REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET.
MISC.CIVIL APPLICATION NO. 9 OF 2004
IN THE MATTER OF THE LOCAL GOVERNMENT ACT CHAPTER 265 LAWS OF KENYA
AND
IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA
AND
IN THE MATTER OF

REPUBLIC…….
……..APPLICANT

VERSUS

KENYA AFRICA NATIONAL UNION (KANU) THROUGH THE SECRETARY GENERAL……..……1ST RESPONDENT

THE MINISTER FOR LOCAL GOVERNMENT…….2ND RESPONDENT

THE CLERK KAPENGURIA MUNICIPAL COUNCIL…….……..3RD RESPONDENT

CLEMENTINE CHEROP JOHN……..……..…….INTERESTED PARTY

AND

EXPARTE……..…….…….REBECCA ISAAC ROTINO

RULING.

Kenya African National Union (KANU) is a political party in Kenya. Rebecca Isaac Rotino, who is a member of KANU and who also happens to be the applicant herein, was nominated by her party, KANU, to serve as a councillor with the Kapenguria Municipal Council. Her nomination was gazetted on 11.2.2003 and she took her office soon thereafter.

She now claims that towards December 2003, she received information to the effect that KANU intended to withdraw her nomination and to replace her with one Clementin Cherop John. KANU acted as she had suspected, and wrote to the Electoral Commission on 4/12/2003 and requested it to advice the Minister for Local Government to degazzette her, but before that was effected she moved this court under Order LIII of the Civil Procedure Rules, and obtained leave after which she filed her substantive application seeking the following orders:

> *(a) This Honourable Court be pleased to issue the orders of certiorari to issue to remove into the High Court and quash forthwith the decision of the 1st Respondent recommending degazettment of the applicant as a nominated councilor for Kapenguria Municipal Council and the degazettment of the Interested Party herein.*

(b) This Honourable Court be pleased to issue the order of prohibition so as to prohibit the 2nd Respondent from gazetting the Interested Party as a nominated Councilor for Kapenguria Municipal Council in replacement of the Applicant.

(c) This Honourable Court be pleased to issue the order of prohibition so as to prohibit the 3rd Respondent from swearing in (if any) the Interested Party as a nominated Councilor for Kapenguria Municipal Council.

(d) Costs be provided for.

Clementin Cherop John is named as the interested party, while the Minister for Local Government, Clerk to Kapenguria Municipal Council are named as the 2nd and 3rd respondents respectively. The application was opposed by the three respondents, whose main contention was that this court lacks the jurisdiction to issue the orders being sought that the 2nd respondent cannot be restrained from carrying out his functions by a prerogative order, and on which basis, it was the submission of the counsels, that the application ought to be struck out.

It was the submission of Mr. Limo for KANU, that the application is incompetent and improperly before the court, as the applicant is a member of KANU, to which she and all its other members subscribe, and that the resolution of all disputes is well catered for in the party's Constitution. In his opinion, the machinery must be exhausted first before any member can move the court.

Mr. Murei, counsel for the interested party, who supported Mr. Limo's arguments, urged the court to find that the 1st respondents actions cannot be subject to Judicial Review.

Mr. Chemitei, was however of the opinion that this court is empowered by Section 3 of the Constitution to try matters of this nature, and that wherever the constitution of KANU is inconsistent with Constitution, the Constitution should prevail, and in which case, that this court has the relevant supervisory powers. It was also his submission that, she was not given an opportunity to be heard, yet, rules of natural justice must be adhered to, at least to ensure that her degazettment was procedural, and further that the 2nd respondent is a member of the Government, which can be supervised by this Superior Court.

The three counsels relied on various cases in support of their applications, which I have had time to peruse including Football Association Ltd exparte Football League Ltd. [1993] 2 All ER 833, in a matter of Judicial Review and in which a Football League in England, which contended that, the Football Association (the governing body and rule making authority of Association Football in England) was amenable to Judicial Review because:

"(i) It had a monopoly control over the way the game of association football was played.

(ii) It regulated an important aspect of national life in circumstances in which if it did not do so the state would have to create a public body to perform its functions."

The court held that "the Football Association was not a body susceptible to Judicial review either in general or, more particularly, at the instigation of the League with whom it was contractually bound, and that despite its virtually monopolistic powers and the importance of its decisions to many members of the public, the Football Association was a domestic body whose powers arose from and duties existed in private law only ". *The court further held that "the Football Association was not underpinned directly or indirectly by any organ or agency of the State or any potential government interest nor was there any evidence that if the Football Association did not exist the state would intervene to create a public body to perform its functions. It would be inappropr iate to apply to the governing body of football, on the basis that it was a public body, principles designed for the control of the abuse of power by the governmen*t." The application for judicial review was accordingly, dismissed.

