REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc. Appli. 13 of 2008

SIMON NGANGA MBUGUA……...……APPLICANT

Versus

THE RETURNING OFFICER KAMUKUNJI

CONSTITUENCY & ANOTHER…….RESPONDENT

RULING

The ex parte Applicant, Simon Nganga Mbugua filed Judicial Review proceedings seeking Judicial Review orders against the Returning Officer Kamukunji Constituency Nairobi and the ECK.

The Applicant was one of the candidates who took part in the parliamentary elections held in December 2007. The Applicant seeks orders of mandamus to compel the 1st and 2nd Respondent to comply with their duties under Regulation 40 and 41 of the National Assembly Presidential Elections Regulations made pursuant to S. 34 of the National Assembly and Presidential Elections Act. An order of certiorari is also sought to quash the decision of the 2nd Respondent made on 29th December 2007 nullifying the Kamukunji elections and an order of prohibition seeking to restrain the 1st and 2nd Respondent ordering repeat of the elections or supervising a repeat of the said elections. The Notice of Motion is dated 17th January 2008 brought pursuant to Order 53 Civil Procedure Rules supported by a statutory statement and a verifying affidavit sworn by the applicant on 15th January 2008.

On 3rd April 2008 one of the Interested Parties, one Professor Ibrahim Yusuf a parliamentary candidate during the elections of 2007 filed a Notice of Motion under the inherent powers of the court seeking the following orders:-

(1) That the 1st and 2nd Respondent do produce upon oath all the form 16A in their possession;

(2) Alternatively, that the 1st and 2nd Respondents do produce all the form 16A in their possession or power for inspection by the Applicant/Interested Party and permit the taking of copies thereof;

(3) That the 1st Respondent do attend court for cross examination on her affidavit sworn on 4th March 2008;

(4) Costs of the Application be awarded to the Interested Party.

The Notice of Motion was based on grounds found on the face of the Application and a 3 paragraphed affidavit sworn by the Interested Party Ibrahim Ahmed Yusuf. The Applicant contends that cross examination of the 1st Respondent is necessary for the ends of justice to be met and prevent abuse of the court process; that the Interested Party has a constitutional right to a fair hearing; that the issues raised in the Report on the final tallied results of Kamukunji Constituency compiled by the 1st Respondent amongst others require verification and calls for cross examination of the 1st Respondent.

Counsel for the 1st and 2nd Respondent Jemima Keli filed grounds of opposition on 7th April 2008 to the effect that the application is bad in law and incompetent, that the application has no basis in Judicial Review proceedings and is totally unmerited and lastly that the court lacks the requisite jurisdiction to grant the orders sought.

The ex parte Applicant also filed grounds of opposition on 8th May 2008 as follows;

(1) That the court lacks jurisdiction to grant the orders sought;

(2) The applicant has no locus standi to file the application;

(3) The application is misconceived and an abuse of the court process.

The ex parte applicant also filed skeleton arguments dated 8th May 2008.

The Interest Parties represented by Ms. Chelangat did not file any papers but when the application came up for hearing, the court asked the Interested Party/Applicant to address the court on the question of jurisdiction alone.

Mr. Owino, Counsel for the Interested Party submitted that though Sections 8 and 9 of the Law Reform Act and Order 53 Civil procedure Rules which donate Judicial Review jurisdiction to the court do not entertain such applications for disclosure, the courts have on certain occasions invoked the court's inherent jurisdiction to set aside leave and other circumstances that call for it. It was Counsel's further submission that the affidavits filed herein are not candid and yet the decision maker needs all the facts placed before the court because it is not proper to leave the court to make a decision based on the insufficient evidence before it. Counsel said that the court exercised its inherent powers in **HMISC 1335/05 R V KENYA BUREAU OF STANDARDS** where the court quoted **O'REILLY V MACKMAN HL (1983) 237** in order to justify its decision that disclosure was not envisaged under Order 53 and that the court quoted Lord Diplock out of context because the jurisdiction under Order 53 allows for limited disclosure and interrogatories though its not specifically provided for. He argued that there are disadvantages in our jurisdiction just like in England before the 1977 Act but that even then the courts allowed limited disclosure. Counsel relied on **REG V STOKESLEY YORKSHIRE JUSTICES ex parte BARTRAM (1956) 1 WLR 255** where the court held that power to cross examine in Judicial Review proceedings would only be allowed in exceptional and remarkable circumstances. The same was applied in **MISC 1175/07 CHAN MEI YIU; PADDY & OTHERS V SECRETARY OF STATE.** That the procedure adopted in **R V EALING (2002) EWIRC 250** was not inconsistent with Rules of the court or procedures. That if the court allowed the application it will not be inconsistent with rules of this court or procedures. That this court has inherent powers to entertain the application and allow or dismiss it.

