REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW

MILIMANI LAW COURTS

MISCELLANEOUS APPLICATION NO. 330 OF 2017

IN THE MATTER OF THE VIOLATION OF THE PROVISIONS OF ARTICLE 38, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF THE NOMINATION OF DEMOCRATIC MOVEMENT PARTY CANDIDATE FOR KABONYO KANYAGWAL WARD

AND

IN THE MATTER OF A DECISION BY THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION DISPUTE RESOLUTION COMMITTEE

BETWEEN

JAPHETH ONYANGO OMOLOH.....APPLICANT

VERSUS

CHARLES AGUKO AGUKO…...……..1ST RESPONDENT

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.…….....……..2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT…....…...…..3RD RESPONDENT

RULING

Introduction

1. On 20th June, 2017, this Court quashed the decision of the Independent Electoral and Boundaries

Commission Dispute Resolution Committee made on 7th June, 2017 and directed that the dispute be heard on merits by the said Committee in accordance with the due process of the law.

2. However by a Notice of Motion dated 4th July, 2017, the *ex parte* applicant herein, **Japheth Onyango Omoloh,** seeks the following orders:

> **1. This Honourable Court be pleased to grant a temporary stay of order issued by the Independent Electoral and Boundaries Commission Dispute Resolution Committee restraining the 2nd Respondent, its servants, and/or its agents from nominating, gazetting and/or forwarding for printing the name of the 1st Respondent for the position of Member of County Assembly of Kisumu for the ward of Kabonyo/Kanyagwal under the Orange Democratic Movement ("ODM") Party pending hearing and determination of this application *inter-partes*.**
>
> **2. The Honourable Court be pleased and do hereby grant Judicial Review Order of certiorari to remove into the High Court and quash the proceedings before the Independent Electoral and Boundaries Commission Dispute Resolution Committee which revoked his nomination as the 3rd Respondent's nominee in respect of Kabonyo Kanyagwal Ward, Nyando Constituency.**
>
> **3. The Honourable Court be pleased and do hereby grant Judicial Review Order of mandamus to remove into the High Court and compel the 2nd Respondent to reinstate the name of the Applicant as the 3rd Respondent's nominee for the position of Kabonyo Kanyagwal Ward, Nyando Constituency.**
>
> **4. Such further and other reliefs that this Honourable Court may deem just and expedient to grant.**
>
> **5. Costs for this application be provided for.**

<u>Applicant's Case</u>

3. According to the applicant, following the delivery of this Court's earlier decision, the Applicant on the 21st June, 2017, wrote to the 2nd Respondent, the Independent Electoral and Boundaries Commission (hereinafter referred to as "the IEBC" or "the Commission") informing them of the said decision and requested that they be supplied with a copy of the Complaint and proceedings that resulted to the IEBC's Decision dated 7th June, 2017 for the Applicant to adequately prepare. However, the IEBC failed to provide same.

4. It was averred that the IEBC directed that all the parties appear before them on Wednesday, 28th June, 2017 at 10.00 am. The applicant averred that it was his legitimate expectation that he would have been accorded a hearing before a decision adverse to him was made by the IEBC. The applicant averred that his Advocate was present at the IEBC's offices at the time communicated to him that is at 10.00 am.

5. According to the applicant, from the Decision of the IEBC it does not disclose at what time the matter was called out but what is clear is that his Advocate was at the Commission at 10.00 am as was required of him. The only indication as to what time the matter was called out is to be found in the 1st Respondent's Replying Affidavit where he avers that the matter was called out at noon, clearly 2 hours from the stipulated time.

6. According to the applicant, it was utterly dishonest for the IEBC to claim that his Advocates could not be reached when they made no efforts to reach the applicant or his Advocates either through their cell phone numbers or physically to his Advocate's offices that is less than five (5) metres from the 2nd Respondent's Offices.

7. The applicant asserted that from the 1st Respondent's supplementary affidavit and the annexures therein, it is manifestly evident that the 1st Respondent is notorious in moving judicial and quasi-judicial bodies ex parte and obtaining orders adverse to the Applicant herein without any notice to him.

8. It was therefore his view that it was unfair for the IEBC Dispute Resolution Committee to hear the complaint before it without notifying the ex parte Applicant. The IEBC nevertheless proceeded to gazette the name of the 1st Respondent on 30th June, 2017 even without informing the Applicant herein.

9. It was the ex parte applicant's position that the Preliminary Objection raised was premature, misconceived and meant to waste the court's time as it neither disclosed a pure point of law, as required of such Applications, as its foundation nor raised any compelling reasons as to why the Applicant's entire Application should be dismissed. According to the applicant, the 1st Respondent failed to appreciate that there are other prayers that the Applicant has sought other than *mandamus* both at the leave stage and in the substantive Application.

