



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 201 OF 2012

REPUBLIC.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION1ST RESPONDENT

HUSSEIN GUYO JASO2ND RESPONDENT

AND

THE NATIONAL ALLIANCE.....1ST INTERESTED PARTY

MOHAMED DADO HATU.....2ND INTERESTED PARTY

EX-PARTE

IMANI FUMAO REDO

RULING

The application for the consideration of this Court is the notice of motion dated 16th October, 2013 in which the 2nd Respondent, Hussein Guyo Jarson prays for orders:

1. **THAT** this Honorable Court do review and set aside the judgment delivered by the three judge bench of Mumbi Ngugi, David Majanja and Weldon Korir on 12th July, 2013 ordering the IEBC's Electoral Disputes Resolution Committee to reconsider the complaint by the ex-parte applicant herein, thereby effectively annulling the nomination of the 2nd Respondent to the Tana River County Assembly, without giving him an opportunity to be heard contrary to the fundamental rules of natural justice and the Constitution of Kenya.
2. **THAT** the proceedings subsequently taken by the IEBC's Electoral Disputes Resolution Committee and the decision made on 16th July 2013 nominating Imani Fumao Redo in the place of the 2nd Respondent be recalled and quashed and/or annulled by this court, as the Committee failed to afford the 2nd Respondent an opportunity to instruct an advocate to

represent him thereby denying him a fair hearing.

3. **THAT** this court do find that the 2nd Respondent's nomination by the TNA party as ratified by the IEBC Electoral Disputes Committee's decision of 7th June 2013 was valid, the ex-parte applicant having been fully heard by the said committee and proceed to nullify the controversial nomination of the ex-parte applicant.
4. **THAT** the costs of this application be provided for.

The application which is supported by the grounds on its face and the supporting affidavit of the Applicant/2nd Respondent seeks to overturn the judgment delivered by this Court on 12th July, 2013.

The grounds in support of the application are:

“1. THAT the court's judgement delivered on 12th July, 2013 by the three judge bench of Honourables; Lady Justice Mumbi Ngugi, Mr. David Majanja and Weldon Korir, was made oblivious of the rights of the 2nd respondent to a fair hearing since he was not served at all and particularly for the proceedings that led to the judgement.

2. THAT exparte applicant who had initiated the proceedings thereby naming the 2nd Respondent as a direct party to the suit and then failing to serve him or inform him of such proceedings did the case sneakily and deliberately in order to take the 2nd respondent's nomination, without a fair fight.

3. THAT failure on the part of the exparte applicant to inform the court that he had not served the 2nd Respondent as it was his duty to do knowing that the said respondent would be the one most adversely affected by the intended relief, was a deliberate act of bad faith calculated for maximum harm to the 2nd Respondent.

4. THAT by proceeding with the hearing of the case without confirming that all the parties had duly been served, the court failed to ensure that the 2nd Respondent who stood to suffer serious loss from the proceedings was protected and that allowed maximum damage to befall him. It was also a breach of its duty to ensure that justice is done to all who come or are brought before it.

5. THAT further nobody can tell how the proceedings might have turned out if the 2nd Respondent had been allowed to participate and he was thereby gravely prejudiced.

6. THAT having at paragraph 12 of the judgement noted that the 2nd Respondent had not been served and was therefore unaware of the proceedings that would end with the annulment of his nomination, the court ought to have recalled the parties and insisted on having him served to appear even at that stage. But the court proceeded to issue orders that would forever alter his status even after appropriately observing that he was the most affected party by the proceedings.

7. THAT in view of the absence of the 2nd Respondent, the court ought to have given proper weight to the position taken by the 1st respondent and the 2nd Interested Party, the TNA which fully supported the 2nd respondent's nomination and defended the decision of the committee of IEBC.

8. THAT in view of the foregoing there is good and sufficient cause for review of the said judgement as prayed and for appropriate remedies to issue so that justice is not only done but seen to be done as well.

9. **THAT** this application has been made diligently and without unreasonable delay. The 2nd Respondent has made this application within reasonable time in all the circumstances of this case.

10. **THAT** the court ought to strike a balance between the constitutional limitation of time regarding these matters and the fundamental constitutional right of the 2nd respondent not to be condemned unheard. The right to a fair hearing cannot and should not be sacrificed at the altar of time limitations.

11. **THAT** unless the said judgement is reviewed as prayed:-

(a) The 2nd respondent's right to fair trial would forever remain breached.

(b) In the circumstances the Plaintiff would continue to suffer loss which would be irreparable

13. **THAT** accordingly and in the interests of justice and fairness of justice and fairness, the said Orders sought in this application ought to be granted as prayed.”