Mr. Kibe counsel for the ex parte applicant submitted that Judicial Review is a special jurisdiction which is neither civil nor criminal within the meaning of S. 60 of the Constitution where the court has wide power to invoke its inherent jurisdiction in both civil and criminal matters than where the power of the High Court is specifically conferred by parliament. That the Law Reform Act Ss. 8 & 9 donates jurisdiction to this court, an express jurisdiction granted by Parliament. That once rules are made pursuant to S. 9 of the Law Reform Act, it is not available for a party to invoke any other provisions of the law in Judicial Review. That the inherent jurisdiction of the court cannot be invoked if they are inconsistent with S.8 & 9 of the Law Reform Act and Order 53 Civil Procedure Rules.

It was also Mr. Kibe's submission that Judicial Review proceedings are by way of summary procedure by filing of affidavits and grounds and that the Interested Party having filed a replying affidavit in this matter, they have exhausted their role. That the right of the Interested Party is limited to answering to the application but in this case the Interested Party is challenging the Respondent which is improper.

Counsel further urged that S. 8 and 9 of the Law Reform Act and order 53 Civil Procedure Rules are silent on discovery and that this court would be usurping the powers of the Rules Committee to make such rules under S. 9 of the Law Reform Act. That stay and setting aside are discretional. That even if the decision in the **O'REILLEY CASE** were correct that cross examination can be allowed in exceptional cases, yet the Law Reform Act and Order 53 Civil Procedure Rules is a special jurisdiction and no rules have been made to create exceptional circumstances. That at the time the **O'REILLEY CASE** was decided, Parliament in the United Kingdom had passed legislation allowing for such exceptional circumstances when cross examination, discovery may be permitted and that whereas the court allowed cross examination in a Judicial Review application in 1956 in **R V STOKESLEY (1956) WLR 255** the next decision in **O'REILLEY V MACKMAN (1983) (HLR) 1 282** was made in 1983 after amendment to the law allowing discovery and cross examination.

Mr. Kibe also submitted that the prayer sought cannot be granted because the subject matter relates to parliamentary elections which is a special jurisdiction under S. 44 of the Constitution and Sections 19 and 20 of the National Assembly and Presidential Elections Act, Cap 7 Laws of Kenya and that the documents which the Interested Party seeks to cross examine upon cannot ordinarily be obtained except in the context of an Election Petition Court where inspection is done pursuant to Regulation 42 (2) of the Cap 7 Laws of Kenya. That Regulations 42 (4) provides for public inspection but it is limited to a pending petition. That the election results in Kamukunji have not been declared and the court cannot therefore inspect the documents.

Ms. Keli, Counsel for 1st Respondent opposed the application on grounds that the issues raised are for an election court to deal, pursuant to Section 44 of the Constitution and S.23 of Cap 7 Laws of Kenya which provides procedure for the Election Court. Ms. Keli also submitted that the Applicant seeks several orders of Judicial Review including Mandamus to compel the 1st Respondent to declare results of Kamukunji Constituency and yet the Interested Party is now asking the Respondent to explain why the duty was not performed by the Respondent which will be looking at the reasons as to why no results were announced and that goes to the merits of the decision of the Respondents.

Ms Chelagat appearing for the 14 Interested Parties associated herself with submission by Mr. Owino, Counsel for the Interested Party/Applicant.

