



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 16 OF 2017

FRANCIS OSIMBA MALACHI.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...RESPONDENT

JARED MAINYE.....1ST INTERESTED PARTY

ORANGE DEMOCRATIC MOVEMENT.....2ND INTERESTED PARTY

JUDGMENT

1. The applicant moved this court by the Notice of Motion dated 21st June, 2017 for orders of *certiorari to bring to the High Court for purposes of quashing the decision of the Independent Electoral and Boundaries Commission to omit the applicant's name from the list of contestants for member of the County Assembly for Kaptembwa Ward in the general elections to be held on 8th August, 2017 and an order of mandamus compelling the respondent to publish the applicant's name among the list of contestants.*

2. The application is supported by the affidavit of the applicant, statutory statement and affidavit verifying the facts all dated 15th June, 2017, his supplementary affidavit sworn on 21st June, 2017 and further affidavit sworn on 6th July, 2017.

3. The applicant was nominated by the Ford Kenya Political Party to vie for the position of Member of the County Assembly Ward for Kaptembwa Ward, Nakuru County in the upcoming general elections which will be held on 8th August, 2017. He was subsequently issued with a certificate of nomination by the respondent's returning officer on 31st May, 2017. He alleges that on 15th June, 2017 the respondent's returning officer served him with the respondent's decision barring him from contesting in the elections. He argues that this decision was made without his knowledge or participation. The respondent refused to accede to the applicant's request to be supplied with copies of the pleadings and proceedings. As a result he does not know the complaint against him and has been greatly prejudiced by the respondent's decision which was made without giving him an opportunity to present his case. He maintained that he is a lawful candidate for the MCA seat for Kaptembwa Ward and annexed to his further affidavit, copies of his application form for membership to the party dated 23rd March, 2017 and a resignation letter from the 2nd interested party which was served on 19th March, 2017. He contended that the complaint which formed the basis for the respondent's decision was baseless and motivated by malice targeting him as a competitor.

4. The 1st Interested Party swore a replying affidavit on 29th June, 2017 in response to the application. He alleged that he is a registered voter in Kaptembwa Ward, a member of the 2nd interested party, Orange Democratic Party (ODM) and was the complainant in the case against the applicant. He lodged the complaint with the respondent challenging the nomination of the applicant by the Ford Kenya Political Party. His argument was that the applicant was a member of the 2nd interested party as at 8th April, 2017, the deadline set by the respondent for parties to change their political parties, and even participated in the 2nd interested party's (ODM) nominations that were held on 27th April, 2017. He also contended that the applicant violated section 14 of the Political Parties Act by failing to resign from the 2nd Interested Party (ODM) and serving Registrar of Political Parties with the notification of resignation so that his name could be removed from the party's list. The interested party argued that on the basis of the foregoing, the applicant could not be validly nominated and the respondent acted lawfully in expunging his name from the list of nominees.

5. On its part the respondent relied on the grounds of opposition dated 10th July, 2017. It objected to the application on two grounds. The first was that the applicant has adopted the wrong approach in seeking the remedy and should have first appealed against the decision of the respondent. The second ground that was the applicant did not demonstrate that the respondent acted on any wrong principle, that it considered or failed to consider something material, or that the rules of natural justice were not observed. The Respondent argued that the applicant was not entitled to the order sought.

6. The application was canvassed by way of written submissions. In his submissions dated 6th July, 2017, the applicant reiterated that he was not aware of the case against him until he was served with the decision barring him from contesting in the elections. He submitted that his right to be heard by the respondent which was exercising a quasi-judicial function is guaranteed by Article 50 which guarantees the right to a fair hearing and the right to equal protection and equal benefit of the law under Article 27 (1) of the Constitution. He referred to the holding in **Kenneth Kipkemboi Settim & Another V. National Security Fund The Board of Trustees [2014] eKLR** that the rule “*audi alteram partem*”, a fundamental principle of constitutional law also expressed in Articles 25 (c), 50 and 40 (2) (a), embodies the concept in law that no person should be condemned unheard. Any person whose life, liberty, or property is in jeopardy has the right to confront the evidence against him or her in a fair hearing

7. On his part, the 1st interested party submitted that the applicant cannot allege that he was not heard since he was a respondent in the suit before the respondent and was granted ample opportunity to present his case but he declined. He was duly served and was aware of the decision of the respondent. It was further argued that the suit herein is defective because the applicant should have challenged the respondent's decision by way of appeal to the High Court. There was no evidence of procedural impropriety or breach of the rules of natural justice by the respondent.

8. The respondent filed the submissions dated 10th July, 2017. It argued that the applicant was duly served with copies of the pleadings by way of substituted service *vide* an advertisement ran in the papers on 12th June, 2017. The matter was determined *ex-parte* when the applicant refused to enter appearance or attend the hearing. It was submitted that judicial review remedies are discretionary and may be denied even when the court finds that there are grounds that warrant the issuing of the order.

9. The respondent further submitted that the complaint against the applicant was allowed after it was found he had not resigned from the 2nd Interested Party before the deadline of 8th April, 2017. The respondent was acting pursuant to the powers conferred on it by Article 88 (4) of the Constitution and was enforcing the provisions of Section 14 of the Political Parties Act. The respondent also adopted the 1st interested party's submissions that the suit herein is incompetent because the applicant should have moved court by way of petition, the procedure provided for by the Elections Act.

Analysis and Determination

10. The first issue that has been raised concerns the jurisdiction of the court to determine the matter. The

submission of the respondent and the interested party was that there are mechanisms provided for in law, according to the 1st interested party the applicant should have appealed, and the respondent argued that the applicant should have come by way of petition as provided for under the Elections Act.

11. The availability of other remedies is not a bar to filing judicial review proceedings. (**Republic V. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi**, HC MISC. Application No. 1235 of 1998). Judicial review proceedings are special proceedings that are invoked if the court is required to exercise its supervisory jurisdiction over public bodies that are exercising a judicial or quasi-judicial function. The purpose of judicial review proceedings are to ensure that a body acts within the law. However, where there are equally convenient, beneficial and effective alternative avenues for litigation provided the court may refuse to exercise its discretion to issue the remedy until the party has exhausted those procedures (**The Republic V. The Rent Restriction Tribunal and Z. N. Shah & S M Shah Ex Parte M M Butt Civil Appeal No. 47 of 1980 [U/R]**). Judicial review is regarded as a remedy of last resort. To be issued, the court must be satisfied that it is the most effective remedy available to the parties because the alternative procedures are otherwise less convenient, appropriate or expeditious. (See the **Republic V. Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPRA) [2013] eKLR, John Fitzgerald Kennedy Omanga V. Postmaster General Postal Corporation of Kenya & 2 Others [2004] eKLR** and **Republic V. Ambrose Odwaya O Onyango & Another Ex-parte CeasarNgigeWanjao [2014] eKLR**).

12. In determining the dispute the respondent was exercising the jurisdiction conferred upon it by Article 88 (4) (e) of the Constitution which vests in the respondent the mandate to settle **electoral disputes including disputes relating to or arising from nominations but excluding petitions and disputes subsequent to the declaration of election results**. This power is restated at section 74 of the Elections Act which provides-

"(1) pursuant to Article 88 (4) (e) of the constitution, the commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

(2) an electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the commission.

(3) notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable."

13. The above provisions do not require that a party aggrieved by a decision of the Commission on nominations to lodge an appeal in the High Court. Lesiit, J in **Shem Odongo Ochuodho V. Independent Electoral and Boundaries Commission & Another [2017] eKLR** had a similar finding, and further held that the only conclusion to be drawn from the silence of the Constitution and the Statutes on the matters of appeals to the High Court from this body is that jurisdiction does not exist. The court held that only available remedy is that of judicial review, under Article 23 of the Constitution or under the Civil Procedure Rules.

14. I agree with the above decision. I find that the application is properly before this court and the court is clothed with jurisdiction to determine the issues that have been raised. The objection on jurisdiction has no merit.

15. The second issue is whether the applicant's right to be heard was contravened. The right to be heard also known as "*audi alteram partem*" was enumerated by the Court of Appeal in **Pashito Holdings & Another vs Ndungu & 2 Others [1197] eKLR** as follows-

"The rule of "*audi alteram partem*", which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition).

“It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him”.

There is an unpronounceable (sic) Latin maxim which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right."

16. In Msagha vs Chief Justice & 7 Others [2006] 2 KLR 553, the three judges agreed that a person has a legitimate expectation to be heard before a decision is made against him. The court was guided by the English decision of Ridge –vs- Baldwin [1963] 2 All ER 66, where it was observed that:-

“An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice”,

and the Court at page 102 said-

“a decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision.”

17. The requirement to adhere to the rules of natural justice will be read into any statute under which an administrative or judicial function is exercised unless it is expressly excluded. It is not pegged on the strength of the case. (Republic V. Kenya School of Law & 2 others Ex-parte Juliet Wanjiru Njoroge & 5 others [2014] eKLR). A decision made in contravention of the rules of natural justice is void ab initio and will be set aside. (Onyango Oloo V. Attorney General [1986-1989]EA 456).

18. The admitted facts are that the 1st interested party lodged a complaint in the respondent against the nomination of the applicant. This complaint was heard and allowed ex-parte resulting in the revocation of the nomination certificate that had been issued to the applicant and removal of his name from the list of nominated candidates. The only issue is whether the applicant was duly served with the pleadings, and was therefore aware of the proceedings but nonetheless refused to attend.

19. The 1st interested party submitted at length of the merits of the complaint. His arguments were that the applicant could not be nominated under the Ford Kenya Political Party because at the material time he was still a member of the 2nd interested party (ODM). His arguments were that the respondent’s decision was sound on law and fact. He however did not indicate whether he served the applicant with the pleadings or notice of the hearing. The respondent also did not prove on what basis it determined that the pleaded matters in the 1st interested party’s complaints were undisputed. It alleged that the applicant was notified of the case vide advertisement in the newspaper of 12th June 2017. This allegation has no probative value as it was only made in the submissions. The respondent did not produce the newspaper advertisement as evidence or even furnish particulars of the name of the newspaper in which the advertisement was made. It is my finding that that the applicant herein was not heard before the decision to revoke his certificate was made. This decision is null to this extent.

20. In addition to the order of certiorari to quash the impugned decision, the applicant also sought orders to compel the respondent by way of mandamus to forthwith include him in the list of nominees. However, this court cannot disregard the very serious allegations that have been made against the applicant. There is a dispute as to whether the applicant contravened the provisions of section 14 of the Political Parties Act, which according to this court should be determined by the respondent first before making a decision whether to include his name in the list of contestants. The respondent has established a mechanism under Article 88 (4) (e) of the Constitution and section 74 of the Elections Act to determine the complaints in a more effective manner particularly because time is of the essence in this matter that touches on the impending elections. Therefore I find it prudent that the matter be sent back to the IEBC Disputes Resolution Committee to be heard *inter-partes*.

21. For the above reasons, the application dated 21st June, 2017 is hereby partially allowed on the

following terms: **THAT-**

- a. an order of certiorari be and is hereby issued for purposes of quashing the decision of the Independent Electoral and Boundaries Commission dated 9th June, 2017 to omit the applicant's name from the list of contestants for Member of the County Assembly for Kaptembwo Ward, Nakuru County in the general elections to be held on 8th August, 2017;
- b. the prayer for the order of mandamus is hereby declined;
- c. the complaint dated 5th June, 2017 be retried by the respondent *inter-partes*;
- d. the applicant shall have the costs of the suit.

Dated, Signed and Delivered at Nakuru this 14th day of July, 2017

A. K. NDUNG'U

JUDGE