



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW MISC. APPLICATION NO. 384 OF 2017
IN THE MATTER OF AN APPLICATION BY PARTY OF NATIONAL UNITY
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF *CERTIORARI*
AND *PROHIBITION* AGAINST THE RESPONDENTS HEREIN.

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT (CAP 26 OF
THE LAWS OF KENYA) AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

ALPHONSE MBINDA MUSYOKI.....1ST RESPONDENT

POLITICAL PARTIES DISPUTE TRIBUNAL.....2ND RESPONDENT

AND

PARTY OF NATIONAL UNITY.....EX PARTE APPLICANTS

JUDGMENT

1. Pursuant to the leave of the Court granted on 27th June 2017, the *ex parte* applicant moved this Court by way of Notice of Motion dated 17th July 2017 expressed under the provisions of Order 53 Rules 1, 2, 3 & 4 of the Civil Procedure Rules, 2010, Sections 8 and 9 of the Law Reform Act^[1], seeking :-

a. An order of **Certiorari** to quash the entire decision of the second Respondent herein to assume jurisdiction in PPDT Claim No. 14 of 2017; **Alphonse Mbinda Musyoki vs John Okemwa Anunda & Another** and issue a judgement dated 20th June 2017 purporting to set aside and or reverse the High Court order in Nairobi JR Miscellaneous Application No. 642 of 2016; **Republic vs Registrar of Political Parties, Ex parte Party of National Unity** on 21st April 2017.

b. An order of **Prohibition** prohibiting the second Respondent herein from carrying out any further proceeding with regard to the facts surrounding the Gazettement of the applicants officials elected on the 29th of October 2017.

c. That the costs of this application be in the cause.

2. The core grounds relied upon are:-

a. That vide an application filed on 20th December 2016 the ex parte applicant instituted Nairobi J.R. No. Misc App No. 642 of 2015, Republic vs Registrar of Political Parties, Ex parte Party of National Unity seeking Judicial Review orders of Mandamus to compel the Registrar to Gazette the applicants officials elected at the National Delegates meeting held on 28th October 2016.

b. That on 20th December 2016 this Court granted leave to institute the Judicial Review proceedings and ordered that the leave sought to operate as a recognition of the appellants action carried out through its officials elected on 28th October 2016 by its National Delegates Conference with respect to compliance with the electioneering calendar timelines and such action if procedurally undertaken deemed valid of course subject to the determination of the substantive motion.

c. That in the course of the proceedings, the first Respondent through his servants and or agents duly applied to be enjoined in the proceedings and objection was raised to the Gazettement of the officials of the applicant on grounds that proper procedure was not followed in their elections.

d. That on 20th April 2017, a consent order was recorded in the said case to the effect that "an order of mandamus be and is hereby issued compelling the Respondent (Registrar of Political Parties) to cause a notice to the changes and alterations by the applicant (Party of National Unity), duly served upon the Respondent on the 2nd November 2016, to be published in the Gazette forthwith pursuant to section 20 (1) of the Political Parties Act as per Gazette Notice No. 3956 (Special issue No. 52 Vol. CXIX) dated 21st April 2017."

e. That pursuant to the said order, Gazette Notice No. 3956 (Special issue No. 52 Vol. CXIX) dated April 2017 was duly published by the Registrar of Political Parties, gazetting the applicants officials as elected on the 28th October 2016, thus settling the case.

f. That despite the aforesaid Court order, the second Respondent vide its judgement delivered on 20th June 2017 in excess of its jurisdiction purported to overturn and or set aside the High Court order properly issued in Nairobi JR Misc. App. No. 642 of 2016 in blatant disregard of Constitutional hierarchy espoused under Article 165 of the Constitution of Kenya, which gives this Honourable Court supervisory powers over all subordinate Courts and Tribunals.

g. That in furtherance of the blatant disregard of the law, the Tribunal has purported to order that the Gazetted officials of the applicant herein sanctioned by dint of a High Court order, do hand over the reins of the party to officials sanctioned by the inferior Tribunal within 7 (seven) days, officials who are not only non-existent but who have never been Gazetted as such. That there now exists two conflicting judgments, one from the High Court and the Political Parties Disputes Tribunal.

h. That the PPDT acted ultra vires in reaching their decision.

The Respondents' preliminary objection.

3. The first Respondent filed a preliminary objection on 25th July 2017 stating that:- **(a)** that this Court has no jurisdiction to grant the orders sought; **(b)** that the Political Parties Act provides for a procedure for challenging decisions of the Political Parties Tribunal; **(c)** that these proceedings were commenced on misrepresentation and on-disclosure of material facts.

4. The record shows that the Court ordered that the preliminary objection be argued at the hearing of the substantive motion. The second Respondent did not file a Response to the substantive application nor did they file submissions.

Issues for determination.

