICANT
MR. KIPKORIR MENJO.....6TH APPLICANT
COUNCILLOR JOHN T. LEOSIN.....7TH APPLICANT
COUNCILLOR HANNINGTON WANDERA AWORI.....8TH APPLICANT
MS MARGARET NATHE.....9TH APPLICANT
FAITH MICHERE GITARI.....10TH APPLICANT
COUNCILLOR JACKSON N. KARANJA.....11TH APPLICANT
BERNARD G. MUGO.....12TH APPLICANT
JANE M. CATHERINE.....13TH APPLICANT
SOLOMON MURIRA.....14TH APPLICANT
JEDIDAH KATHURE.....15TH APPLICANT
FRANCIS M. MWONGERA.....16TH APPLICANT
ROSEMARY KANYUA.....17TH APPLICANT
AMOS MASENGE.....18TH APPLICANT
MARGARET ATITO ANYANGO.....19TH APPLICANT
ZACHARIA R. KARANJA.....20TH APPLICANT
JANE NGARIA.....21ST APPLICANT
OLMUTENTEI OLE RUMPE.....22ND APPLICANT

GIDEON N. KUNGU.....	23 RD APPLICANT
JOYCE C NZOKA.....	24 TH APPLICANT
ESTHER WANGUI KURIA.....	25 TH APPLICANT
SUSAN WAINAINA.....	26 TH APPLICANT
EDWIN DERBA PETER NJERU.....	27 TH APPLICANT
GITONGA H. GICHONGE.....	28 TH APPLICANT
ELIAS KIVUTI NJOGU.....	29 TH APPLICANT
CHRISTINE KATUI MWENGA.....	30 TH APPLICANT

JUDGMENT

The First applicant is the National Rainbow Coalition of Kenya (Narc Kenya). It is a body corporate duly registered as a political party in Kenya under the Political Parties Act. The 2nd to 30th Applicants are all fully paid up members of the 1st Applicant.

The 1st Respondent is a body corporate established by the Constitution of Kenya. One of its duties was to conduct voter registration and conduct civic, parliamentary and presidential elections, among other things in Kenya. The 2nd Respondent is the Minister for Local Government, and the 3rd to 13th Respondents are political parties.

The applicants seek the following orders:

- a) **An order of certiorari directed at the 1st and 2nd Respondents to move into the high court and quash the order and decisions taken in refusing to nominate and refusing to gazette the 1st Applicant's civic nominees as nominated councillors in the various councils;**
- b) **An order of prohibition directed against the 1st and 2nd Respondents and ordering each one of them to stop and cease from picking, appointing and gazetting the civic nominees from either themselves and from other political parties, including from the party of national unity for nomination as the nominated councillors in the various councils and in the places allocated and belonging to the Applicant's civic nominees as particularly set out in the list annexed hereto;**
- c) **An order of mandamus directing the 1st and 2nd Respondent to appoint and nominate and issue a notice in the Kenya Gazette where they are concerned the civic nominees that originated from the 1st Applicant as nominated councillors in the various councils of their entitlement in the places allocated**
- d) **That the costs of this application be provided for.**

The application is supported by the affidavit of the Honourable Danson Buya Mungatana and the statutory statement, and is based on the grounds that:

- a) The Respondents have contravened the applicant's constitutionally and statutorily entrenched democratic rights to nominate (or to be nominated) as councillors in the various outlined civic seats and councils contrary to the provisions of the Local Government Act Cap 265 as read together with the

provisions of section 33 of the Constitution of Kenya;

- b) The 1st and 2nd Respondents are in breach of the Applicant's right to be heard before being adversely affected by the decisions of the Respondents respectively;
- c) The subject term of the transgressing nominees and/councillors is fast running out and hence the complaint should be heard and determined expeditiously;
- d) The applicants herein are aggrieved by the Respondent's conduct which is irrational, unreasonable and disproportionate in breach of its legitimate expectations and is within the Wednesbury principles;
- e) The 1st Respondent made a decision in excess of and in abuse of its power and without jurisdiction;
- f) The decision was arbitrary and without any sufficient basis.