Mr. Chemitei, learned counsel for the applicant relied on Kadamas vs. Municipality of Kisumu,

[1985] KLR 984 where the gist of the holding was that *" the remedy is of Judicial Review is only available where an issue of a public law nature is involved. Judicial Review remedy is not available where the issue is on an 'ordinary' relationship of master and servant with no element of 'public law' in it, and further that 'Prohibition' is not only for excess or absence of jurisdiction, but also for departure from the rules of natural justice". The court went further to explore the areas where such orders would be granted and it held that "in deciding whether or not to grant an order of prohibition it is irrelevant to the court that there are or were other remedies available to the appl icants……acts of any body of persons having legal authority (underlings mine) to determine questions affecting the rights of subjects, and having the duty to act judicially, are subject to judicial review whether they act in excess of their legal authority ."*

Indeed Nyarangi J.A relied on "the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as courts of justice…" and therefore that "whether any body of persons having legal authorit y to determine questions affecting the rights of subjects and having a duty to act judicially, act in excess of their legal authority, they are subject to the authority jurisdiction of the Kings Bench Division exercised in these writs". (R vs. Electricity Commissioner [1924] 1 KB 171, Atkins LJ at page 205,) In my mind the main gist of all the above holdings is that, the first order being sought herein, being one of certiorari, should be directed to an inferior tribunal requiring the record of the proceedings in some cause or matter to be transferred to the High Court. Proceedings will not be removed into the superior court unless they are capable of being determined there, and the order will not, therefore be directed to a court, which is not one of civil jurisdiction, unless it is shown that civil rights have been affected. I therefore, form the opinion that the body of persons against whom the orders are being sought must be one that has legal authority to determine questions affecting the rights of its subjects. Such a body must be subject to the supervisory jurisdiction of the High Court, which, where sufficient and convincing reasons are advanced, will grant the prerogative remedies. Such a body must of essence be one on which authority has been conferred by legislation to make decisions which so affect the said subjects.

It is common ground that the applicant is a member of KANU, whose constitution has set out elaborate procedures on dispute resolution; these are to be found in Article 23, which stipulates that:

> *1. "No member, as a condition -precedent for membership of the party, shall resort to a Court of Law for the resolution of any dispute arising out of the conduct of any party matter, issue or affairs, unless the machinery he re established has been exhausted.*
>
> *2. If the dispute in question arises out of or relates to the outcome or the conduct of any nominations for elections or elections within the party or any matter connected therewith, the aggrieved member shall refer the s ame to the Elections Appeals Tribunal established under this Article.*
>
> *3. (a) There is hereby established an appeals tribunal to be known as the KANU National Elections Appeal Tribunal which shall have power to hear and resolve all party disputes relatin g to nominations and or to elections as provided under Clause 2 of this Article. (b) The Tribunal shall consist of a Chairman and not less than two and not more than nine other members who shall all be appointed by the National Chairman on such terms and conditions as he shall deem fit.*
>
> *(c) No person shall be appointed to the Tribunal unless he is a life member of the party and in making appointmen ts as provided for in paragraph (b) Clause 3 of this article, the National Chairman shall appoint persons who are eminent Party Elders who shall include at least one woman.*
>
> *(e) No person shall qualify to be appointed a member of the Tribunal if he is, dire ctly or otherwise, interested in the outcome of the Tribunal's verdict or was in any way substantially or otherwise, responsible for or connected with any factor leading, causing or contributing to the dispute; and if after the commencement of the hearing of a dispute it appears that the*

continued participation of any member of the Tribunal in the hearing is likely to contravene the provisions."

This applicant is a subscribed member of KANU, but she has not been able to demonstrate that she attempted to take advantage of the party machinery in resolving the said dispute, but the issue that also arises in this matter is whether KANU is one of such bodies or tribunals which would fall squarely with the bodies with the aforementioned legal authority and also whether the matter before me is a 'public law' matter or it really is a 'private law' matter.

In an application of this nature, the acts complained of must be of Public Law in nature, which means that the body is duty bound to act judiciously, but I find that Kanu is a political party, and not a tribunal or public body, which is governed by legislature.

In any event, prerogative orders can only be issued where the Government has an interest on the power making decision of the body whose decision is to be reviewed, that would not apply in the case of KANU, and though Section 3 of the Constitution of the Republic of Kenya stipulates that "*it shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent" with it, it" s hall prevail and the other law shall, to the extent of the inconsistency, be void," I am of the humble opinion that party, who feels aggrieved such as this applicant, should see*k remedies through a constitutional reference and not under Order LIII of the Civil Procedure Rules.

In the circumstances, the preliminary objections are upheld and this application which lacks in merit is dismissed with costs.

Dated and delivered at Eldoret this 7th day of April 2004.

JEANNE GACHECHE

JUDGE

Delivered in the presence of: