



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

JUDICIAL REVIEW NO. 1 OF 2015

REPUBLIC PLAINTIFF

VERSUS

BUSIA COUNTY ASSEMBLY..... 1ST RESPONDENT

THE GOVERNOR, BUSIA COUNTY 2ND RESPONDENT

HERMAN JOSEPH LEO OGULLA EX-PARTE APPLICANT

JUDGEMENT

1. Upon being granted leave to commence these judicial review proceedings, the ex-parte Applicant Herman Joseph Leo Ogulla filed the Notice of Motion dated 19th March, 2015 seeking orders as follows:

“1. That an Order of Certiorari be directed against the 1st Respondent to quash the conclusion found at paragraph 3, 2(c) on page 10 of the Report on Vetting of Nominees to County Land Management Board, December 2014.

2. That an Order of Mandamus be directed against the 1st Respondent to forward the name of the Ex-parte Applicant to the 2nd Respondent for swearing in as a member of the County Land Management Board.

3. That an Order of Mandamus be directed against the 2nd Respondent to swear the Ex-parte Applicant as a member of the County Land Management Board.

4. That cost of this Application be provided for.”

2. A perusal of the statutory statement and the verifying affidavit filed together with the chamber summons application for leave shows that the Applicant attacks the decision of the respondents on four grounds.

3. Firstly, it is the Applicant’s case that he was nominated by the National Land Commission to represent Bunyala Sub-County on the Board. The Applicant asserts that he is a Munyala from Bunyala Sub-County and his ancestral home is in Bunyala though he resides in Funyula County. It is the Applicant’s case that there was no candidate from Bunyala Sub-County.

4. Secondly, the Applicant contends that even assuming that he comes from Funyula with one Peter Odwori Olumbe, he would still be the better choice when the vetting proceedings are considered. He

points to the fact that Peter Odwori Olumbe was rated as “good” on technical knowledge whereas he was rated “well versed” on the same parameter.

5.Thirdly, the Applicant asserts that to date he has not been notified that he was unsuccessful as per the provisions of (the Public Appointment Parliamentary Approval) Act, 2011 (“the Act”).

6.The fourth ground is that the respondents acted in breach of Section 9 of the Act which requires approval or rejection of the nomination of a candidate to be done within 14 days otherwise the candidate shall be declared to have been approved. According to the Applicant the last day for adoption or rejection of the nominees was 26th November, 2016 but in this particular case the vetting report was tabled for discussion before the Assembly on 2nd December, 2014 which was way out of the statutory period.

7.The respondents opposed the application through an affidavit sworn by Allan W. Mabuka the Clerk of the 1st Respondent. Their case is that the Applicant has not established the basis for the grant of the orders sought. They concede that the Applicant was indeed interviewed by the National Land Commission and was among the seven persons nominated for possible appointment, subject to vetting by the 1st Respondent.

8.The respondents assert that the Applicant was vetted by the Committee on Trade, Planning, Tourism, Co-operative Development and Industrialization (“the Committee”) using the parameters laid down in the Act. The respondents contend that the vetting revealed that the Applicant and one Peter Odwori Olumbe hailed from Funyula Sub-County and the two of them could not be picked as that would have amounted to over-representation of one Sub-County at the expense of other sub-counties.

9.It is the respondents’ case that the name of the Applicant was therefore not forwarded to the 2nd Respondent for appointment. According to the respondents’ the 2nd Respondent’s role was only limited to formally appointing the nominees and he cannot be said to have acted illegally. Although the respondents filed a joint reply, they filed separate submissions. Their submissions buttress the contents of the replying affidavit.

10.The question that needs to be answered in this case is whether the Applicant has met the conditions for the issuance of judicial review orders.

11.Judicial review is available where an applicant has established breach of the law, procedural impropriety or unreasonableness on the part of the respondent – see **Council of Civil Service Unions and others v Minister for the Civil Service (1985) AC 374**. It is therefore incumbent upon an applicant to demonstrate breach of the law, procedural impropriety or unreasonableness on the part of the decision-maker.

12.A perusal of the grounds upon which the Applicant seeks relief shows that he wants this Court to overturn the findings of the 1st Respondent which found that he is from Bunyala Sub-County and not Funyula Sub-County. He also wants the Court to find that between him and Peter Odwori Olumbe who was picked to represent Funyula Sub-County, he was the better option.

