



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

MISC APPLI 1249 OF 2007

BEJA MNYIKA BEJA.....APPLICANT

Versus

ELECTORAL COMMISSION OF KENYA.....RESPONDENT

RULING

Before me is the Chamber Summons dated 23rd November 2007 brought by Beja Mnyika Beja against the Electoral Commission of Kenya (ECK) in which the Applicant seeks:-

- (1) To be exempted from serving notice on the Registrar in terms of Order 53 Rule 1(3) Civil Procedure Rules
- (2) That the court do grant leave to the Applicant to apply for
 - (i) An order of certiorari directed at the Respondents removing to this court for purposes of being quashed any purported proceedings orders and or recommendations pursuant to which a decision was made on 13th November 2007 failing the Applicant on the English proficiency test.
 - (ii) An order of certiorari to quash the Respondents result's notification slips on English language issued against the Applicant on 12th November 2007 and 13th November 2007 by the Respondents language Board No. 7 and Appeals Board 'A' respectively;
 - (iii) An order of prohibition directed at the Respondent to restrain it from interfering with, preventing or denying in any way stopping the Applicant from submitting his Parliamentary nomination papers to the Respondent's returning officer, Msambweni Constituency premised on the purported English Proficiency test conducted on 11th November 2007 and 13th November 2007 respectively;
 - (iv) An order of mandamus compelling the Respondent to issue a language proficiency certificate to the Applicant or accept the Applicant's nomination certificate and insert the Applicant's name in the register or list of parliamentary aspirants for Msambweni Constituency;
 - (v) A declaration that the purported language proficiency tests conducted by the Respondent on 11th November 2007 and 13th November 2007 in respect of parliamentary elections for the year 2007 and based on National Assembly and Presidential Elections Regulations 1999 is ultra vires invalid, null and void ab initio;

(vi) That the grant of leave do operate as stay of orders of the Respondent stopping and/or preventing the Applicant from submitting his nomination and or any other requisite papers to the Respondent's returning officer Msamweni Constituency;

(vii) Costs of the Application be provided for.

Though the Application for leave under Order 53 (1) is ordinarily made ex parte, this court ordered that the same be heard inter partes.

The Chamber Summons is supported by a statutory statement, a verifying affidavit and supporting affidavit, all dated 12³rd November 2007 and sworn by the Applicant. The Respondents filed a Preliminary Objection brought on grounds that; the Application is brought under the wrong procedure and that the Plaintiff's suit is unmaintainable and a non-starter and that the court has no jurisdiction to entertain the Application.

The court took up the Preliminary Objection first. The Applicant is challenging the Respondent's decision to fail him in the English Proficiency Examination which he took to enable him qualify to stand in the upcoming parliamentary elections. Mr. Annan, Counsel for the Respondents submitted that since the Applicant submitted to a language test which is part of the election process, any challenge to it should be by way of a petition. Counsel relied on the case of **SPEAKER OF THE NATIONAL ASSEMBLY V HON. NJENGA KARUME CA 92/1992** where it was held that procedure prescribed by statute should be followed. That the procedure prescribed under the National Assembly and Presidential Elections Act (Cap 7) 2nd schedule, para 5 provides for appeals. That the decision of the Appeals Board is final and the Applicant cannot come to court to seek review.

Counsel also cited the case of **KAPKALYA KONES V REP & ECK CA 94/05** where the court held that matters pertaining to the electoral process must be dealt with by way of election petition and that court held that mistakes which are always bound to happen should not stop the electoral process.

In opposing the Preliminary Objection, Mr. Milimo urged that what has been raised is not a pure point of law as espoused in the case of **MUKISA BISCUITS V WESTEND DISTRIBUTORS (1969) EA 662** at page 701. Counsel argued that what is before the court touches on disputed issues. That Section 44(1) of the constitution gives the High Court the mandate to hear and determine questions relating to validity of election of members of the National Assembly, and when a seat in the National Assembly of a member has become vacant and that under S.44 (4) parliament is given a discretion to enact procedural regulations. That the constitution does not oust the inherent jurisdiction of this court to determine issues when they arise.

He submitted that Section 2 of the National Assembly & Presidential Elections Act Cap 7 Laws of Kenya, defines the Election Court as the High Court in exercise of the jurisdiction conferred upon it by S. 44 (1) of the Constitution. Section 19 (2) & (3) of Cap 7 then goes on to specify what issues can be determined by the Election Court. That questions relating to validity of the nomination and election of the president and members of parliament. It is Mr. Mulimo's view that the election court presupposes there having been an election and that therefore this Application does not fall within S.44 of the constitution and 19 of Cap 7. Laws of Kenya

That the Applicant is challenging the decision of the ECK which they allege is made in excess of their powers and that the courts unlimited jurisdiction conferred by S.60 of the constitution overrides any other statutes that tend to fetter the court's jurisdiction.

Counsel submitted that in **HCC 92/1992** the **SPEAKER OF THE NATIONAL ASSEMBLY V NJENGA KARUME** relates declaring a seat vacant and is not relevant to this matter. That **CA 94/05** was a challenge to the nomination of members of the National Assembly which was held to be part of the electoral process.

