



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Judicial Review 21 of 2008

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW RELIEFS IN THE NATURE OF CERTIORARI &
MANDAMUS UNDER ORDER LIII RULE 3 OF THE CIVIL PROCEDURE RULES**

AND

**IN THE MATTER OF LOCAL GOVERNMENT ELECTIONS FOR KAPTEMBWA WARD IN THE MUNICIPALITY OF
NAKURU**

AND

IN THE MATTER OF AN APPLICATION

BY

REPUBLIC.....APPLICANT

-AGAINST-

**THE ELECTORAL COMMISSION
OF KENYA1ST RESPONDENT
JULIUS BISSIEN.....2ND REPENDENT**

-AND-

JEPITHAR MAINA MANIGA.....INTERESTED PARTY

EX-PARTE

JAMES MOKUA RUTE.....SUBJECT

H.C.J.R.NO.21/2008

RULING

The issues in this dispute are fairly straight forward and largely uncontroverted.

During the 2007 Civic Elections conducted under the supervision of the defunct Electoral Commission of Kenya, the 1st respondent, now replaced by the Interim Independent Electoral Commission by **Gazette Notice No.4794 of 8th May, 2009**, the interested party, Jepithar Maina Maniga was declared the duly elected councillor of Kaptembwa Ward in Nakuru Municipality.

A contestant for that ward, the applicant, **James Mokua Rute**, was aggrieved and challenged in the Resident Magistrate's Court, the declaration of the Interested Party by the 1st Respondent as the councillor of Kaptembwa Ward. The case before the Resident Magistrate's Court in Nakuru **CMCC No.58 of 2008**, between the applicant, on one hand and the respondents and interested parties on the other hand is still pending determination.

Pursuant to leave granted on 25th July, 2008, the applicant has now brought the instant motion seeking *certiorari* and *mandamus*. *Certiorari* to quash the decision of 1st respondent contained in **Gazette Notice No.474 of 25th January, 2008** declaring the interested party the duly elected councillor of Kaptembwa Ward even after it had countermanded the elections in a **Gazette Notice No.12614 of 30th December, 2007**.

By an order of *mandamus*, the applicant wants the 1st respondent compelled to call for fresh elections in Kaptemwa Ward. The

application is premised broadly on the grounds that the 1st respondent acted *ultra vires* in declaring the interested party the duly elected councillor when the elections had been countermanded. Secondly, it is contended that the 1st respondent acted in excess of its powers by declaring the interested party the duly elected councillor when there was confusion as to the party on whose ticket he was contesting. On this ground, it is contended that the interested party was running on the Orange Democratic Movement Party (ODM) ticket, yet he was reflected in the ballot material as contesting on the Orange Democratic Movement of Kenya Party (ODM-K) ticket, complete with its symbol of an orange and a half orange.

The respondents in their reply, while admitting the mix-up on the parties and symbol as well as conceding that it issued **Gazette Notice No.12614 of 30th December, 2007**, argued that the latter was issued in error as it had no powers to countermand an election which had already been conducted and a winner declared; that the applicant having complained to the Resident Magistrate's Court cannot seek the determination of an election dispute in this court by way of judicial review.

The interested party maintains that his election was lawful and if the applicant was aggrieved, the right forum is the Resident Magistrate's Court.

I have considered these arguments, written submissions as well as authorities cited. The broad question is whether, in the circumstances of this matter, the High Court can issue orders of *certiorari* and *mandamus*. There is no doubt at all that any person or body which performs *quasi-judicial* public duties or functions is amenable to this court's power of judicial review. The 1st respondent is such a body and in a proper case, its decision can be quashed by *certiorari*. See **Kipkalya Kiprono Kones Vs. Republic and Electoral Commission of Kenya, Exparte Kimani Wa Nyoike & others**, Civil Appeal No.94 of 2005.

However, it must be remembered that the remedy of judicial review is concerned with the integrity of the process and not the merit of the decision. Where a question of validity of election under the **Local Government Act** arises, by dint of **Section 61** of that **Act**, such a question can only be referred to a Resident Magistrate's Court within or nearest to the area of the local authority in question. Although I have stated that the decision of the 1st respondent is amenable to judicial review, it must be borne in mind that where a statute provides a procedure of challenging elections, that procedure ought to be followed.

In the case of **The Speaker of the National Assembly Vs. James Njenga Karume**, Civil Application No. NAI. 92 of 1992, the Court of Appeal stated the law 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.”

In **Kimani Wa Nyoike Vs. The Electoral Commission of Kenya & Another**, Civil Application No. NAI. 213 of 1995, the Court of Appeal dealing with a parliamentary election said:

**“We think that the procedure for addressing grievances arising from elections is through an election petition.....
What we are saying is that there are special procedures when it comes to matters of election and those procedures ought to be strictly followed as the court observed in Karume case.”**

The ratio in these cases arising from parliamentary election disputes, apply with equal force to elections under the **Local Government Act**.

In conclusion, the applicant having gone to the right court namely the magistrate's court, was in blatant abuse of the process of the court to bring this application while **CMCC No.58 of 2008** is yet to be determined.

In the result, this application is for dismissal and is hereby dismissed with costs to the interested party and the respondents. It is further ordered that **CMCC No.58 of 2008** be mentioned before the trial court on 5th July, 2010 for the purpose of taking a hearing date.

Dated, Signed and Delivered at Nakuru this 24th day of June, 2010.

W. OUKO
JUDGE