In order not to create confusion, we will refer to the parties as they appear in this Judicial Review Application No. 201 of 2013.

The summary of the 2nd Respondent's case is that he is a disabled Kenyan and a member of the National Alliance Party (TNA). He is also a registered voter at Maji Safi Polling Station in Likoni, Mombasa. Towards the end of 2012 he applied to his party to be considered for nomination as a County Assembly member in the special category of the disabled. After the 2013 General Elections he was indeed nominated and his name forwarded to the 1st Respondent, the Independent Electoral & Boundaries Commission (IEBC) for vetting and gazettelement.

As he was planning to go for the nomination certificate, he was informed by a friend that his name was among those of people who had been summoned to Nairobi by the 1st Respondent. It is only when he arrived at the 1st Respondent's offices at Anniversary Towers that he realized that he had been called to attend a case as there was a complaint concerning his nomination.

After the hearing of the case, the complaint which had been filed by Imani Fumao Redo (the ex-parte Applicant) was dismissed.

Consequently the ex-parte Applicant surreptitiously filed these judicial review proceedings. The decision of 1st Respondent's Electoral Disputes Resolution Committee (the Tribunal) was set aside by this bench which nullified his nomination and sent the matter back to the Tribunal for reconsideration. He asserts that the decision of this Court was reached without his being heard since he had not been served. He therefore faults the Court for proceeding without ensuring that he had been served.

When the matter went back to the Tribunal for reconsideration, the 2nd Respondent's nomination was nullified. The 2nd Respondent is of the opinion that: **“the order to reconsider my nomination could in the circumstances of this case be assumed to have been a directive to the IEBC, which had done its job, to simply remove my name and insert that of the ex-parte applicant who had been accorded a fair hearing but failed to convince the tribunal that he should be given the opportunity rather than myself.”**- see paragraph 42 of the supporting affidavit.

The 2nd Respondent contends that it cannot be argued that his presence before this Court may not have made much difference as his presence was a mandatory requirement unless he had absented himself after being served.

The 2nd Respondent asserts that his fundamental right to a fair hearing cannot be defeated by any time limit because a breach of the right to a fair hearing is a violation that goes to the root of fairness and justice should not be sacrificed at the altar of the strict timelines of the relevant electoral laws.

The application is opposed by the ex-parte Applicant (Imani Fumao Redo) and the IEBC (the 1st Respondent). The 2nd Interested Party (Mohamed Dado Hatu) supports the 1st and 2nd prayers of the notice of motion but opposes the prayer for an order restoring the original decision made on 7th June, 2013 by the Tribunal in favour of the 2nd Respondent.

The ex-parte Applicant filed Grounds of Opposition and a Notice of Preliminary Objection as well as a Replying Affidavit. The 1st Respondent opposed the application through the replying affidavit of Moses Kipkogei sworn on the 17th February 2014.

Mr. Kipkogei averred that in the judgement which is the subject of this application for review, the Court took note of the fact that the 2nd Respondent did not participate in the proceedings as there was no evidence of service and declined to make a finding that is adverse to his interests. It was his case that the Court did not annul the nomination of the 2nd Respondent but only returned the matter for reconsideration by the 1st Respondent. It was his case that the 1st Respondent complied with the Court's order and invited the concerned parties, the 2nd Respondent included, heard them and proceeded to make a determination in IEBC/PL/MISC/12/2013, where the complaint by the ex-parte Applicant was allowed and he was subsequently gazetted.

He averred that since the election of the ex-parte Applicant had not been challenged by way of an election petition, the court lacks jurisdiction to issue orders 2 and 3 sought in the application. According to him the application is bad in law and lacks merit and it should be dismissed with costs in favour of the 2nd Respondent.

The ex-parte Applicant (Imani Fumao Redo) opposed the application through his replying affidavit of 5th March, 2014. He also filed grounds of opposition dated 25th November, 2013 and a preliminary objection dated 20th January, 2014.

It was his case that the 2nd Respondent is indeed candid as he has admitted that he was registered as a voter in Likoni within Mombasa County and not Tana River County. He contended that the 2nd Respondent in his affidavit deliberately failed to attach a copy of his application to the party for nomination in effect concealing from the Court that his application, if any, was for nomination to the County Assembly of Mombasa where he was registered as a voter and not Tana River County.

He asserted that the Tribunal was properly constituted as provided under Article 88(5)(e) of the Constitution. It was his case that after they were heard *inter partes* no appeal was preferred and in as far as he is concerned the Court did not make any ruling or judgement against the 2nd Respondent to warrant the application. He argued that the Court only referred the matter back to the 1st Respondent (IEBC) to hear the parties afresh.

He contended that the 2nd Respondent did not challenge the judgement of the Tribunal. He averred that the 1st Respondent served all the parties through the local dailies on the 15th July, 2013. He stated that when the matter came up for hearing by the Tribunal all the parties were given ample time to state their cases.

It was his case that during the proceedings the 2nd Respondent sought no adjournment and neither did he state his desire to get representation. He contended that once judgement has been delivered the same is not available for review and therefore the application is misplaced.

He averred that he had been gazetted and sworn in as a member of Tana River County Assembly and the

only way to challenge his nomination or election was through an election petition. According to him this court has not been constituted as an election court and it therefore lacks jurisdiction to deal with this matter. It is the ex-parte Applicant's view that this application is an abuse of the court process.

He contended that Section 75 of the Elections Act, 2011 prescribed the time within which an election dispute should be filed and that this application has been commenced wrongly and out of the prescribed timelines. It was his case that there must be an end to litigation with regard to electoral disputes.

It is the ex-parte Applicant's case that the Notice of Motion herein has been brought unreasonably late in the day as it was filed three months after the Tribunal made its decision and the 2nd Respondent has all along been aware of the decision. The ex-parte Applicant contends that as a consequence of the delay in filing the matter the application had been overtaken by events.

The 2nd Interested Party (Mohamed Dado Hatu) through his replying affidavit dated 3rd July, 2013 averred that he was a complainant in the case before the Tribunal with regard to nominations to the Tana River County Assembly. Further that he was a person with disability and duly registered as such with the National Council of Persons with Disabilities. He annexed affidavits and documents to show that he was the person to be nominated in Tana River County. He asserted that the 2nd Respondent's name was not in the list submitted by the 1st Interested Party (TNA) to the 1st Respondent for nomination to Tana River County Assembly.

It was his case that the 2nd Respondent is not a resident of Tana River County and therefore did not deserve to be nominated. He asserted that the 2nd Respondent is not a person with disability and therefore did not qualify for nomination. He averred that he is a member of TNA and its coordinator in Bura Constituency. His case is that the complaint he presented before the Tribunal was about the 2nd Respondent who according to him was not a resident of Tana River County. He claims that he received a letter from the 1st Respondent which confirms his assertion. It was his contention that he could not understand why the Tribunal proceeded to dismiss his complaint.

He proceeded to oppose the prayer of mandamus by the 2nd Respondent and averred that the proper order for the Court to issue would be to order the 1st Respondent to obey the law and gazette him as the TNA nominee to the Tana River County Assembly.

In response to the ex-parte Applicant's Notice of Preliminary Objection the 2nd Respondent's advocate Mr Omagwa Angima swore an affidavit in which he contended that what they seek is relief for the breach of the fundamental constitutional right to be heard. He argued that the nullification of the ex-parte Applicant's nomination would be the natural outcome of redressing the breach.

He averred that the application is timeous, as it was immediately filed the moment the 2nd Respondent became aware of the court's decision and further that a magistrate's court has no jurisdiction to entertain this matter. It is his case that the Tribunal had initially upheld the 2nd Respondent's nomination and only revisited the matter after this court set aside the 2nd Respondent's nomination. He averred that the ex-parte Applicant's preliminary objection is not a proper one, as it would not lead to logical determination of the issues.

The facts surrounding this matter as can be gleaned from the court record is that the name of the 2nd Respondent was submitted to the 1st Respondent by the 1st Interested Party for nomination to the special slots for the party in Tana River County. The ex-parte Applicant was aggrieved by this decision and filed a complaint with the Tribunal. After considering the matter, the Tribunal concluded that the nomination of the 2nd Respondent was proper and dismissed the complaint. The ex-parte Applicant challenged the decision of the Tribunal by filing this judicial review application alleging that the Tribunal had not given him a fair hearing.

In a judgment delivered on 12th July, 2013 this court at paragraph 9 of the judgment stated:

“The gist of the applicant’s complaint is that he was not accorded a hearing by the IEBC in his complaint. However, from his own averments at paragraph 9 of his affidavit dated 24th June 2013, he did prosecute his complaint on 3rd June 2013. Consequently, there is no basis for impugning the decision of the 1st respondent as due process was observed in regard to his complaint. The other complaints raised in his statement filed in this matter pertain to matters that are new and were not placed before the 1st respondent, and we therefore decline to consider them.”

In essence the application by the ex-parte Applicant was dismissed.

There was, however, a twist to the matter as on 3rd July, 2013 Mohamed Dado Hatu had applied and had been allowed to join the proceedings as a 2nd Interested Party. On the issues raised by the 2nd Interested Party, the court at paragraphs 10 and 11 of its judgment stated that:

“10. With regard to the 2nd Interested Party, his complaint before the IEBC No. IEBC/DRC/PL/142/2013 was heard and dismissed. The issues that he raised before the IEBC were whether Hussein Guyo Jaso is a member of any political party, whether he is a registered voter in Tana River County, and whether he was on the list of nominees submitted by the party to the 1st respondent. The reasons given in the decision of 7th June 2013 for dismissal of his complaint by the 1st respondent is that the issue of party membership could not be sufficiently verified, and that the party did not come out strongly on the matter. The 2nd Interested Party has annexed to his affidavit a list on which he appears second, although in the category column against his name, the word “women” is indicated.

11. In our view, the 1st respondent was under a duty to allocate the nominations for Tana River County on the basis of the list submitted to it by the 1st Interested Party. From the list annexed to the affidavit of the 2nd Interested Party, it is evident that he had been on the list for nomination, and if a male was to be nominated, he ought to have been considered. It appears therefore that the 1st respondent failed to consider matters that were before it in nominating the 2nd respondent.”

Upon making that finding the court then remitted the matter to the IEBC for reconsideration.

In a ruling on assorted complaints delivered on 16th July, 2013 the Tribunal in particular reference to the Tana River County matter stated that:

“The complainant was erroneously nominated by TNA in Taita Taveta rather than Tana River County where he resides and applied for. TNA having admitted such an error and confirming that he was intended to be nominated in Tana River County to represent the Munyoyaya, a marginalized community in the County. Furthermore, the nominee Hussein Guyo Jaso, who appeared in person before the Committee, confirmed that he is neither a resident nor a voter in Tana River, and that the only time he is in the County is when he goes to visit his relatives. Based on the aforesaid facts and evidence, the Committee therefore allowed the complaint and hereby replaces the name of Hussein Guyo Jaso with that of Imani Fumao Redo of ID No. 190925.”

The 2nd Respondent therefore seeks to review the judgement of this court and the decision of the Tribunal.

The 2nd Respondent’s only ground for seeking the review of the judgment of this court is that Hussein Guyo Jaso’s judicial review application was heard in his absence yet there was no evidence that he had

been served with the application.

His assertion that the matter was heard in his absence and without notice is indeed confirmed by paragraph 12 of the court's judgment where it was observed:

“Regrettably, the 2nd respondent who is directly affected by these proceedings, did not participate in these proceedings, and there is no evidence that he was ever served with the application.”

The court having noted the involuntary absence of Hussein Guyo Jaso proceeded in the same paragraph 11 and concluded that:

“Consequently, it would be against the tenets of natural justice to make a decision that adversely affects his interests without affording him a hearing.”

It is at that juncture that the court remitted the matter back to the Tribunal for reconsideration.

The application before this court is said to be brought under Order 53 of the Civil Procedure Rules and undisclosed provisions of the Constitution. It is also said to be brought under Sections 1A, 1B, 3, 3A, 63(e) and 80 of the Civil Procedure Act, Cap 21 of the Laws of Kenya; Order XLIV Rules 1,2 and 3(2) ; Order L Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.

It is evident that the citation of the law under which the application is brought is not concise. However, we will proceed on the presumption that this is an application for review brought under Section 80(e) of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010.

Order 45 Rule 1(1) provides:

“1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

Looking at the said rule, it is clear that a review of a decree or order is only available where an applicant has discovered new and important evidence which was not available at the time the decree was passed or where there is a mistake or error apparent on the face of the record or for any other sufficient reason.

The 2nd Respondent limits his application for review to the ground of an error or mistake apparent on the face of the record. He contends that the court's decision to proceed with the matter knowing that he had not been served was an error which is apparent on the face of the record and is so grave and strikes at the heart of the judicial process that it calls for an immediate redress by way of review.

In **MUYODI v INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION AND ANOTHER [2006] 1 EA 243** the Court of Appeal defined an error or mistake apparent on the face of the record as follows:-

“In *Nyamogo and Nyamogo v Kogo* [2001] EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of

indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

In **MICHAEL MUNGAI v FORD KENYA ELECTION & NOMINATION BOARD & OTHERS & 2 OTHERS [2013] eKLR** it was observed that:

“For one to succeed in having an order reviewed for mistake or error apparent on the record, he must demonstrate that the order contains a mistake that is there for the whole world to see. It is not enough for an applicant to say that he is dissatisfied with the decision or that the same is wrong. Such opinions ought to be the subject of an appeal.”

The question is whether the decision of the court to proceed in the absence of the 2nd Respondent is an error apparent on the face of the record. It is important to note that the court was aware that the 2nd Respondent had not been served with the judicial review application. After noting this fact, the court proceeded with caution and stated that it would be against the tenets of natural justice to make a decision that would adversely affect him and remitted the matter to the Tribunal for determination.

In proceeding this way, the court may have reached an erroneous decision but the same cannot be equated to an error apparent on the face of the record. The decision made by this court to remit the matter to the Tribunal having not heard 2nd Respondent is one that could only be challenged by way of an appeal. If the matter had proceeded and the court had not commented on the lack of service, may be one could say that this was an error apparent on the face of the record.

We therefore find that no reason has been established to enable this court review its judgment.

We decided to consider the merits of the application although we need not have done so. We are of the opinion that this court has no jurisdiction to issue the orders sought by the 2nd Respondent. Once the ex-parte Applicant was gazetted as a member of Tana River County Assembly, the only way to challenge his nomination was by way of an election petition. Even if the application for review were to succeed, it would still amount to nothing. The removal of a duly gazetted member of a county assembly cannot be achieved through a judicial review application.

The 2nd Respondent does not stop there. He has proceeded to ask for the quashing of the decision made by the Tribunal after the court remitted the matter back to it. This is a very interesting application considering that we have not found it fit to review our decision which gave rise to the proceedings before the Tribunal.

Do we, at this point in time have jurisdiction to review the decision of the Tribunal? The evidence on record shows that the name of the ex-parte Applicant was published as duly nominated as a member of the County Assembly of the Tana River vide the Special Issue of the Kenya Gazette Notice No. 9794 Vol. CXV No.105 of 17th July, 2013. Through the gazette, the rules of the game completely changed so that the ex-parte Applicant could only be removed through an election petition filed as per the Constitution and the Elections Act, 2011.

We are aware of the decision in **ROSE WAIRIMU KAMAU & 3 OTHERS v THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION, Nairobi Civil Appeal No. 169 of 2013** in

which the Court of Appeal in allowing an appeal in a case involving nomination of members of a county assembly stated that:

“In reaching this conclusion, we are alive to the fact that once the nominees to parliament and to the county assemblies under Articles 97(1) (c) and 177 (2) respectively have been gazetted, as the High Court correctly observed in the National Gender & Equality Commission v The IEBC & others, Petition No. 147 of 2013, [2013] eKLR, they are deemed to be elected members of Parliament and the county assemblies and any challenge to their membership has to be any way of election petitions under Article 105 of the Constitution or Part VII of the Elections Act as the case may be. That however, does not apply here as the complaint giving rise to this appeal was lodged with the IEBC and a constitutional petition filed in the High Court before the nominees were gazetted. We are therefore entitled to make the orders we have made.”

The difference between that case and the case before us is that the dispute that went all the way to the Court of Appeal had been filed before the nominated members of the concerned county assembly had been gazetted. In the case before us, the application for review dated 16th October, 2013 and received in court on 24th October, 2013 was filed over three months after the gazetting of the ex-parte Applicant on 17th July, 2013. This court therefore lacks jurisdiction to entertain an application to review the Tribunal’s decision dated 16th July, 2013,

We only need to state that jurisdiction is the cornerstone of any court proceedings and the moment a court discovers that it has no jurisdiction then it must down its tools – see **SAMUEL KAMAU MACHARIA & ANOTHER v KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2014] eKLR** and **OWNERS OF THE MOTOR VESSEL “LILLIAN S” v CALTEX OIL (KENYA) LTD [1989] 1 KLR 1**.

We therefore have no authority to consider the question as to whether the 2nd Respondent received a fair hearing before the Tribunal when he appeared before it. We will therefore not consider whether the conclusion reached by the Tribunal was legal or reasonable or made in compliance with the rules of natural justice.

Having reached the conclusion that we have no authority to disturb the decision of the Tribunal, it follows that the prayer to declare the 2nd Respondent as validly nominated by the TNA party should also fail.

Consequently, the application is hereby dismissed, but with no order as to costs.

Dated and Signed at Nairobi this 10th day of October 2014

MUMBI NGUGI

JUDGE

D. S. MAJANJA

JUDGE

W. K. KORIR

JUDGE

Dated, Delivered and Signed at Nairobi this 13th day of October 2014

MUMBI NGUGI

JUDGE