



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 288 OF 2017

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS BY OSMAN
KHALIF ABDI IN THE NATURE OF CERTIORARI**

AND

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI**

AND

**IN THE MATTER OF CONSTITUTIONAL RIGHTS PURSUANT TO ARTICLE 19, 20, 21, 22,
23,27,28, 38, 47, 48, 49 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF SECTION 33 OF THE ELECTIONS ACT

AND

IN THE MATTER OF SECTION 14(1), (2), (3) OF THE POLITICAL PARTIES ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

OFFICE OF THE REGISTRAR

OF POLITICAL PARTIES.....2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....3RD RESPONDENT

JIMAL IBRAHIM HASSAN.....4TH RESPONDENT

JUDGEMENT

Introduction

1. By his Motion dated 6th June, 2017, the ex parte applicant herein, **Osman Khalif Abdi**, seeks the following orders:

a) **THAT the Honourable Court be pleased and do hereby grant Judicial Review Order of CERTIORARI to remove into High Court and quash the Kenya Gazette Notice No: 4888 issued by the 1st Respondent in so far as it relates to the name of the Ex-parte Applicant which appears at No: 2110 of the list of names in the Kenya Gazette published on the 19th May, 2017.**

b) **THAT the Honourable Court be pleased and do hereby grant Judicial Review Order of CERTIORARI to remove into High Court and quash the decision of the 1st and 2nd Respondents to gazette the name of the Ex-parte Applicant as an Independent Candidate in the Kenya Gazette Notice No: 4888 at Number 2110 of the list of names of Independent Candidates published on the 19th May, 2017.**

c) **THAT costs of and incidental to the application be provided for.**

d) **THAT such further and other relief that this Honourable Court may deem just and expedient to grant.**

Ex Parte Applicant's Case

2. According to the applicant, he is a life member of the **Orange Democratic Movement Party** (hereinafter referred to as "the Party" or "ODM"), the 3rd Respondent herein, and a most loyal and staunch believer of the Party Ideals.

3. He averred that on the 30th April, 2017, he contested in the Party's nomination exercise for the position of the Member of County Assembly seat South C Ward (hereinafter referred to as "the Ward") within Langata Constituency and won by garnering a whopping 294 votes based on the evidence from the tallying sheets as entered by the Returning Officer and signed by all the agents. However, to his utter shock and disbelief, the Party issued two final nomination certificate, one to the 4th Respondent herein and another to **Kiptanui Vinton Simantoi** who was also one of the contenders in the Party's Nomination Exercise in respect to the Ward. As a result of the foregoing, the applicant the Applicant appealed to the Political Parties Dispute Tribunal and subsequently to High Court of Kenya sitting at Milimani Nairobi vide Election Petition Appeal No: 47 of 2017 in which **Justice E C Mwita** delivered a judgment dated 22nd May, 2017 declaring the Ex-parte Applicant the Party's lawful nominee for the Ward and also declared null and void the other Certificates issued by the Party to the other aspirants.

4. The applicant however averred that on the 22nd May, 2017 while he was seated in court awaiting judgment of the Court, one of the supporter of 4th Respondent by the name **Ahmed Sharif** walked into the court with a brown envelope and handed it over the Counsel representing 4th Respondent who retrieved a document therefrom and shared it with the applicant's advocate on record **Prof. Tom Ojienda**. It was averred that after the Court rendered its Judgment and adjourned, **Prof Tom Ojienda** showed the Ex-parte Applicant a copy of the document in his possession, supplied to him by the Counsel of 4th Respondent herein which was a Kenya Gazette dated 19th May, 2017 purporting to list him as an independent candidate with a symbol of "Mosque". It was averred that the applicant also saw similar information circulating on Social Media, and proceeded to Akila Police Post in South C and recorded statement on 22nd May, 2017, and was supplied with an OB number OB23/22/05/2017. On the 24th May,

2017 he wrote a letter to the office of the Political Party Registrar enclosing an affidavit affirming that he is a life member of the Party and that he has never resigned therefrom. However when his letter dated 24th May, 2017 elicited no response, he wrote another letter dated 30th May, 2017 addressed to the Registrar of the political parties seeking verification of his Political Party Membership status.

5. The applicant averred that on the 31st May, 2017 the Registrar of political parties responded vide an official letter of an even date confirming that the Applicant is a bona fide member of the Party. It was disclosed that the Party upon being served with the decree of the High Court in Election Petition Appeal No: 47 of 2017 on 31st May, 2017 awarded the Ex-parte Applicant Final Nomination Certificate but when the applicant proceeded to submit his nomination papers to the 1st Respondent herein, the **Independent Electoral and Boundaries Commission** (hereinafter referred to as “the Commission”) for clearance, the Commission blatantly refused to admit the Applicant’s Court Decree and final nomination certificate citing the Kenya Gazette Notice No. 4888 of 2017 published on the 19th May, 2017, notwithstanding the confirmation from 2nd Respondent that indeed the applicant is a bona fide member of the Party. The applicant asserted that he is a life member of the Party and he has never resigned from membership thereof but was maliciously and suspiciously gazetted without his knowledge and consent as an independent candidate by corrupt officers from the Commission in collusion with 4th Respondent herein and the matter is still under police investigation.