Counsel urged the court to dismiss the Preliminary Objection and Ms annan be made to pay for the

costs personally because the Preliminary Objection was meant to delay the hearing of this matter. That since the raising of the Preliminary Objection presupposes that the facts are admitted the court should go ahead to grant the prayers in the Chamber summons Application.

The basis of the Respondents objection is that the Applicants application is brought under the wrong procedure. According to the Respondents it should have been brought as a petition, pursuant to Section 44 of the constitution and S. 19 of the National Assembly and Presidential Elections Act Cap 7 Laws of Kenya. Section 44 of the Constitution gives the court the jurisdiction to hear and determine any question whether a person has been validly elected as a member of the National Assembly or the seat in the National Assembly of a member has become vacant. Section 19(e) of that National Assembly Presidential Elections Act then specifically provides that the application shall be by way of a petition. The issues for determination by an election court under S. 19 are whether a person has been validly elected as a president or as a member of the National Assembly or whether a seat has become vacant. I do agree with Mr. Milimo, Counsel for the Applicant that the election process presupposes there having been elections. What the Applicant was involved in was nominations at party level after which the ECK carried out its mandate, testing the candidates on English and Kiswahili proficiency. What took place and what the Applicant challenges are the preliminary to the elections which are due on 27th December 2007. The election process and can only come into force and an election court constituted after the 27th December 2007 elections. The **Kipkalya Kones Case** and **Njenga Karume case** related to elections or nomination process and were challengeable in the election court through a petition but what is before us is not yet ripe for that court. The Preliminary objection must fail.

Ms. Annan also urged that the Applicant had submitted himself to the jurisdiction of the Language Appeals Board set up under paragraph 5 of the 2nd Schedule of Regulations made under Cap 7 and that once he filed an appeal, that decision of the Appeals Board is final and he could therefore not move this court by way of Judicial Review. There is no doubt that the remedy of Judicial Review is different from an appeal because what Judicial Review deals with is the process by which the decision was arrived at but not the merits of the Board's decision. The Board dealt with merits of the Respondents decision to fail the Applicant in the English Test. The court would still have jurisdiction to make an enquiry into whether or not that decision was reached in adherence to rules of natural justice or in excess of the ECK's jurisdiction as alleged.

The court is aware that at this stage all that the Applicant has to show is that they have an arguable case that may succeed at the hearing. See **NJUGUNA V MINISTER FOR AGRICULTURE**. Though a Preliminary Objection was raised first, the facts touched on the merits of the Chamber Summons. Counsel for Applicant urged the court to go ahead and grant the orders for leave. That is why I have gone into the merits of the Chamber Summons.

The Applicants case is that the Respondents relied on the National Assembly and Presidential Elections Act, 1999 to test him whereas there exists new Regulations in legal Notice 66 of 2002 the Presidential and Parliamentary Elections Regulations 2002. He contends that the said exercise was invalid having been made under the wrong Regulations. I have looked at both Regulations made in 1998 and those made in 2002. The Legal Notice No. 66 of May 2002 Para 4 dealt with issue of language tests. It reads:-

“For purpose of attesting the qualification of a person for election as a member of the National Assembly, in respect of his proficiency in the English and Swahili languages, the provisions contained in the 2nd schedule shall have effect”

That is all that was provided for in legal Notice 66/02 regarding language tests. Schedule 2 referred in Legal Notice 66 of 2002 to must be one in existence in the Act, the 1998 Act.

There was no amendment to these Regulations of 1998. On 1st July 2002 the Legal Notice 66 was revoked under Legal Notice 118 of 2002. Legal Notice 66/02 which the Applicant intends to rely upon is non existent. What is in existence is the same Regulations under the 1998 Act the existed before Legal

Notice 66/02 and therefore the claim by the Applicant that there exists Legal Notice 66/02 is wrong. The law in force is the Regulations made in 1998 which were applied. The ground of illegality would have no basis.

The Applicant also alleges that rules of natural justice were flouted in respect of him, the decision of the Examination Board biased, actuated by malice, was unreasonable. The Affidavit does not demonstrate how the Respondents so acted. It is not enough first to make unsubstantiated allegations.

Besides, after the language proficiency tests the process of nomination went ahead and has been concluded. Would this Application serve any purpose? I believe it will not. And if the Applicant were to get orders of Judicial Review can this court give the proficiency test. This court would not be the one to give the test. The applicant would still be subject to the ECK and it is unlikely that a different decision would be arrived at. Discretion was exercised by the Respondent in the testing of the Applicant and it would be a futile exercise granting the Applicant leave to bring Judicial Review proceedings. The court cannot substitute its decision with that of the Respondent and order the Applicant to present his examination papers. Judicial Review orders are discretionary in nature and this court is of the view that leave will not serve any purpose.

For the above reasons, this court will decline to make an order in vain. Leave is declined and Chamber Summons dismissed with each party to bear their own costs.

Dated and delivered this 7th day of December 2007

R.P.V. WENDOH

JUDGE

Read in the presence of

Mr. Milimo for Applicant

Mr. Mwangangi holding brief for Mr. Annan for the Respondent

Daniel: Court Clerk`