10. It was the applicant's position that the 1st Respondent wanted to rely on procedural lapses and technicalities to trump on substantial justice. He asserted that **it is in the overall interests of justice that procedural lapses and technicalities should not be invoked to defeat Applications unless the lapse goes to the jurisdiction of the court or substantial prejudice is caused to the adverse party. In this case the 1st Respondent had not** disclosed or demonstrated how they will be prejudiced if the Order for Mandamus sought in the Motion is granted.

11. On behalf of the applicant it was submitted by **Mr Ashioya** that the IEBC's action was irrational, unreasonable and was arrived at in disregard of this Court's decision. While acknowledging mandamus was not one of the prayers set out in the statement, it was however submitted that even without the order of *mandamus* the application was still competent.

12. Although the 3rd Respondent, the Orange Democratic Movement (hereinafter referred to as "the Party"), did not file any response, its advocate, **Mr Oduor**, supported the applicant's case. According to him, the action of the IEBC violated the applicant's right to fair hearing and fair administrative action pursuant to Article 47 of the Constitution and the provisions of the ***Fair Administrative Actions Act***. According to learned counsel the IEBC acted arbitrarily.

13. It was submitted that whereas the remedy of contempt was available, it was just one of the remedies and the applicant was not barred from instituting these proceedings. In this case, however the said remedy was not available as it would have meant that the said process be completed well after the elections.

1st Respondent's Case

14. The application was however opposed by the 1st Respondent herein, **Charles Aguko Aguko**.

15. According to him, pursuant to the orders of this Honourable Court issued on 21st June 2017 in this cause, the dispute was referred back to the 2nd Respondent's Committee with a direction that the ex parte applicant be granted an opportunity to be heard.

16. It was averred that the parties were indeed called to appear before the 2nd Respondent for hearing in the presence of the ex parte Applicant on Wednesday, 28th June 2017 at 10.00am. According to him when he got the call at 5.p.m of 27th June 2017, he dropped everything he was doing and took a bus overnight arriving at the 2nd Respondent's offices at 9am. He then informed his counsel on record who arrived at 9.20am.

17. According to the 1st Respondent the ex parte applicant never served him with the applicant's response despite knowing or learning of his presence and he believed no document was ever filed by him.

18. It was averred by the 1st Respondent that he patiently waited at the Board Room for the matter to be called till noon when the same was finally called out by which time the whereabouts of the Ex Parte Applicant's counsel could not be established and the Chairman of the IEBC advised them to wait at least to see if he would appear and placed the file aside.

19. It was averred by the 1st Respondent that they were kept waiting for one full hour while the IEBC attempted to contact counsel for the Ex parte Applicant in vain and after a while they were called in and made their oral submissions in the absence of the Ex parte Applicant's counsel. Thereafter, the 2nd Respondent issued a detailed ruling on the same day detailing the steps taken by it to trace the whereabouts of the Ex parte Applicant's counsel.

20. It was the 1st Respondent's case that in light of these clear findings, it cannot lie for the ex parte applicant to state that he was present at the 2nd Respondent's offices all through.

21. The 1st Respondent however asserted that it is only the 2nd Respondent's Committee who now have jurisdiction to further re-admit the claim before it after the ex parte applicant satisfy themselves of the reasons for non-appearance o the ex parte applicant and not through this Court. It was the 1st Respondent's case that the Ex parte Applicant is not candid when his counsel indeed left the premises of the 2nd Respondent.

22. It was the 1st Respondent's position that if it was the case of the Ex parte Applicant that the IEBC intentionally disregarded the orders of this Court, the proper recourse would be to institute contempt application and not regurgitate proceedings with no end in sight. The 1st Respondent disclosed that it was a matter of public notoriety that names have been officially gazetted and printing of ballot papers with respect to county seats are underway and failures or omissions of a party cannot be used to have the process fail.

23. On behalf of the 1st Respondent, it was submitted by **Mr Ogembo**, his learned counsel that the prayer for mandamus cannot be sustained in light of Order 53 rule 4 of the ***Civil Procedure Rules***.

24. It was further submitted that these proceedings were incompetent since the order sought herein were the same orders which were being sough in the earlier application that had been determined by his Court. According to the 1st Respondent if it was alleged that the IEBC had violated the orders of this Court the applicant ought to have instituted contempt of court proceedings instead of commencing proceedings in the same proceedings seeking the very same orders which had been determined.

25. It was the 1st Respondent's case that the law is not that a party must be heard but that the party be afforded an opportunity of being heard which is what the IEBC did.