5. Upon analysing the opposing facts presented by the parties, I find that only one issue falls for determination, namely; **whether the ex parte applicant has established any ground(s) for this Court to grant the Judicial Review orders of Certiorari and Prohibition.**

6. The crux of the ex parte applicant's counsels submissions is that the second Respondent lacked jurisdiction to nullify orders issued by the High Court^[2] and that PPDT Case No. 14 of 2017 was res judicata since that matter in issue was determined in Nairobi JR. No. 642 of 2016.^[3]

7. The first Respondent's Advocate's counsel submitted that the consent order recorded in JR No. 642 of 2016 did not address all the issues surrounding the Gazettement in question and that Judicial Review is mainly concerned with the process a statutory body employs to reach a decision.^[4] Further, he argued that the jurisdiction of the High Court must be exercised in the context of the laid down statutory provisions. He also argued that Judicial Review must be pursued as a remedy of last resort and ought not be invoked as an alternative to ordinary civil litigation or an appellate process.^[5]

8. This case presents an opportunity to this Court to restate the function, scope and nature of Judicial Review remedies and the test for granting such remedies. In Judicial Review, the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects. The role of the Court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'.

9. Judicial Review is about the decision making process, not the decision itself. The role of the Court in Judicial Review is supervisory. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

10. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a Court will not interfere. As was held in Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [6]:-

“Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant.....”

11. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:-

- a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or
- b. a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.

12. An administrative or quasi-judicial decision can only be challenged for **illegality, irrationality and procedural impropriety**. An administrative decision is flawed if it is illegal. A decision is illegal if it: - **(a)** contravenes or exceeds the terms of the power which authorizes the making of the decision; **(b)** pursues an objective other than that for which the power to make the decision was conferred; **(c)** is not authorized by any power; **(d)** contravenes or fails to implement a public duty.

13. *First*, it is not in dispute that the PPDT had jurisdiction to entertain the dispute before it. *Second*, there is nothing to show that it exceeded its powers in determining the said dispute. This Court cannot delve into the merits of the decision in exercise of its Judicial Review jurisdiction. Whether the issues before the PPDT were *res judicata* or not is a matter that ought to have been challenged by way of an appeal but not by way of invoking Judicial Review jurisdiction of this Court.

14. The decision has not been shown to be illegal or *ultra vires* or outside the functions of the first Respondent. A petition for a writ of *Certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated Rule of Law. Judicial Review is not an appeal and the Court is not concerned with the merits of the decision. A decision can only be quashed if the body acted without jurisdiction or in excess of its powers or if the decision is so perverse or unreasonable that it would be against the sense of justice to allow it to stand.

15. Perhaps I should add that the first Respondent is vested with powers to entertain the proceedings. No abuse of such powers has been alleged or proved. It has not been shown that the power was not exercised as provided for under the law. It has not been proved or even alleged that the first Respondent acted outside its powers. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the Courts unless the decision under challenge is illegal, irrational, or un-procedural.

16. The *ex parte* applicant also seeks an order of *Prohibition*. The writ of prohibition arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established.

17. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued. In this case, the *ex parte* applicant ought to have appealed against the decision complained of or even apply for an order of Review before the same body that issued it instead of invoking the Judicial Review jurisdiction of this Court.

18. The grant of the orders or *Certiorari*, *Mandamus* and *Prohibition* is discretionary. The court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that a serious issue arises, namely, whether or not the consent order issued in JR 642 of 2016 conclusively resolved the issues raised in the case before the first Respondent. Such issues, cannot be resolved in this Judicial Review application which is restricted to examining the legality, procedural propriety and reasonableness of the decision. It is not possible to determine matters raised in this Judicial Review application without delving into the merits of the impugned decision, which is a clear invitation to this Court to delve into the forbidden sphere of exercising appellate jurisdiction.

19. In any event, the judgement rendered by the first Respondent clearly shows that the *ex parte* applicant herein raised an objection before

the first Respondent to the effect that the matters in question were determined by the High Court. The first Respondent addressed its mind on the said objection and made a finding. Inviting this Court to re-open the issue is a merit review which is a ground for appeal outside the function and scope of Judicial Review jurisdiction.

20. In a nut-shell, this Judicial Review application challenges the impugned decision on merits. The issues raised herein were raised and canvassed before the PPDT. It considered the issues and made a finding. This Court cannot now examine the merits of the finding. This is outside the function of Judicial Review proceedings. I decline the open and deliberate invitation to do delve in to a merit review which is outside the purview of Judicial Review jurisdiction.

21. In view of my analysis herein above, I find and hold that the applicant has not established any grounds for this Court to grant the Judicial Review Orders of *Certiorari* and *Prohibition*.

22. The upshot is that the ex parte applicants application dated 17th July 2017 is hereby dismissed with no orders as to costs.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 11th day of September 2018.

John M. Mativo

Judge.

[1] Cap 26, Laws of Kenya.

[2] Counsel cited *Republic vs Feisal Mohammed & Others* {2015} eKLR.

[3] Counsel also cited the explanations on *res judicata* in the Civil Procedure Act, Cap 21, Laws of Kenya and also cited *ET vs A.G & Another* {2012}eKLR, *Omondi vs NBK & Others* {2001} EA 177 and *Njagu vs Wambugu & Another* NBI HCC No. 2340 of 1991

[4] Counsel cited *Republic vs Kenya Revenue Authority & Another ex parte Bear Africa (K) Ltd.*

[5] Counsel cited *Republic vs The HIV & AIDS Tribunal ex parte DynCorp International & JKM.*

[6] {2014} eKLR.