REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU Judicial Review 20 of 2008

REPUBLIC……APPLICANT

-AGAINST-

THE ELECTORAL COMMISSION OF KENYA ……1ST RESPONDENT

JULIUS BISSIEN…..……..2ND REPONDENT

AND

RISPER ATIENO OUMA…….INTERESTED PARTY

EXPARTE

JAMES MACHARIA KANYI……....SUBJECT

RULING

The applicant, James Macharia Kanyi, took part in the 2007 civic elections for Kivumbini Ward, Nakuru on a Party of National Unity (PNU) ticket, while the interested party, Risper Atieno Ouma, who was declared duly elected, ran on the Orange Democratic Movement Party (ODM) ticket.

The respondents, the disbanded Electoral Commission of Kenya and the Returning Officer, Julius Bissien, declared the interested party duly elected to represent Kivumbini Ward with 3748 votes against the applicant's 3744 votes – a narrow margin of only four (4) votes.

The applicant being aggrieved by the declaration of the interested party as the elected councillor of the ward instituted a suit on 23rd January, 2008 in the subordinate court. While that suit is still pending hearing and determination, the applicant has, upon being granted leave, filed the instant motion on notice pursuant to **sections**
8 and **9** of the **Law Reform Act and Order 53** of the **Civil Procedure Rules.**

The applicant seeks two substantive reliefs, certiorari to quash the decision of the 1st respondent contained in the **Kenya Gazette Notice No.474** of **25th January, 2008** declaring the interested party the successful candidate and councilor for Kivumbini Ward in Nakuru Municipality while the same 1st respondent had issued an earlier **Gazette Notice No.12614** of **30th December, 2007** in which elections in several wards in the country including Kivumbini were countermanded on the ground that the ballot papers were invalid. The second relief sought by the applicant is an order of mandamus directing the 1st respondent to conduct fresh elections in Kivumbini Ward.

It is the applicant's contention that although the interested party was contesting the elections on an ODM party ticket, the ballot papers indicated that she was doing so on ODM-K ticket; that he raised the anomaly with the 2nd respondent during the nominations and was given assurance that the anomaly would be addressed hence the said **Special Gazette No.12614** of **30th December, 2007** countermanding the elections. According to the applicant, as he was waiting and preparing for a fresh round of elections, he was surprised that the 1st respondent had declared the interested party the successful candidate by a **Gazette Notice No.474** of **25th January, 2008**. That in publishing **Gazette Notice No.474** the 1st respondent acted *ultra vires* its powers, in excess of its jurisdiction and against the applicant's legitimate expectations.

Responding to these averments, the respondents maintained that the elections in question were conducted in accordance with the law; that the interested party was issued with a Certificate of Results having garnered the highest number of votes cast; that the gazette notice of 30th December, 2007 in respect of Kivumbini Ward was issued in error; that the applicant having been aggrieved by the results of the elections, ought and indeed did file a suit in the magistrate's court, a fact the applicant has deliberately concealed from this court; that the remedy of judicial review is not available to the applicant in the circumstances, and; that this application is incompetent having been instituted out of time.

The interested party has filed both grounds of opposition and a replying affidavit. She has maintained that elections were conducted and the applicant fully participated. That the mix-up on her party and party symbols cause no prejudice to the applicant; that the gazette notice of 30th December, 2007 had no effect on the results as elections had been conducted three (3) days earlier; that the applicant's recourse was in **Nakuru CMCC No.57** of **2008**, which is still pending determination; that this application is otherwise an abuse of the court process.

I have most carefully considered these arguments, written submissions and the authorities cited. It is common ground that civic elections were held in respect of Kivumbini Ward on 27th December, 2007. On 28th or 29th December, 2007, (see the two certificates annexed to the interested party's and 1st respondent's replying affidavits) the 1st respondent issued to the interested party a certificate to signify her election as a councillor to represent Kivumbini Ward and a gazette notice to that effect issued. However, before the issuance of that gazette notice, there was another gazette notice whose effect was to suspend the elections in Kivumbini and other wards throughout the country on account of invalid ballot papers.

Although the applicant did not disclose this, it is not denied that he was aggrieved by the results and moved the chief magistrate's court in **CMCC No.57** of **2008**. I have had the liberty to call for and peruse the record of **CMCC No.57** of **2008**. The last time the matter came up was 19th August, 2008 – nearly two years ago and is indeed still pending hearing ostensibly awaiting the outcome of this judicial review application. The basis of staying those proceeding on account of this application is not clear to me.

From the on set, I need to make it clear that the right forum to challenge the validity of a local authority election is the magistrate's court. **Section 61** of the **Local Government Act** provides as follows:

"61. (1) If the validity of an election to a local authority under this Act is brought into question by any person qualified either to be elected or to vote at the elections or by the returning officer on any ground or for any cause whatsoever, that person or the returning officer, as the case may be, may at anytime within fifteen days after the publication of the results of the election, apply to a Resident Magistrate's court within or nearest to the area of the local authority to set the election aside.

(2) The Resident Magistrate's court shall, after due inquiry declare whether the candidate whose election is questioned, or any and what other person, is duly elected, or whether the election is void.

(3) If the election is declared void, a new election shall be held."

Having found that the right forum to ventilate this dispute is in the **CMCC No.57** of **2008** and in view of the fact that that suit is pending, I will confine my consideration of the matters before me to the question of whether the proper procedure in bringing this application has been adhered to and whether the remedy of judicial review is available in this electoral process. Issues to do with the conduct of elections, the mix-up of nominating parties, party symbols, two gazette notices and so forth are matters of merit which do not concern me and will indeed be determined in **CMCC No.57** of **2008**.

First the procedure: The application has been challenged on three procedural prongs. It has been submitted that the application has been filed out of time. The impugned decision of the 1st respondent is contained in Gazette Notice of 25th January, 2008 but dated 22nd January, 2008. In terms of **Order 53 rule 2** of the **Civil Procedure Rule** in respect of an order of certiorari, leave can be granted if the application is presented to the court not later than six months after the date of the impugned decision. The 1st respondent's decision in this election was formalized on 22nd January, 2008. Leave to bring the present application was sought and obtained on 25th July, 2008. In strict computation of time according to **section 57** of the **Interpretation and General Provisions Act – Cap 2** – excluding the first day and the days referred to in the Act as the excluded days, the application was brought well within the prescribed six months and therefore that ground must fail.

The second procedural point taken is to the effect that the application is incompetent as the motion has been brought in the same miscellaneous file in which leave was obtained. That once leave was obtained in this file, the same was spent and the motion ought to

have been brought in a separate file. The case of **Republic** Vs. **Funyula Land Dispute Tribunal & 3 others**, Busia H.C.Misc. Application No.327 of 2003 was cited in support of this proposition.

That being a decision of a court of concurrent jurisdiction, I have the liberty not to follow it. I find no legal basis for that proposition. It has always been the procedure and practice to seek leave by a chamber summons in the same filed the motion would be brought within twenty one days of the grant of leave. Nothing turns on that ground also.

Finally it is submitted that, contrary to **Order 53 rule 3(2)** of the **Civil Procedure Rules**, the facts sought to be relied on are contained in the verifying affidavit instead of being in the statement of facts. I believe the proper interpretation of **Order 53 rule 1(2)** aforesaid and as propounded by case law is quite the opposite of what counsel has submitted. For example in the well known case of the **Commissioner General, KRA** Vs. **Silvano Onema Owaki T/A Marenga Filling Station**, the Court of Appeal rendered itself thus:

> **"We would observe that it is the verifying affidavit and not the statement to be verified which is of evidential value in an application for judicial review."**

The court referred to the **Supreme Court Practice** 1976 vol. 1 where it is confirmed that the statement should contain nothing more that the name and description of the applicant, the relief sought and the grounds on which it is sought. See also **Republic** Vs. **Wandsworth JJ *Exparte* Read** (1942) IKB 281.

I now turn to the second issue, which is really the crux of this application, namely, whether the decision of the respondents is amenable to this court's jurisdiction of judicial review. The applicant's counsel relied on the decision of the Hon. Mr. Justice J. B. Ojwang in **Republic** Vs. **Electoral Commission of Kenya, *exparte* Nyoike & 3 others** (2004) 1 KLR 385 for the position that the decision of the 1st respondent are amenable to judicial review proceedings as they involve determination of individuals' rights. Both learned counsel for the applicant and the interested party did not confirm that this decision went upto the Court of Appeal in **Kipkalya Kiprono Kones** Vs. **Republic & Electoral Commission of Kenya, Exparte Kimani Wa Nyoike & others**, Civil Appeal No.94 of 2005 where one of the questions for determination was whether, in the circumstances of that dispute, judicial review was available to the respondent in the appeal against the Electoral Commission of Kenya. The Court of Appeal made reference to its previous decisions and stated the law ultimately as follows:

> **"The point we are making is that the Commission, i.e. the Electoral Commission of Kenya is amenable to the jurisdiction of the**
> **High Court and in appropriate circumstances, the High Court will intervene in its decision- making process through the procedure of judicial review.**
> **……...**
> **……...**
> **The jurisprudence underlying these decisions is that the Constitution itself and the National Assembly and Presidential Elections Act deal with and set out in detail the procedure of challenging elections and nominations to the National Assembly. Those procedures ought to be followed and the judicial review process, which in Kenya is provided for in the Law Reform Act, chapter 26 of the Laws of Kenya and Order 53 of the Civil Procedure Rules cannot oust the provisions of the Constitution in particular."**

The court concluded as follows:

> **"We have said enough, we think to show that the procedure of judicial review, like that of plaint or any such like procedures, is and was not available to the parties aggrieved by the acts or omissions of the Commission. We re- assert, as we previously did, that the only valid way of challenging the outcome of the electoral process, and for that purpose nominating members to the National Assembly is part of the electoral process, is through an election petition as provided in the Constitution and the National Assembly and Presidential Elections Act."**

I am tempted to refer to only two more cases if only to put this matter beyond doubt. The Court of Appeal in an earlier decision in the case of **The Speaker of the National Assembly Vs. James Njenga Karume** Civil Application No.NAI 92 of 1992 stated as follows:

> **"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions."**

Finally another case involving the same Kimani Wa Nyoike as in the **Kipkalya Kones** case (supra), namely **Kimani Wa Nyoike** Vs. **The Electoral Commission of Kenya and another**, Civil Application No. NAI. 213 of 1995, the court stated as follows:

> **"We think that the procedure for addressing grievances arising from elections is through an election petition and that is exactly what the court was saying in Karume case (supra). That view had full support in authority both local and foreign. ……..……**

……..What we are saying is that there are special procedures when it comes to matter of election
and those procedures ought to be strictly followed as the court observed in Karume case."

I cannot attempt to paraphrase or interpret those clear and sound pronunciations of the highest court of the land, save only to state in conclusion that this court lacks jurisdiction to determine matters raised in this application as they call for determination of facts which have the effect of deciding the issues before the magistrate's court, the proper forum. I must also observe that by the applicant filing this matter in the High Court while pursuing another relief in the magistrate's court at the same time, he is not only in abuse of the process of the court but also in pursuit of an absurdity. Instead he is advised for free to pursue CMCC No.57 of 2008 to save both his money and court's time. Indeed there is no justification why a matter which was filed in 2008 has not been heard. In that regard, it is directed that CMCC No.57 of 2008 be mentioned before the trial magistrate for taking of directions with a view to listing it for hearing on 24/5/2010.

In the result this application fails and is dismissed with costs to the interested party and the respondents.

Dated, Signed and Delivered at Nakuru this 7th day of May, 2010.

W. OUKO
JUDGE