



Rombo v Independent Electoral and Boundaries Commission; Ongondo (Interested Party) (Civil Appeal E190 of 2022) [2023] KECA 785 (KLR) (23 June 2023) (Reasons)

Neutral citation: [2023] KECA 785 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E190 OF 2022
PO KIAGE, HA OMONDI & F TUIYOTI, JJA
JUNE 23, 2023**

BETWEEN

ZACHARY ASEDA OMONDI ROMBO APPELLANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION RESPONDENT**

AND

BILLY ODHIAMBO ONGONDO INTERESTED PARTY

*(An appeal from the ruling and orders of the High Court of Kenya at Homabay
(K. W. Kiare, J.) dated 25th July, 2022 in Judicial Review No. 9 of 2022)*

REASONS

REASONS FOR JUDGMENT

- 1 By our judgment delivered on August 3, 2022, we dismissed the appellant's appeal with costs but reserved our reasons. These are our reasons.
- 2 The appellant challenged the decision of KW Kiare, J where the learned judge found the appellant's judicial review application incompetent and dismissed it on grounds that, the appellant did not exhaust the laid down appeal procedure before approaching the court and neither did he seek leave prior to lodging the judicial review application pursuant to Order 53 Rules 1 & 2 of the *Civil Procedure Rules*.
- 3 The appellant had tendered a motion before the learned judge protesting the dismissal of his claim by the Dispute Resolution Committee (DRC) of the respondent on account that it did not have jurisdiction. He had filed a complaint before the DRC challenging the nomination of the interested party as the Orange Democratic Party (ODM) candidate for the position of Member of County Assembly for West Kamagak Ward, in Kasipul Constituency, within Homa Bay County.



The basis of the complaint was that the ODM Appeals Tribunal had nullified the nomination of the interested party and instead issued him with a direct nomination certificate as the preferred candidate. Subsequently, however, he claimed, the Returning Officer for the respondent declined to clear him as the ODM candidate but instead cleared the interested party. The appellant thus sought the following substantive orders in the application;

- ' 3. THAT this Honourable Court do issue Judicial Review orders in the nature of Certiorari seeking to remove into this Honourable Court and quashing the decision of the Independent Electoral and Boundaries Commission Dispute Resolution Committee issued and dated June 19, 2022 and read in open court on June 20, 2022 dismissing complaint no 228 of 2022 in respect of Orange Democratic Movement Party nominee for West Kamagak Ward, Kasipul Constituency within Homa Bay County.
4. THAT this Honourable Court do issue Judicial Review orders in the nature of MANDAMUS compelling the Respondent to immediately receive and effect changes confirming the Applicant herein as the Orange Democratic Movement Party nominee to contest on the party ticket for the position of West Kamagak Ward, Kasipul Constituency within Homa Bay ward.
4. THAT this Honourable Court do issue Judicial Review orders in the nature of PROHIBITION directed at the Respondent prohibiting it from gazetting any other candidate on the ODM party ticket for the position of West Kamagak Ward Kasipul Constituency within Homa Bay ward.'

- 4 The respondent opposed the application contending that the appellant had failed to act with due diligence and prosecute his complaint before the proper forum within the strict timelines stipulated by the law. It was deposed that the interested party was the person nominated by the ODM party as its candidate for Member of County Assembly for West Kamagak Ward, and his name was forwarded and uploaded on the Candidate Registration System. Further, on May 20, 2022 when the respondent conducted a pre-candidate registration meeting for West Kamagak Ward, the appellant did not attend. Conversely, the interested party attended, whereupon the Constituency Returning Officer verified that his papers were in order and gave him the registration certificate.
- 5 The interested party similarly resisted the application maintaining that he was the one issued with the nomination certificate by the ODM National Elections Board for the position of West Kamagak Ward, and the appellant's nomination certificate was declared and disowned as a forgery by the same Board.
- 6 As above stated, the learned judge dismissed the appellant's application. Aggrieved by that decision, the appellant has preferred this appeal by which he contends that the learned judge erred by;
 - a. Finding that he did not have the requisite jurisdiction to hear and determine the application.
 - b. Finding that leave was not granted to the applicant to apply for judicial review orders yet leave was granted on June 29, 2022.
 - c. Erroneously and selectively interpreting the relevant constitutional and statutory provisions of the law.
 - d. Basing his decision on extraneous matters.
 - e. Finding that the applicant did not exhaust the procedure for appeal before instituting the application.



- f. Failing to review and appreciate the law and the entire evidence on record in making a just determination.
- 7 Following directions given for the efficient and expedited hearing of the appeal, the parties had filed written submissions and authorities which were highlighted by counsel at the plenary hearing of the appeal on August 3, 2022. Learned counsel Mr Ayieko appeared for the appellant, Miss Njari for the respondent and Mr Gesumwa for the interested party.
- 8 Mr. Ayieko insisted that the respondent DRC had the jurisdiction to hear the appellant's complaint. For this contention he cited Article 88(4)(e) of the *Constitution* which enjoins the respondent to, among other responsibilities, settle electoral disputes, including those relating to nominations. To buttress that proposition, counsel further placed reliance on the Supreme Court decisions in *MOSES Mwicigi & 14 Others Vs Independent Electoral And Boundaries Commission & 5 Others [2016] eKLR* And *Sammy Ndung'u Waity Vs Independent Electoral & Boundaries Commission & 3 Others [2019] eKLR*. Mr Ayieko urged that where a party is aggrieved by the decision of the respondent DRC, the High Court can sit as a judicial review court or in exercise of its supervisory jurisdiction to determine the issues raised.
- 9 Counsel submitted that contrary to the learned judge's finding, leave was sought and granted before the judicial review application was lodged. He contended that the interested party was not a member of the ODM party at the time of clearance, hence not eligible to be the party candidate for the position of Member of County Assembly. In the end counsel urged this Court to allow the appeal with costs.
- 10 We probed Mr Ayieko whether, in fact, this controversy should not have been dealt with by the Political Parties Dispute Tribunal (PPDT) seeing that the dispute was between a party and its member. In a rather cursory manner, counsel agreed that indeed this was a matter fit for the PPDT, but that the appellant was aggrieved by the action of the respondent Returning Officer clearing someone else. To this we inquired why the appellant did not consider raising the complaint with the internal mechanisms of the ODM party first, and then, if dissatisfied, escalate it to the PPDT. Counsel responded that by the time the appellant realized that someone else's name had been sent to the respondent, time for taking the matter to the PPDT had elapsed, and the only other avenue that was available to resolve the dispute was the respondent DRC.
- 10 In reply to the appellant's submissions, Miss Njari was categorical that the dispute herein was between the appellant and his party ODM which, counsel lamented, the appellant did not bother to join in the judicial review proceedings. Counsel continued that the Returning Officer was presented with a party list by ODM. There was also the Case Registration Management System, where the party fills the names of the candidates that have been nominated, and both documents had the name of the interested party. To counsel, therefore, the Returning Officer, and by extension the respondent, acted properly within their purview.
- 11 Miss Njari concurred with the holding of the learned judge that he had no jurisdiction to handle the matter since the appellant had not exhausted the internal dispute resolution mechanism available. She asserted that the appellant should have lodged his complaint with the PPDT rather than the respondent DRC, citing section 40 of the *Political Parties Act*. Moreover, the appellant's party wrote to the respondent indicating that the documents in his possession, including the nomination certificate, were forgeries. On whether the appellant was granted leave by the court to make the judicial review application, it was submitted that the leave that was granted was for application for orders of certiorari only.



- 12 We sought to know Miss Njari's view regarding the appellant's claim that he could not proceed to file the complaint before the PPDT because he was out of time. To this counsel remarked that time to present the complaint before the PPDT had not run out because the dispute arose immediately after nominations had been done. Counsel opined that in any case, time can always be extended. In conclusion, counsel urged us to dismiss the appeal with costs.
- 13 For the interested party, Mr Gesumwa associated himself with the submissions of the respondent.
- 14 It is apparent that this appeal turns on the single issue of whether the learned Judge erred in holding that he was bereft of jurisdiction to entertain the application since the appellant had not exhausted the prescribed appeal procedure. Indeed, during the hearing and upon probing by this Court, counsel admitted that the appellant should have taken his complaint to PPDT instead of the DRC, but for time. The learned judge cannot therefore be faulted for declining to deal with the matter for lack of jurisdiction. We note that in making that determination, the court considered section 9 of the Fair Administrative Actions Act on the procedure for judicial review and observed;
9. It is clear that the import of this legal provision is that an applicant for judicial review must be aggrieved by an administrative action and that the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. It is only under exceptional circumstances and on application by the applicant that the court may exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

Upon reviewing varied case law on the subject he concluded;

12. 'I therefore find that the applicant herein did not exhaust the procedure for the appeal before his application to this court was filed. Secondly, he did not demonstrate any exceptional circumstances for him to be exempted from this legal obligation. The preliminary objection is sustained'.
- 11 We are in accord with the learned judge's analysis. We do not think the appellant's excuse of time as the cause for his failure to follow due process is satisfactory. No doubt, resolution of election disputes is governed by very stringent defined timelines, which broadly are aimed at forestalling any electoral injustice. It is therefore incumbent upon all affected parties to be diligent and observe the electoral calendar without fail. These matters leave parties with little wriggle room and contestants should plunge into the political space duly forewarned. Such is the nature of the beast. The Apex Court was emphatic on the importance of adhering to the set electoral time frame in *Lemanken Aramat V Harun Meitamei Lempaka & 2 Others [2014] eKLR*. The Court expressed itself as follows;
70. [...] However, there are instances when the *Constitution* links certain vital conditions to the power of the Court to adjudicate a matter. This is particularly true in the context of Kenya's special electoral dispute-resolution mechanism. By linking the settlement of electoral disputes to time, the *Constitution* emphasises the principles of efficiency and diligence, in the construction of vital governance agencies. This consideration addresses the historical problem of delayed electoral justice, that has plagued this country in the past.
74. Efficient and dependable plays and interplays of governance entities, is a fundamental principle underlying Kenya's democratic Constitution of 2010. The vital primary agencies of discharge of the public mandate, must each function within a disciplined time-frame, if they are not to hold up the functioning of a different public agency, with the effect of occasioning immobility in one or more of the governance-units'.



- 12 The learned judge was also faulted for holding that the appellant had not obtained leave before filing the judicial review application. We note that the appellant was indeed granted leave, but the same was for applying for orders of certiorari only. In any event, as rightly held by the learned judge, the application was still incompetent, for reasons already adverted to above. In the end, we find quite inevitably, that the learned Judge did not err in any way to warrant our interference.
- 13 It is for these reasons that we dismissed the appeal with costs. We apologize for any inconvenience caused by the delay in rendering these reasons. This was due to an inadvertent filing error whereunder the file was marked as closed after the Decision was delivered.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF JUNE, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