The 1st Respondent opposed the Application by way of grounds of opposition dated 14th January 2010. These grounds are mainly that:

- a) The application is fatally defective and lacks substratum;
- b) The orders sought are not available to the applicants as against the 1st Respondent;
- c) The applicants have no locus for the reliefs sought;
- d) The applicants are strangers to the 2007 general elections;
- e) The 1st respondent is a stranger to the dispute involving the applicants and the 3rd to 13th Respondents.
- f) The Applicants have not laid any legal or factual basis for their claim and they do not establish any entitlement to legitimate expectation.

The Applicants case is that it is the 1st Respondent who allots spaces to political parties for nominated councillors. It states that it is entitled to select its own members to nominate in these allotted spaces using the prescribed criteria of proportionality.

At the time of the general elections in 2007, the 3rd Respondent was at all material times a coalition of seven founding and 20 other affiliate parties, and was not holding any individual membership save for the token membership of the original subscribers and of his Excellency the President.

After the general election, the 1st Respondent's predecessor, the Electoral Commission of Kenya, published a list concerning the number of seats for councillors won by each political party that had presented candidates for councillorship in the elections.

Following the election and the publication of the list, the 1st Applicant processed its nominations and forwarded them to the PNU's coalition office for onward transmission to the ECK. The list contained 101 names of civic nominees for final nomination and gazetting by the 2nd Respondent. The nominees concerned 46 local authorities.

In February 2008, the Applicants were shocked to learn that gazettelement of the councillors was done, and that their nominees had left out and interchanged with persons nominated by the Respondents.

Upon the signing of the National Accord, the Applicants were assured that remedial measures would be effected. This did not happen and in June 2009, the same anomalies were repeated. The Applicant

contends that the Respondent's conduct in unilaterally rejecting or making their decision and publishing the list of nominations without any regard to the Applicant's list is high handed, is unreasonable, in breach of the laws of the land and the principles of natural justice. The Applicants therefore contend that they are entitled to 55 civic nominations which are currently wrongfully awarded to other political parties. This position is set out in the letter dated 1st December 2008 from the 1st Applicant to the 2nd Respondent.

The 2nd Respondent responded to this letter on 23rd February 2009, and acknowledged that there were some discrepancies in the nomination process – both at the government level including the ECK (at the time) and at the party level because of internal conflicts. He informed the 1st Applicant that his predecessor, Hon. Uhuru Kenyatta, had nominated councillors for a period of just 16 months, and indicated that he would be requesting the various political parties to present proper lists of nominees for the remainder of the term.

On 10th June 2009, just as the term of the nominated councillors was drawing to a close, the 2nd Respondent wrote to the 1st Respondent conveying his intention to renew the term of the councillors. He asked the 1st Respondent to re-apportion the vacant seats within the PNU Coalition partners so that the issue could be sorted out.

The 2nd Respondent has opposed this application by way of a replying affidavit sworn by Wycliffe Musalia Mudavadi. At the material time, he was the Minister for Local government. He depones that the powers of the Minister regarding the nomination and revocation of councillors are provided for under section 26 and 27 (for municipal councils) and sections 39 and 40 (for county and town councils) of the local government act, that the criteria and principles for appointment of nominated councillors is provided for in section 26 (2) of the local government act which applies mutatis mutandis to the criteria for the appointment of nominated members of the national assembly as provided for under section 33 of the Constitution, that the section of the Constitution gives political parties the mandate to nominate councillors according to their strength in the local authorities taking into account the principle of gender equality. He further states that the Electoral commission is empowered to apportion the vacancies amongst the contending parliamentary parties and inform them of its decision.

The political parties after nominating the councillors then forward the list to the electoral commission to vet and if satisfied with the list provided by the political parties then it forwards the list to the Minister for appointment and gazettelement.

After the general election of 2007, the Electoral Commission of Kenya forwarded a list of councillors for nomination by the Minister for Local Government. The minister then duly gazzetted and nominated the councillors as per the list submitted by him to the Electoral Commission.

The Applicants then informed him that there was a discrepancy in the nomination process. On 23rd February 2009, he wrote to the Applicant's explaining to them that his hands were tied by the law as it was express that the political parties were to prepare the list and forward it to the Electoral Commission for vetting before forwarding to the Minister, whose role is merely to gazette and appoint the councillors.