2nd Respondent's Case

26. The 2nd Respondent, the IEBC, also opposed the application.

27. According to the IEBC, the applicant's prayer to stay the publishing of qualified aspirants in the Kenya Gazette has been overtaken by events and was already overtaken by events when his application was served on the 2nd respondent on 12th July, 2017 since publication of the 3rd respondent's as duly nominated by the 2nd respondent to vie for Member of County Assembly, Kabonyo Kanyagwal Ward was done in the Kenya gazette effected on 27th June, 2017 vide Legal Notice No. 6253 of 2017.

28. According to the IEBC, on 20th July, 2017 the applicant obtained orders in this same cause that quashed the decision of the 2nd respondent's Dispute Resolution Committee made on 7th June, 2017 and ordered that the applicant be heard afresh. According to the Commission, the decision which the applicant

seeks to quash on the basis of being denied the right to be heard is the decision that was made by the Dispute Resolution Committee of the 2nd respondent on the 28th June 2017 in obedience to the court order requiring the dispute to be heard afresh on merits.

29. It was averred that the applicant and his counsel were informed of the date, time and venue of the hearing to be Wednesday, 28th June, 2017 at the 2nd Respondent's offices in Anniversary Towers at 10.00 A.M. but when the case was reached and called out at about noon of the same day neither the applicant nor his advocate was present and therefore the same was dismissed.

30. It was the Commission's case that this application is misconceived and a waste of precious judicial time since where an allegation is on non compliance with valid court orders then the correct cause of action is contempt proceedings. To the Commission, the law is not that a party must be heard in every litigation, but that parties must be given a reasonable opportunity of being heard. In this case however, the applicant was duly afforded the opportunity to be heard in accordance with Article 50 (1) of the Constitution of Kenya, 2010 and the rules of natural justice. Its view was that in light of the opportunity to be heard that was availed to the applicant, the strict gazettement timelines and the impending elections the 2nd respondent's Dispute Resolution Committee was justified in proceeding with the hearing. The Commission urged the Court to take judicial notice of the fact that it is now at a very advanced stage of preparing the process leading to the conduct of the general elections to be held on 8th August, 2017, less than a month away, which process entails printing of ballot papers and other logistical matters at immense public expenditure and that to grant the applicant the orders that he now seeks will lead to a reversal of that process and occasion a constitutional crisis considering that the times or dates for conduct of the elections are set out in the Constitution.

31. To the Commission, the decision made by its Dispute Resolution Committee ought to be quashed was well reasoned, free of bias, impartial and objective in light of the evidence presented before it.

32. According to its counsel, **Mr Mwongela**, the IEBC was operating under strict timelines hence the applicant could not expect that the IEBC would be the one to accommodate him.

33. It was reiterated that the printing of ballot papers were almost complete hence the public interests dictated that the application be disallowed. It was contended that the applicant ought to have applied for fresh leave to institute these proceedings.

34. It was therefore submitted that he application ought to be dismissed with costs.

Determination

35. I have considered the application filed herein and the submissions made herein.

36. Order 53 rule 4(1) of the ***Civil Procedure Rules*** provides that:

> ***Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.***

37. Since it is admitted that *mandamus* was not one of the reliefs set out in the statement the same cannot be granted. However nothing stops this Court from issuing an order of certiorari. Although it was submitted that an order of certiorari without *mandamus* in the circumstances of this case is of no use, that does not render these proceedings incompetent. In **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572** the Court of Appeal expressed itself as follows:

> **"The learned judge had jurisdiction to quash the University decision but whether he was**

right or wrong in exercising that jurisdiction in the manner he did is not and cannot be a matter for the Court's consideration in the application for stay of execution pending appeal. It is doubtful whether the university could be prohibited from instituting further disciplinary proceedings after the earlier ones had been quashed unless, of course it was shown that the proposed further proceedings would be contrary to law…..Under section 8(2) of the Law Reform Act, the High Court has power to issue the orders of *certiorari,* prohibition and *mandamus* in circumstances in which the High Court of Justice in England would have power to issue them. The point to be canvassed in the intended appeal being whether, in the exercise of his admitted jurisdiction, the learned judge was in fact entitled to, in effect, issue an order of *mandamus* against the University when neither the applicants nor the University had asked for such an order, is clearly arguable. If the superior court had no jurisdiction to order a retrial, then the validity of the subsequent proceedings held pursuant to such an order would themselves be highly questionable."

38. In other words where an order of certiorari is issued without an order of mandamus, the decision is thereby quashed and the body whose decision is quashed is thereby at liberty to decide whether to commence the proceedings afresh or not.

