



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 67 OF 2017

**IN THE MATTER OF AN APPLICATION BY CHAMA CHA UZALENDO TO APPLY FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AGAINST THE
REGISTRAR OF POLITICAL PARTIES**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

CHAMA CHA UZALENDO.....APPLICANT

AND

THE REGISTRAR OF POLITICAL PARTIES..... RESPONDENT

RULING

1. On 6th March, 2017, this Court issued an order *mandamus* compelling the Respondent to cause a notice of the changes and alterations on the applicant herein, **Chama Cha Uzalendo** (hereinafter referred to as “the Party”) party’s officials list, namely the National Executive Council list of officials of the Party, as per the Applicant’s letter dated 17th January, 2017, to be published in the Gazette forthwith pursuant to section 20(1) of the **Political Parties Act**. The said notification was directed to be gazetted within 14 days from the date of service of the said order on the Respondent.

2. By a Notice of Motion dated 13th March, 2017 the Respondent herein, the Registrar of Political Parties, now seeks the following orders:

1. That this application be certified urgent and service thereof be dispensed with in the first instance.

2. That this Honourable Court do review the Judgement/Order made by the Honourable Court on 6th March, 2017.

3. That from the said judgement of the Honourable Court and the consequent Order, there is sufficient reason to obtain a review of the said Orders on costs.

4. That pending the hearing and determination of this Application, this Honourable Court, do order a stay of execution of the Order of the Honourable Court made on the 6th March, 2017.

5. That in the alternative, this Honourable Court do make such other interlocutory Orders as it may deem just and expedient pending the hearing and determination of this Application.

3. According to the Respondent on 20th February, 2017, the ex parte applicant filed an application seeking leave to apply for orders of mandamus compelling the Respondent to cause a notice of change and alteration on the party's official list as per the letter dated 17th January, 2017 to be published in the Gazette forthwith which leave was granted ex parte the same date but the ex parte applicant failed to serve the Respondent with the said order as required by law.

4. It was contended that instead the ex parte applicant served the Respondent the Chamber Summons together with the substantive Notice of Motion without indicating that leave had been granted.

5. It was the Respondent's case that owing to abuse of Court process, there was no evidence on record indicating that the Chamber Summons had been dispensed with and in addition the Summons and the Motion did not indicate the hearing date. Accordingly the Respondent took the mention notice to be on the Summons as opposed to the Motion.

6. In a further affidavit, the Respondent contended that the applicant herein has had long standing internal wrangles regarding the change of its party governing officials and that this has posed a challenge to the Respondent's implementation of section 20 of the ***Political Parties Act*** 9hereinafter referred to as "the Act") which deals with change of political party officials. To this end, in accordance with the law, the Respondent advised the party and its officials/members to settle the emerging disputes through the laid down internal mechanisms or seek redress before the Political Parties Tribunal. Pursuant thereto the applicant filed an appeal before the said Tribunal which was heard and determined by upholding the removal of some officials from the party. However the affected officials appealed to the High Court which Court issued orders against the execution of the said Tribunal's decision.

7. It was therefore disclosed that the ex parte applicant had been advised that due to the said order the change of officials could not be gazetted. The Respondent further disclosed that there was another pending case being Mombasa Civil Case No. 13 of 2017 relating to the same subject matter in which another order had been issued.

8. It was therefore contended that the gazettelement sought herein could not be effected.

Determination

9. I have considered the issues raised in this application.

10. The main reason for seeking review of the decision made herein is that the order granting leave was not served and further that the Respondent was not notified of the date for the hearing of the Motion. Order 53 rule 3(2) of the ***Civil Procedure Rules*** provides for the service of the Motion. Rule 4(1) thereof provides for the service of the statement accompanying the application for leave and the affidavits in support thereof. There is no requirement under the said order for service of the order granting leave.

11. A perusal of the record herein reveals that on 21st February, 2017, the Notice of Motion, Chamber Summons and the hearing notice for 24th February, 2017 were duly served on the Respondent herein. Further on 24th February, 2017, a mention notice was served on the Respondent for 2nd March, 2017. It is therefore clear that service was duly effected on the Respondent. The reason for either failing to appear or file papers is similarly in my view untenable as it is not grounded on any law.

12. The Respondent has however contended that due to the existing court orders, she was unable to gazette the request by the ex parte applicant. I have perused the orders from the Mombasa High Court and it is clear that what the Court restrained were the publishing, disseminating, broadcasting, propagating and/or distributing information on any media including digital, print and/or radio in Kenya. There was no order directed at the Respondent barring her from gazetting the applicant's requests. In any case there is no indication that the Respondent was a party to those proceedings and that the order was directed at her.