The 2nd Respondent maintains that the dispute is purely an internal affair between the applicants and the party for national unity who were supposed to agree and submit the lists to the electoral commission.

Moreover, the 2nd Respondent avers that the matter before court is premature as disputes between political parties are to be settled by the Registrar of Political Parties.

The 3rd Respondent also put in grounds of opposition. Its grounds are mainly that the application is unfounded, that the application is fatally defective, that the applicants have not exhausted all alternative modes of dispute resolution provided for in the Political Parties Act and that the Applicants have ignored the provisions of the 3rd Respondent's constitution which provides for arbitration as a dispute resolution

mechanism.

The 3rd Respondent takes the view that it followed the provisions of the nominations as set out in its constitution, election rules and other governing documents.

The parties filed submissions in support of their positions. The Applicants submit that the allegations of the Respondents that the application is unfounded and an abuse of the court process is undefined, and really does not amount to a challenge on the application.

The Applicants also submit that they had no other recourse, since the mode of dispute resolution provided for in the Political Parties Act had at the time of the offending action not been operationalized. Moreover, the dispute in issue is not one of those envisaged to be adjudicated upon by the Tribunal under the Act;

The Applicants submit that the current 3rd Respondent is currently registered as a political party under the Political Parties Act, and not as a coalition and therefore, alternative dispute resolution would not be appropriate.

The 1st Respondent submissions are that the 3rd Respondent presented joint civic candidates. It further submits that the affairs of the 3rd Respondent and the Applicants were regulated by a Memorandum of Understanding between themselves. The 1st Respondent is not a party to the affairs of the 3rd Respondent and the Applicants.

The 1st Respondent also submitted that Section 26 of the Local Government Act read together with section 33 of the Constitution of Kenya obliges the electoral commission to deal with the 3rd Respondent and not its affiliate parties when it comes to nominations to civic seats.

Moreover, civic nominees are presented by the 2nd Respondent, and the 1st Respondent merely gazettes the nominees presents to it. It submits that its role is purely clerical, that it has no power to make nominations on councillors under section 26 of the Local Government Act as this is a role preserved for the 2nd Respondent.

The 1st Respondent therefore submits that certiorari cannot issue against the 1st Respondent as there is no evidence that it acted in excess of or lack of jurisdiction, or that it breached the rules of natural justice. It also submits that an order of prohibition cannot issue against the 1st Respondent for an action that has already been undertaken. The councillors were gazetted on 28th January 2008.

The 3rd Respondent on its part submits that this application has been overtaken by events and its substratum has been lost. They further submit that the Applicants have not exhausted all the alternative dispute resolution mechanisms afforded by the Political Parties Act as well as the political parties act to which they are subject to. They further submit that the 1st Applicant is a member of PNU and is therefore bound by its Constitution. As a first recourse, the Applicant should have sought audience before the relevant organs of PNU and then exploited the relevant alternative dispute resolution mechanisms. They therefore submit that the Applicant's case is premature.

It is the 3rd Respondents case that they properly adhered to the requirements of Section 33 of the former constitution as well as sections 2A and 26 of the Local Government Act.

On its part, the 7th Respondent submits that the Application is defective, that it lacks merit and should be dismissed with costs. The 7th Respondent submits that the process for removing a nominated member of parliament as it is set out in section 33 of the repealed Constitution of Kenya, is the same procedure applies to the nomination of councillors.

The councillors nominated to the places aforementioned assumed office in 2009 and have been in office

since then. Whether the correct procedure was followed or not, it remains that the procedure to nominate the councillors were sworn in and therefore the procedure to remove them from office cannot be by way of judicial review.

The 7th Respondent further submits that section 33 of the Constitution does not make mention of political parties and therefore since the Applicants had an agreement with the Respondents it ought to rely on the provisions of that agreement.

The 7th Respondent also submits that the 2nd Respondent complied with the rules of natural justice as he gave a chance to all political parties to propose names for the available civic seats, and when the names were forwarded to him, he gazetted them according to the proportion available to each political party, as it is a common understanding that when nominating councillors, it is the political party with more elected members of parliament who should get more slots, and this is the principle of proportionality that the minister followed.

I have read and considered all the pleadings filed by the parties. In my view, the main issues that come up for determination are that:

- a) Did the Applicants have an alternative remedy to pursue under the Political Parties Act, and if so, would that bar the Applicants from filing this application?
- b) Did the Applicants have a legitimate expectation that was violated by the Respondent's?

The Respondents take the view that there are two alternative remedies that the Applicant could have taken. They contend that since there were alternative remedies available to the Applicants they should not have invoked the supervisory jurisdiction of the court.

The issue of alternative remedies was discussed by Lady Justice Wendoh in ***Republic V National Environment Management Authority Ex-parte Sound Equipment Limited [2010] eKLR (Miscellaneous Civil Application 7 of 2009)***. She considered case law on the issue and expressed herself thus:

“In Harley Devt Inc V Commissioner Of Inland Revenue (1996) Iwlr 727 R V Wandsworth County Court (2002) EWCA CIV 1728 (2003) IWLRL 475 the courts said that permission to claim Judicial Review should not be granted when a suitable alternative remedy is available. In REP V LAMBERTH LONDON BOROUGH COUNCIL (2006) UKHL 10 (2006) 2 AC 265, Lord Bingham said

“referring to the principle that if other means of redress are conveniently and effectively available to a party, they ought ordinarily to be used before resort to Judicial Review”. In Michael Fordham’s Book “Judicial Review Handbook, fifth Edition, he observes that Judicial Review is a remedy of last resort (see R V IMMIGRATION APPEAL TRIBUNAL IWLRL 1445). Back home, the Court of Appeal has held the same view in JAMES NJENGA KARUME V CR 192/1992

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed. Order 53 cannot oust clear Constitutional and Statutory provisions.”

That is the law.”

The findings of Wendoh J were upheld in the court of Appeal. In ***R –Vs- National Environment Management Authority [2011] eKLR (Civil Appeal No.84 of 2010)*** where the court considered the various authorities that the superior court had cited and stated that:

“The principle running through these cases is that where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully

at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to determine and whether the statutory appeal procedure was suitable to determine it”.

The principle therefore regarding an alternative remedy is that the Applicant ought to disclose the remedy and to show the court that there are some exceptional circumstances that would warrant the court to invoke its judicial review jurisdiction.

Two alternative remedies have been suggested by the Respondents. The first is to resolve the dispute through the Political Parties Tribunal that is established under Section 5 of the Political Parties Act. However, at the time of the dispute arising, and the gazetting of the councillors, this tribunal had not yet been formed. The tribunal was established by Gazette Notice dated 17th December 2010, and published on 24th December 2010. It was therefore not possible for the Applicants to attempt to resolve the dispute by this way.

The second remedy suggested is to go through alternative dispute resolution that is contained in the governing documents of the Applicant and the 3rd Respondent. I however find that this option would still not have adequately addressed the concerns of the Applicants. First alternative dispute resolution mechanisms are voluntary. Any of the parties could have refused to take part in this. Moreover, the Applicant’s dispute the decision of the Respondents as it is contained in the Kenya Gazette Notice published on 22nd June 2009. The 2nd Respondent is the one who published the Gazette Notice. Even if the Applicants would have gone for alternative dispute resolution, the 2nd Respondent would not have been a party to the proceedings, and the Gazette Notice would still remain. This would therefore not be an efficient remedy for the Applicants.

The Applicant claims that the 2nd Respondent has acted ultra vires the powers conferred on him by the Local Government Act. The only way an inferior body may be supervised is through judicial review. The Applicant is therefore before the right forum and his claim deserves to be determined on merit.

The issue for determination that arises therefore is whether the 1st and 2nd Respondents action in gazetting the councillors is an action that would require the intervention of this court.

Nomination of councillors as was done in this case is regulated under section 26 of the Local Government Act.