13.In order for the Applicant to convince the Court to travel this path of reviewing the decision of the 1st Respondent, he ought to have demonstrated that in reaching its decision the 1st Respondent breached the law, did not follow the rules of natural justice or acted in a manner that no reasonable person would have expected it to act. The Applicant has failed to do so. What the Applicant wants this Court to do is to substitute its opinion in the place of that of the respondents. That is not within the province of judicial review. The Applicant alleges that to date he has not been notified that he was not successful. The purpose of such notification is to let an applicant know that a process has come to a conclusion and the outcome of such a process. In the case at hand, the Applicant by filing these proceedings has shown that he is aware of the outcome. Failure to notify him of that outcome was not prejudicial to him as he was able to file this application within the statutory period.

14. The Applicant alleged breach of Section 9 of the Act. He submits that the entire process from the time the matter is placed before a committee upto the time the nominees are approved by the Assembly should not take more than 14 days. The Applicant asserts that the matter was placed before the Committee on 12th November, 2014 and the nominees approved on 2nd December, 2014 which was outside the 14 days envisaged by the said Section 9. It is this argument that once the 14 days lapsed he was deemed to have been appointed Member of the County Land Management Board.

15. Section 9 provides:

“9. If, after expiry of the period for consideration specified in section 8, Parliament has neither approved nor rejected a nomination of a candidate, the candidate shall be deemed to have been approved.”

Section 9, must be read together with Section 8 which states that:

“8. (1) Unless otherwise provided in any law, a Committee shall consider a nomination and table its report in the relevant House for debate and decision within fourteen days from the date on which the notification of nomination was given in accordance with section 5.

(2) At the conclusion of an approval hearing, the Committee shall prepare its report on the suitability of the candidate to be appointed to the office to which the candidate has been nominated, and shall include in the report, such recommendations as the Committee may consider necessary.”

Section 8 makes reference to Section 5 which states that:

“5. (1) An appointing authority shall, upon nominating a person for an appointment to which this Act applies, notify the relevant House of Parliament accordingly.

(2) A notification under subsection (1) shall be-

(a) in writing;

(b) be lodged with the Clerk of the relevant House of Parliament.

(3) A notification of appointment shall be accompanied by information concerning the nominee, having regard to the issues mentioned in section 7.

(4) For purposes of this Act, a notification of nomination shall be deemed to be duly given on the day on which it complies fully with subsections (2) and (3).”

16. A committee of the relevant House of Parliament has 14 days from the date on which notification was done as per Section 5, to consider the nomination and table its report in Parliament for debate and decision.

17. I have perused the report titled: **“REPORT ON VETTING OF NOMINEES TO COUNTY LAND MANAGEMENT BOARD”** and note that the report states at page 4 that the notification of the nominations was conveyed to the Committee on Trade, Planning, Tourism, Co-operative Development and Industrialization on 12th November, 2014.

18. At page 3 of the report the Chairperson presents its report to the House for consideration. The date of presentation is indicated as 2nd December, 2014.

19. The Applicant is correct that the Committee did not comply with Section 8(1) of the Act as it did not

take its report for debate by Parliament within 14 days from the date of notification of his nomination.

20.However, Article 93(1) of the Constitution establishes a Parliament of Kenya made up of the National Assembly and the Senate. Article 177 provides for membership of a County Assembly.

21.The Act which the Applicant claims was contravened is titled Public Appointments (Parliamentary Approval) Act No. 33 of 2011. A reading of Act and its title clearly shows it was meant for approvals of nominees by Parliament (National Assembly and Senate). It does not make reference to appointments by a County Assembly. A County Assembly is not one of the two institutions which form Parliament.

22.The Committee cannot therefore be faulted for breaching an Act that is not applicable to its operations. It has not been demonstrated to this Court that Acts of Parliament passed later have made provision for the application of the Act to county assemblies. The Applicant's argument that the respondents breached the Act therefore fails.

23.The end result is that the Applicant's case lacks merit and it is therefore dismissed. Although the matter appears to be that of an individual pursuing his own interests, the truth of the matter is that this is public interest litigation. As such, each party will meet own costs of litigation.

Dated, signed and delivered at Busia this 16th day of February, 2017

W.KORIR,

JUDGE OF THE HIGH COURT