13. With respect to the order issued in Nairobi High Court ISC. Application No. 480 of 2015, which order was by consent of the parties, thereto some of whom are also parties in these proceedings, the Court while expressly suspending the expulsion of the applicants, **Veronica Mbithe Mativo, Maur Abdalla Bwanamaka and Titus Kaloki** proceeded to restrain the same applicants from acting or purporting to act as officials of the Party.

14. Therefore I have not been shown any order which expressly barred the Respondent from gazetting the officials of the Party herein.

15. In my early decision I relied on section 20 of the Act which provides as hereunder:

(1) Where a fully registered political party intends to change or amend—

(a) its constitution;

(b) its rules and regulations;

(c) the title, name or address of any party official; or

(d) its name, symbol, slogan or colour;

(e) the address and physical location of the head office or county office:

it shall notify the Registrar of its intention and the Registrar shall, within fourteen days after the receipt of the notification, cause a notice of the intended change or alteration to be published in the Gazette.

(2) The political party giving notification under sub-section (1) shall publish such notification in at least two daily newspapers having nationwide circulation.

(3) Upon the expiry of thirty days from the date of publication of the notice in subsection (1), the political party may, after taking into account any representations received from the public under subsection (1) and (2), effect the change or alteration in accordance with its constitution and rules.

16. I then expressed myself as hereunder:

“It is therefore my view that when the Respondent receives a notification under section 20 of the Act, it has no option but to, within fourteen days after the receipt of the notification, cause a notice of the intended change or alteration to be published in the Gazette. His or her discretion only arises upon receipt of representation consequent upon the publication. The law further prescribes the period within which the gazettelement is to be done. This is a clear manifestation of the seriousness with which the law treats such notification. It clearly manifests that such gazettelement ought to be done expeditiously so as to achieve the purpose of Article 38 of the Constitution that guarantees political rights.

17. The Court of Appeal in **Macharia vs. Macharia [1987] KLR 61** held *inter alia* as follows:

“The Court had a very wide discretion to exercise under the relevant order and rule and

there were no limits or restrictions on the discretion of the learned judge except that if the judgement was varied it had to be done on terms that were just...This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice...The matters which should be considered include the facts and circumstances, both prior and subsequent, and all the other respective merits of the parties together with any material factor which appears to have entered into the passing of the judgement, which would not or might not have been present had the judgement not been ex parte and whether or not it would just and necessary, upon terms to be imposed...The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and, finally, it should be always remembered that to deny the subject a hearing should be the last resort of a court...And because it is discretionary power it should be exercised judicially or in a selective and discriminatory manner, not arbitrarily and idiosyncratically for otherwise the parties would become dependent on judicial whim”.

18. In this case I have found that there were no sufficient reasons why the Respondent decided not to participate in these proceedings. The Respondent relied on some untenable grounds not to appear and present its case. With respect to the nature of the case, it is clear that the Respondent had no discretion in the matter unless there was an order barring her from gazetting the notification. It is only after the said notification that the exercise of discretion is contemplated upon hearing any objections that other parties may wish to raise before her.

19. In exercising my discretion to set aside the orders issued herein, this Court is required to consider the nature of the action. In the decision sought to be reviewed, I expressed myself as follows:

“By giving the notification the applicant was in effect expressing the wishes of its members in the exercise of their political rights under the Constitution. It is only through the exercise of the political will of the citizenry that the national values and principles of governance under Article 10 of the Constitution which includes democracy can be realised. Further it ought to be realised and appreciated that in the preamble to the Constitution Kenyans recognised democracy as one of their aspirations of governance. That ideal cannot be realised unless their aspirations to participate in political affairs of the country is translated into reality. By placing roadblocks in their ability to manage the affairs of their political parties, the Respondent would be violating their political rights and would be a hindrance to the attainment of the democratic ideals espoused in the Constitution.”

20. This dispute revolves around the operations of a political party. The General Elections are due in a few months’ time. Such disputes ought to be determined expeditiously in order not to disenfranchise Kenyans of their rights to participate in the democratic process of the country. In this case the mere fact that the Respondent gazettes the notification does not take away the rights of those whose interests are likely to be adversely affected from objection to the intended change in the office holders. In other words the gazettement alone will not prejudice the rights of the parties herein or even third parties.

21. It is however my view that taking into account the prevailing political circumstances with respect to rights enshrined in Article 38 of the Constitution the determination of this dispute ought to move forwards rather than backwards.

22. In the result I decline to grant the orders sought herein and consequently, the Motion dated 13th March, 2017 is dismissed but with no order as to costs.

23. Orders accordingly.

Dated at Nairobi this 11th day of May, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Makolwal for the Respondent/Applicant

NA for the applicant

CA Mwangi