It is common ground that Section 8 and 9 of the Law Reform Act and Order 53 Civil Procedure Rules which donates power to the High Court to grant Judicial Review orders do not provide for cross examination of witnesses, discovery or interrogatories. The question therefore is whether this court has jurisdiction under its inherent jurisdiction to order for cross examination of the 1st Respondent on her affidavit cross examination on Form 16 A and for inspection as prayed by the Interested Party in their Notice of Motion.

Counsel for the Interested Party is aware that no such situation has arisen in our jurisdiction where cross examination or discovery has been called for in a Judicial Review application but submits that these are exceptional and remarkable circumstances that call for the court exercising its inherent powers to allow the cross examination and discovery. In the **STOKESLEY CASE (supra)** a decision made in 1956, the court held that the court had power to allow cross examination of a deponent in Crown proceedings (Judicial Review) and that though the power would only be exercised in special circumstances, the case was of an exceptional and remarkable character that the order had to be made to get to the bottom of the matter. The **O'REILLY CASE** was decided in 1983, about 27 years later. However it is noteworthy that in the **O'REILLEY CASE** a new Order had been introduced in England in 1977 which had express provisions for interlocutory applications, for discovery of documents, and cross examination of deponents to affidavits. This case was followed in the **CHAN MEI CASE**. The circumstances obtaining at the time of **O'REILLY CASE** are not similar to our situation because there

was legislation in force that allowed for cross examination or discovery. In **R V EALING (2002) ELRH C 256** the court allowed examination of witnesses provided it did not interfere with the rules of the court or procedures. What is clear is that even if the courts have allowed cross examination of witnesses in Judicial Review, it is a very rare occurrence.

In **COMMISSIONER OF LANDS V KUNSTE HOTEL LTD (1995-98) IEA 1** the Court of Appeal held that Judicial Review is a special jurisdiction under S.8 & 9 of the Law Reform Act and Order 53 Civil Procedure Rules which is self sufficient (sui generis). We are aware that the court has exercised its discretion in allowing amendment of Notice of Motions or setting aside leave or orders of stay in order to do justice to the parties. Judicial Review proceeds by way of summary procedure by filing of affidavits, grounds and further affidavits. In our view to purport to call for viva voce evidence, cross examination of witnesses, inspection or discovery would be going contrary to Section 8 & 9 of the Law Reform Act and Order 53 Civil Procedure Rules. For this court to adopt such procedure, there would be need for amendment of the law like what had happened in England before the decision in the **O'REILLEY CASE**. We wish to clarify that the decision in **R V KENYA BUREAU OF STANDARDS (supra)** in considering the **O'Reilley Case** did not misunderstand Lord Diplock. The court merely emphasized the fact that Judicial Review is a special jurisdiction and we think the Interested Party misunderstood the court's decision in that case.

Mr. Kibe challenged the role of the Interested Party in a Judicial Review application. Can the Interested Party raise a challenge to the Respondent in such an application? According to Mr. Kibe, the Interested Party's role in a Judicial Review application is limited to reply to the exparte Applicant's application but not the Respondent. Order 53 Rule 4 (3) Civil Procedure Rules provides that every party to the proceedings supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing. Under Rule 6, one who desires to be heard in opposition to the motion shall be heard even though he may not have been served with the Notice. It means the Interested Parties can only be heard in opposition to the exparte Applicants Notice of Motion. By the Interested Party purporting to question the Respondent's case, he is creating another dispute within the Judicial Review application or raising fresh issues within the Judicial Review application which is improper. We would agree that the Interested Party's role would be limited to replying to, or challenging the Applicants case but not creating other issues or other disputes between the Interested Party and the Respondents and muddling up the whole process. The ex parte Applicant has sought specific prayers against the Respondent and the Interested Party's application is likely to interfere and prejudice the Applicant's case if such an Application for inspection and cross examination were to be granted.

By seeking to call upon the 1st and 2nd Respondents to produce Forms 16 A and cross examination of the 1st Respondent, the Interested Party says he intends to clarify the issues raised in the Report on the final tallied results for Kamukunji Constituency. The question is whether this court can go into the merits of issues raised in the Report of the final tallied results. These are issues in contention and it is our considered view that this court would be overstepping its bounds if it were to go to the merits of Form 16 A or verification of the final report. We do agree with Mr. Kibe Counsel for applicant and Ms Keli Counsel for 2nd Respondent that this is an issue for the Election Court set up pursuant to S. 44 of the Constitution and S. 19 of Cap 7 Laws of Kenya. S. 44 of the Constitution provides in part:

"**S. 44 (1) The High Court shall have jurisdiction to hear and determine any question whether-**

(a) a person has been validly elected as a member of the National Assembly; or

(b) the seat in the National Assembly of a member thereof has become vacant.