39. The next issue is whether it was proper for the ex parte applicant to seek the present reliefs in the same proceedings following the earlier decision. In my view by directing the IEBC to hear the dispute *de novo*, it was as if any proceedings undertaken by the IEBC were inconsequential. Therefore if the IEBC committed any wrongdoing in the course of the conduct of the said proceedings, the only recourse available to the applicant was to attack the said proceedings as if there were no earlier proceedings. In other words the decision of the IEBC arising from the re-hearing of the dispute if wrongful could only constitute a new cause of action and could not competently be challenged in the same proceedings as those in which the order directing hearing *de novo* was made. The effect of an order for hearing *de novo* was explained by the Court of Appeal in **Peter Okeyo Ogila vs. Rachuonyo Farmers Co-Operative Union Ltd. Civil Appeal No. 79 of 1992** where that Court expressed itself as hereunder:

"Where the Court of Appeal has set aside a Judgement and ordered a fresh hearing de *novo* by a different Judge, the Judge has to apply his own mind to the matter and decide for himself what would be a fair and reasonable compensation but should not just reproduce the Judgement which had been set aside and increase it by a small sum to take account of inflation as to do so is impermissible and the Judgement not being his, is a nullity."

40. That subsequent proceedings to the order for hearing de novo in judicial review cannot be undertaken in the earlier proceedings is reinforced by section 8(3) of the ***Law Reform Act***, which provides that:

No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.

41. I however appreciate that the Court, in the exercise of its inherent jurisdiction retains residual powers to ensure its orders are implemented. This was recognised by the Court of Appeal in **Nicholas Mahihu vs. Ndima Tea Factory Ltd & Another Civil Application No. Nai. 101 of 2009** where it was held that the Court has the duty to ensure that its orders are at all times effective.

42. In this case however, it is clear that the ex parte applicant is not seeking to effectuate the orders of the Court issued earlier on but is seeking the very same orders that were sought in the earlier proceedings. In fact the issue of effectuating the earlier orders does not arise since pursuant to the said decision the IEBC put into motion a fresh process. If an irregularity was committed in that process the only option available to the applicant was to commence a fresh challenge against the said irregularity.

43. In this case it is contended that the proceedings before the IEBC proceeded ex parte without the applicant being properly notified. In my view if that was the position the applicant ought to have sought to set aside the said proceedings instead of seeking judicial review against the same. Section 9(2) of the

Fair Administrative Action Act, No. 4 of 2015 provides:

> ***The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***

44. Subsection (3) thereof provides:

> ***The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***

45. Subsection (4) of the said section however provides:

> ***Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

46. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. One of the remedies available to a party aggrieved by an *ex parte* decision is to apply for setting aside the same before the Court or Tribunal that granted the order. Accordingly nothing prevented the ex parte applicant from seeking to set aside the decision of the IEBC in the proceedings sought to be challenged in this application.

47. I am however not convinced that the applicant ought to have opted for contempt of court proceedings in the circumstances of this case. Section 30 of the ***Contempt of Court Act, 2016*** provides that:

> ***(1) Where a State organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the State organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.***
>
> ***(2) No contempt of court proceedings shall be commenced against the accounting officer of a State organ, government department, ministry or corporation, unless the court has issued a notice of not less than thirty days to the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.***
>
> ***(3) A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General.***
>
> ***(4) If the accounting officer does not respond to the notice to show cause issued under subsection (1) within thirty days of the receipt of the notice, the court shall proceed and commence contempt of court proceedings against the accounting officer.***
>
> ***(5) Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.***
>
> ***(6) No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith.***

48. According to the foregoing provisions, before any civil contempt of court proceedings are instituted in disobedience of a judgement, decree or order, the applicant must first move the Court to issue a notice to

show cause against the accounting officer of the State organ, government department, ministry or corporation concerned. Such notice is to be served on both the accounting officer and the Attorney General. If no response to the notice is received, the Court may then at the expiry of the said thirty days' notice period proceed to commence contempt of court proceedings against the concerned accounting officer.

49. In this case however the requirement that a 30 days' notice be served before commencing contempt of court proceedings would have rendered the said proceedings superfluous. As this Court held in **Republic vs. Ministry of Interior and Coordination of National Government& the Public Procurement Administrative Review Board Ex-Parte: ZTE Corporation and ZTE Corporation (Kenya) Limited Judicial Review Case No. 441 of 2013**

> **"…ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality…However, where the ouster clause leaves an aggrieved party with no effective remedy or at all, it is my view that such ouster clause will be struck down as being unreasonable."**

50. Therefore where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) of the Constitution are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law is decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved.

51. It is however my view that the prayers sought in the instant application cannot be issued in these proceedings where to all intents and purposes the Court had been rendered *functus officio*.

52. Consequently, the Notice of Motion dated 4th July, 2017 is incompetent and is hereby struck out but as these proceedings relate to nomination of the Party's candidate and in light of my earlier decision on costs in the previous proceedings, there will be no order as to costs.

53. It is so ordered.

Dated at Nairobi this 20th day of July, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kaimenyi for Mr Mwongela for the 2nd Respondent

Mr Ogembo for the 1st Respondent

CA Mwangi