Section 26 reads:

26. (1) The number of councillors of a municipal council shall be as follows—

(a) such number of councillors as the Minister may, by order determine, elected for each electoral area by the electorate thereof; and

(b) such number of councillors nominated by the Minister to represent the Government, or any special interests, as the Minister may, by order determine; and

(c) where the municipal council in its discretion so agrees with the council of any contiguous county, one councillor from amongst the councillors of each such county council, to be appointed by the county council:

(1)The criteria and principles for appointment of nominated members of the National Assembly under section 33 of the Constitution shall mutatis mutandis apply to the nomination of councillors under this section

27.

(2) The term of office of every councillor nominated under section 26(b) shall be five years or such shorter period as the Minister may, at the time of nomination, specify:

Section 33 of the Constitution of Kenya which provides for the procedure for nomination of Members of Parliament, applies mutatis mutandis to the nomination of councillors. The relevant subsections of this section of the Constitution provides that:

(2)The persons to be appointed shall be nominated by the parliamentary parties according to the proportion of every parliamentary party in the National Assembly, taking into account the principle of gender equality.

(3)The proportions under subsection (3) shall be determined by the Electoral Commission after every general election and shall be signified by the chairman of the Commission to the leaders of the concerned parliamentary parties, the President and the Speaker.

(4)The names of the nominees of parliamentary parties shall be forwarded to the President through the Electoral Commission who shall ensure observance of the principle of gender equality in the nominations.

It is common knowledge that the 3rd Respondent was a coalition of parties who fielded candidates from the different member parties in the 2007 general election. Although it is currently registered as a political party. At the time of nomination of councillors, however, it was a coalition of parties, and the 1st Applicant was a member. It is clear from the pleadings before the court that the 1st Applicant had expected to have more nominated councillors as opposed to what happened in February 2008.

Following the nomination of the councillors in 2008, the Applicant raised the issue of the councillors who were left out with the 2nd Respondent. This was acknowledged by the 2nd Respondent. Even in the face of the expectations of the Applicant, in June 2009, the 2nd Respondent still went ahead to gazette other councillors, and leave the 1st Applicant's nominees out. This, in my view, amounts to a violation of the legitimate expectation of the Applicants. A legitimate expectation arises where a public authority or body has represented that it would act, or will in the future act in a certain way. In this case, the 2nd Respondent clearly indicated to the 1st Applicant that it would address the issues that had been raised regarding the nomination of the councillors. This was a representation that the Applicants relied on. It however did not address any of the issues raised. This was a violation of the legitimate expectation of the Applicants. It was also unfair.

De Smith's Judicial Review 6th Edition at pages 615 - 616 indicates the ways in which legitimate expectation may arise: ***“either from an express promise given on behalf of a local authority or regular practice which the claimant can reasonably expect to continue. The representations which induce a legitimate expectation may therefore be express or implied.”***

A legitimate expectation must be:

- a) **Clear unambiguous and devoid of relevant qualification**
- b) **Induced by the conduct of the decision maker**
- c) **Made by a person with actual or ostensible authority**

By virtue of section 33 of the repealed Constitution and section 26 of the Local Government Act, the 2nd Respondent is the person who had the authority to deal with the issues raised. Through the letters dated 23rd February 2009 and 10th June 2009, the 2nd Respondent indicated that it would act to address the issues that had been raised. By failing to address the issues and failing to act on the promise or representation, the 2nd Respondent violated the law and infringed upon the rights of the Applicants.

The law is that once a party gives a legitimate and lawful representation, it is incumbent upon him to abide by the same. Consequently, failure to observe the administrative requirements vitiates the decision.

I am also of the view that in this case, the principle of natural justice that demands that each party should be afforded a hearing was violated. The Applicants argue that they were condemned unheard. In their evidence it is clear that the 1st Respondent never gave them any reasons as to why their nominees for the civic seats were left out. I agree with this submission. It is clear that the nomination was done without the input of the Applicants. An action done in violation of the rules of natural justice is ultra vires, and this court cannot allow it to stand.

For these reasons, I find that the Application before court is merited. The prayers sought are hereby granted, with costs. It is so ordered.

Dated and signed this 10th day of December, 2012.

M. WARSAME
JUDGE

Delivered at Nairobi this 13th day of December 2012.

W. KORIR
JUDGE