6. It was submitted by the applicant’s learned counsel **Prof Ojienda**, that the 4th Respondent herein filed an application in the said High Court in Election Petition Appeal No: 47 of 2017 seeking the review of the decree but the same was dismissed by the Court. It was therefore submitted that the decision of the Court delivered on dated 22nd May, 2017 declaring the Ex-parte Applicant the Party’s lawful nominee for the Ward stands.

7. The Court was therefore urged to allow the application as the application made under section 74 of the **Elections Act** did not succeed.

1st Respondent’s Case

8. The Petition was however opposed by the 1st Respondent the Independent Electoral and Boundaries Commission.

9. According to the Commission, on the 6th day of May 2017 the ex-parte applicant submitted his particulars and symbol to enable him contest as an independent candidate for the position of Member of County Assembly in South C Ward. Subsequently on the 8th day of May 2017 the *ex-parte* applicant presented his intention to contest for the above mentioned position as an independent candidate to the 1st respondent. Contemporaneous with submitting his application and particulars, the *ex parte* applicant also presented two letters both dated the 8th day of May 2017 from the registrar of political parties confirming that he was not a member of a fully registered political party at the time and also cleared the symbol he intended to use for his candidature.

10. It was deposed that the *ex-parte* applicant was subsequently cleared by the 1st respondent to contest for the Member of County Assembly, South C ward as an independent candidate and on the 19th day of May 2017 vide gazette Notice no. 4889 the Commission published in the Kenya Gazette, the names of persons intending to contest in the election as independent candidates.

11. It was contended that this Court does not have jurisdiction to determine the issues in this matter as that is a preserve of the 1st respondent in the 1st instance under Article 88(4)(e) of the Constitution and section 74 of the **Elections Act** No. 24 of 2011. It was further contended that the nomination papers of the *ex-parte* applicant having been received by the Commission the applicant’s claim can only be heard and determined by the Commission’s dispute resolution committee hence the applicant is in the wrong forum and the orders sought against the Commission cannot issue.

12. **Mr Lawi**, learned counsel for the Commission relied fully on the replying affidavit and left the matter to the Court.

Determination

13. I have considered the issues raised before me in this application.

14. It was contended that the application ought to have been made to the Commission. In **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013 it was held that:

“...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though *the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute.*”

15. In this case the applicant has laid the blame for his woes with respect to the publication of the Gazette Notice at the doorsteps of the Commission accusing it of collusion to maliciously paint him as an independent candidate. The Commission has in these proceeding vehemently defended its action insisting that the applicant did apply to be so gazetted. In those circumstances can one seriously contend that the applicant can receive a fair hearing before the Commission? In my view that would be a mirage. Accordingly, it is my view that the alternative remedy mooted by the Commission cannot by any stretch of imagination be termed as efficacious.

16. In this case it is clear that there is a valid order of this Court by which the Court declared that the ex parte applicant herein is the lawful nominee for the MCA, South C Ward, Langata Constituency and directed that he be issued with the final nomination certificate by the ODM Party. In addition, the Commission was directed to accept the said nomination certificate and delete the name of any other person presented to it by the ODM as its nominee for the said Ward. That order still stands as attempts to have it reviewed and set aside have failed.

17. Therefore the Gazette Notice being an action of an inferior Tribunal to the High Court it must give way to the High Court order.

18. It follows that the Motion dated 6th June, 2017, is merited.

Order

19. Consequently I issue the following orders:

e) An Certiorari removing into this Court and quashing the Kenya Gazette Notice No: 4888 issued by the 1st Respondent in so far as it relates to the name of the Ex-parte Applicant which appears at No: 2110 of the list of names in the Kenya Gazette published on the 19th May, 2017.

f) An order of Certiorari to removing into this Court and quashing the decision of the 1st and 2nd Respondents to gazette the name of the Ex-parte Applicant as an Independent Candidate in the Kenya Gazette Notice No: 4888 at Number 2110 of the list of names of Independent Candidates published on the 19th May, 2017.

g) The 1st Respondent will bear the costs of the applicant in this application.

20. It is so ordered.

Dated at Nairobi this 15th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mutua for Prof. Ojienda for the applicant

Mr Karanja for the 1st Respondent

CA Mwangi