The above Section is complimented by S. 19 and 23 of the National Assembly and Presidential Elections Act Cap 7 and Rules made thereunder. Section 19 of cap 7 Laws of Kenya provides for the constitution of Election courts whereas S. 23 provides for procedure to be adopted by the Election court in an election petition. From the application by the Interested Party, he wants Form 16 A inspected at this forum yet Rugulation 42 (2) of the Rules made under Cap 7 Laws of Kenya does specifically provide on how inspection will be done. Under Rugulation 42 (1) all documents relating to an election shall be retained in

safe custody by the returning officer for 3 months after the results are declared and unless the ECK or the Election court otherwise directs that they be destroyed, under Rugulation 42 (2), results retained under Regulation 42 (1), apart from ballot papers and counterfoils can be availed for inspection by any member of public upon request subject to conditions made by the Returning Officer. Regulation 42 (3) provides for how the actual inspection is done. There is therefore special jurisdiction provided by the Constitution and Cap 7 on how inspection of documents relating to elections is to be carried out. This court is not sitting as an election court. The elections of Kamukunji Constituency have not yet been carried out and we are of the view that this court has no jurisdiction to order for an inspection or cross examination of the Returning Officer, a jurisdiction which is specially set apart for the Election court. Since elections of Kamukunji have not yet been done the Interested Parties have to await the whole process of election to be completed before such a challenge can be launched. The jurisdiction of this court is very thin or limited indeed, so that this court has to be very careful that it does not cross its borders with either the civil jurisdiction or as in this case, the special jurisdiction donated to the Election court by the Constitution. We are of the view that cross examination of the Returning Officer and inspection of Form 16 A will be an affront to the jurisdiction set apart for the election court as it will be attempting to go to the merits of the 1st Respondent's decision which we are not concerned with here. Judicial Review is concerned not with the merits of the decision of the 1st and 2nd Respondent but the decision making process itself and we shall confine ourselves to that limited jurisdiction.

As regards the English authorities that were cited, while we agree that this court has on occasions invoked its inherent powers to do justice in some situations like the amendment of notice of motions and setting aside of leave or stay which is not provided for under Order 53 Civil Procedure Rules, yet Judicial Review jurisdiction in England has much wider application than ours. In England the law has been amended so that declarations, and injunctions can be issued unlike our jurisdiction where we are confined to the traditional remedies of certiorari, mandamus and prohibition. In addition to the above, unlike England, we have a written Constitution which provides a specific jurisdiction and procedure to be followed. We cannot exercise our inherent powers to oust the constitutional or clear statutory provisions. The Court of Appeal in **KIPKALYA KONES V REP CA 94/03** said that issues arising from an election process can only be challenged in an election court by way of a petition pursuant to S. 44 of the constitution and S. 19 of the Cap 7. The Interested Party wants this court to consider an issue reserved for the election court which it has no jurisdiction to deal; we would adopt the Court of Appeal holding in the case of **SPEAKER OF NATIONAL ASSEMBLY V JAMES NJENGA KARUME CA 92/1992** where the court said;

"**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. Order LIII cannot oust clear constitutional and statutory provisions."**

The inherent powers of the court are only invoked where there is a vacuum in the law in order for the court to do justice. There is no vacuum in the law relating to Election Petitions and we hold that we have no jurisdiction to engage this court in cross examination of the 1st Respondent and inspection of Form 16 A as that duty is reserved for the Election Court. We hereby strike out the application dated 3rd April 2008 and brought by the Interested Party, Prof. Ibrahim Ahmed Yusuf for want of jurisdiction with the costs to the other parties.

Dated and delivered this 29th day of May 2008.

J. G. NYAMU

JUDGE

R.P.V. WENDOH

JUDGE