Aluochier v Independent Electoral and Boundaries Commission & 17 others (Civil Appeal E176 of 2022) [2022] KECA 952 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KECA 952 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E176 OF 2022

S OLE KANTAI, M NGUGI & KI LAIBUTA, JJA

JULY 29, 2022

BETWEEN

ISAAC ALUOCH POLO ALUOCHIER ..... APPELLANT

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1ST RESPONDENT

SHADRACK OTIENO NYAWADE, EAST KAMGAMBO WARD .... 2ND RESPONDENT

JOSHUA ONYANGO OUMA, WEST KAMAGAMBO WARD 3RD RESPONDENT

DANIEL OOKO OKENDO, SOUTH KAMAGAMBO WARD 4TH RESPONDENT

HILARY OCHOLA MAERI, WASWETA II WARD ..... 5TH RESPONDENT

BONFACE OUMA. EAST KAMAGAMBO WARD ..... 6TH RESPONDENT

JOHNSON WILLYS OYUGI OLOO, GOT KACHOLA WARD .... 7TH RESPONDENT

OTIENO NESTORY OWIYO, WEST SAKWA ..... 8TH RESPONDENT

ALBERT ODETTE AMOLLO, WIGA ..... 9TH RESPONDENT

MALLAN OGEGA OMOLO, RAGANA ORUBA ..... 10TH RESPONDENT

PETER OCHIENG MIJUNGU, WEST KAMAGAMBO WARD .... 11TH RESPONDENT

ALEX JAOKO AKUGO, CENTRAL KAMAGAMBO ..... 12TH RESPONDENT

BRIAN ODHIAMBO OSODO, KACHIENG ..... 13TH RESPONDENT

THOMAS OMONDI AKUNGO, KALER ..... 14TH RESPONDENT

HEVRONE KILLMESS MAIRAH, MUHURU ..... 15TH RESPONDENT

ELIAS JUMA NYAHURE, ISIBANIA ..... 16TH RESPONDENT

OFICE OF THE REGISTRAR OF POLITICAL PARTIES ..... 17TH RESPONDENT

MIGORI COUNTY ASSEMBLY ..... 18TH RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Migori (R. Wendoh, J.) dated 13th July, 2022 Page 2 of 17 in Judicial Review Application No. JR12A of 2022)

JUDGMENT

1. The factual background of the appeal before us is that the appellant, Isaac Aluoch Polo Aluochier, ("the appellant") an aspirant to the position of Member of County Assembly (MCA), East Kamagambo Ward in the Migori County, filed a complaint with the Dispute Resolution Committee ("the Committee") of the 1st respondent, the Independent Electoral and Boundaries Commission ("the IEBC") on 9th June 2022 claiming that the 2nd - 16th respondents, who had been cleared to run for the 9th August 2022 general elections to Membership of the Migori County Assembly ("the Assembly") did not satisfy the requirements of Article 193(1) (b) of *the Constitution*.

2. According to the appellant, the 2nd-16th respondents were allegedly not eligible for election to the Assembly as they did not meet the requisite moral and ethical fitness. He claimed that the said respondents, having resigned from the Orange Democratic Movement (" ODM") party under which they were previously elected as members of the Migori County Assembly in 2017, but who now intend to run for election to the Assembly as independent candidates, are in violation of the law; that they were required to resign from their position as MCAs; and that,having continued to occupy their offices as MCAs after resignation from the ODM party, the 2nd-16th respondents contravened Articles 193, 194(1) (e), 75(1), 2(2), 3(1) and 74 of *the Constitution*, sections 2 and 45 of the *Anti-Corruption and Economic Crimes Act*, section 313 of the *Penal Code* and section 13(1) (b) of the *Leadership and Integrity Act*. He asked the Committee to find that the 2nd-16th respondents were not eligible for election, and that their names should be excluded from the ballot.

3. The appellant's complaint was supported by his affidavit sworn on 9th June 2022 deposing to the foregoing allegations to which the 2nd, 7th, 8th, 14th, 15th and 16th respondents responded vide their respective, but undated responses to the appellant's complaint. On their part, the 9th, 12th and 13th respondents filed replying affidavits sworn on 13th and 14th June 2022.

4. The gist of the respondents' responses and reply to the appellant's complaint was that the respondents did not by any means act in breach of, but acted in compliance with, the law; that they were duly nominated as independent candidates in accordance with section 33 of the *Elections Act* and for the purposes of Articles 97, 98, 137, 177 and 180 of *the Constitution*; that section 43(5) and (6) of the *Elections Act* excluded members of the Assembly from the requirement to resign from office prior to nomination; that they were not guilty of any economic crimes as alleged in the complaint; that they were duly cleared for nomination as candidates in the forthcoming general elections; and that the complaint against them was unfounded.

5. In addition to the foregoing, the 2nd respondent lodged a counter-claim seeking a declaration that the appellant's complaint was discriminatory in so far as it was made against "... a small section of MCAs from Migori County;" that the appellant was acting in conflict of interest in that he was a registered

voter and candidate for the office of MCA East Kamagambo Ward; that the complaint, as presented, was mischievous, driven by malice, and only geared and fueled by political interests and the settling of political wars. He prayed that the same be dismissed with costs. So did the other respondents, who similarly urged the Committee to dismiss the appellant's complaint with costs.

6. When the complaint came for hearing before the Committee on 15th June 2022, the appellant appeared in person and made submissions in support of his complaint. Learned counsel Mr. Nanda (for the 3rd 4th 6th and 10th respondents, and also holding brief for Mr. Owino for the 5th respondent), Mr. Midenga (for the 9th 12th and 13th respondents), and Mr. Nyangi (for the 2nd 7th 8th 11th 14th 15th and 16th respondents), also appeared and made submissions in response to the appellant's complaint against their respective clients.

7. Upon hearing the appellant's complaint, and having considered the respective written and oral submissions of learned counsel for the respondents, the Committee pronounced its decision on 19th June 2022 dismissing the appellant's complaint for the following reasons: that the appellant's complaint was sub judice in view of the fact that the main issue in contention as to "... whether the failure to resign after changing party affiliation violates Article 194(1) (e) of *the Constitution* [was] pending before the High Court in the case of Peter Kibe Mbae v Speaker County Assembly of Nakuru & Another;" Registrar of Political Parties & 49 Others (Interested Parties) - Nakuru Constitutional Petition No.E004 of 2022;" that the Committee is incapable of granting the prayers sought; and that the Committee lacks criminal jurisdiction to hear and determine the allegations of various offences under the *Penal Code*, the *Leadership and Integrity Act* and the *Anti-Corruption and Economic Crimes Act*. The Committee made no orders as to costs.

8. Aggrieved by the decision of the Committee, the appellant sought judicial review in the High Court of Kenya at Kisumu, being Judicial Review Application No. JR 12A of 2022 vide his Notice of Motion dated 21st June 2022. The appellant's application was made on 25 grounds set out on the face of the Motion, but which we need not replicate here. Suffice it to observe that the grounds were largely argumentative and in the nature of written submissions. They provided a summary of the Committee's findings, including the finding that it had no jurisdiction to hear and determine the complaint, and the reasons for which he was dissatisfied with the Committee's decision.

9. In addition to the grounds aforesaid, the appellant's Motion was also supported by his affidavit sworn on 21st June 2022 essentially restating the grounds and arguments on which his application was anchored. In summary, the appellant contended: that the Committee erred in invoking the *Civil Procedure Act* and the Rules of Procedure made thereunder in a dispute relating to elections; that the Committee misapplied section 6 of the *Civil Procedure Act*; that the Committee erred in staying proceedings in the complaint beyond the 10 days period prescribed for hearing and determination of such complaints in accordance with section 74(1) and (2) of the *Elections Act*; that principles of common law, equity, rules of civil procedure, among others, cannot be imported or imputed into electoral dispute resolution; that the Committee had jurisdiction to hear and determine the complaint pursuant to Article 88(4) (e) of *the Constitution*; that the Committee erred in holding that it had no jurisdiction to interpret *the Constitution*, whereas Article 88(5) of *the Constitution* mandates it to exercise its powers and perform its functions in accordance with *the Constitution* and national legislation; that the Committee erred in law in concluding that only the High Court had the exclusive jurisdiction to hear and determine questions on constitutional interpretation, and that the Committee could not exercise that jurisdiction in determination of the complaint; that the Committee erred in law in holding that it had no jurisdiction to hear and determine matters touching on criminal conduct of a party before it; and that the Committee failed to take the administrative action as required of it under section 11(2) of the *Fair Administrative Action Act*.

10. In his application, the appellant sought, inter alia, orders declaring that the 2nd- 16th respondents were not eligible for election as members of a County Assembly pursuant to Article 193(1) (b) of *the Constitution*; and orders directing that the names of the 2nd-16th respondents be excluded from those duly nominated for the appropriate County Assembly Wards. He thereby sought to invoke the High Court's jurisdiction pursuant to Article 47 of *the Constitution* and sections 7(2) and 11(2) of the *Fair Administrative Action Act*.

11. In response to the appellant's Motion, the 2nd, 5th, 7th, 8th, 9th, 12th, 13th, 14th and 16th respondents filed a preliminary objection on 1st July 2022 on the grounds that: the appellant did not seek leave of the court by way of Chamber Summons as mandatorily required prior to filing his Notice of Motion dated 21st June 2022; the application offends the provisions of sections 9, 12 and 14 of the *Fair Administrative Action Act*, 2015 sections 8 and 9 of the *Law Reform Act* (Cap.26) as read with Order 53 Rule 1(2) of the *Civil Procedure Rules*; the application was, therefore, ex facie incompetent, fatally defective and inadmissible; the Honourable court did not have jurisdiction to hear and determine the application; and that, on the whole, the application was a gross abuse of the court process.

12. The above-named respondents filed written submissions in support of their preliminary objection and in opposition to the appellant's application. On their part, the 1st, 3rd, 4th, 6th and 10th respondents filed grounds of opposition to the appellant's Motion, while the appellant filed his reply to the respondents' grounds of opposition together with written submissions in support of his Motion.

13. Upon hearing the appellant's application and having carefully considered the matters deponed in the supporting affidavit together with the documents annexed thereto, the responses by the respondents, the annexures thereto, the respondents' notice of preliminary objection, the grounds of opposition, and the written and oral submissions of the parties through their respective Counsel, the learned Judge settled the issues for determination as: whether the petition was competent; and whether the Committee had jurisdiction to hear and determine the dispute before it.

14. In her judgment delivered on 12th July 2022, the learned Judge dismissed the appellant's application with costs to the respondents. In her considered view, the 1st respondent was correct in finding that it had no jurisdiction to hear the dispute before it on account of the sub judice rule, and that the matter concerned constitutional interpretation, which it had no jurisdiction to undertake. She further held that the appellant's application was defective, bad in law, and an abuse of the court process.

15. The appellant was aggrieved by the judgment and he lodged this appeal on 24 grounds set out in his Memorandum of Appeal dated 20th July 2022. The 24 grounds are accompanied by elaborate arguments in which this Court has neither the luxury of time nor good reason to indulge or replicate in its decision. We purpose to confine ourselves to what we consider relevant in determination of the real issues before us.

16. Having heard and considered the respective pleadings and submissions of the parties, we observe that, despite the multiplicity of the grounds raised in the appeal before us on mixed points of law and fact coupled with comprehensive arguments best suited for submissions, our judgment turns on the decisive question as to whether Wendoh, J. was correct in dismissing the appellant's Notice of Motion dated 21st June 2022 for want of compliance with mandatory procedure applicable to applications for judicial review.

17. We take this view cognisant of the fact that this being an appeal from a judgment of the High Court given in respect of an application for judicial review of the 1st respondent's decision, this Court's mandate is confined to examining only those points of law and procedure relating to the appellant's application and to the impugned judgment. For the avoidance of doubt, what is before us is not a

second appeal from the 1st respondent's decision, which would have warranted consideration of the matters of law relating to the 1st respondent's decision. In view of the foregoing, the appeal before us stands or falls on our finding as to whether, on account of procedure, it was properly before the High Court.

18. The appellant's case is that his application was competent; that it was anchored on, inter alia, Article 47 of *the Constitution* and on sections 7(2) and 11(2) of the *Fair Administrative Action Act*, 2015; and that the procedure contemplated in the *Law Reform Act* and in Order 53 Rule 1 of the Civil Procedure Rules were not applicable to his application. The respondents were of a different view, and hence their preliminary objection citing incompetence of the appellant's Motion on account of incurable procedural defects.

19. Addressing herself on the competence of the appellant's application for Judicial Review, the learned judge made reference to Article 47 of *the Constitution*, which provides that every person has a right to fair administrative action. She observed that, pursuant to Article 47(3), Parliament enacted the *Fair Administrative Action Act* to give effect to Article 47. Citing the case of *Municipal Council of Mombasa vs. Republic & Another, and Umoja Consultants (Interested Party)* [2002] eKLR, she correctly observed that, in judicial review, the Court would only be concerned with the process leading to the making of the decision; and that acting as an appellate court over the decision maker would involve going into the merits of the decision itself, and that that was not in the province of judicial review.

20. With regard to the mandatory procedure for bringing judicial review applications, the learned judge held, again correctly in our view, that judicial review is a special jurisdiction; and that, in so far as no rules have been made under Article 47 of *the Constitution*, there can be no vacuum in law; that a party approaching the court for judicial review orders of certiorari, mandamus or prohibition must comply with the procedure set out in Order 53 Rule 1(2) of the *Civil Procedure Rules*. Accordingly, such a party must seek the court's leave by way of a Chamber Summons Application supported by a Statement of Facts and a Verifying Affidavit together with relevant annexures in support of the prayers sought.

21. Order 53 Rule 1 of the *Civil Procedure Rules*, which is couched in mandatory terms, provides:

> " Applications for mandamus, revision, prohibition and certiorari to be made only with leave.
>
> 1. No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.
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> 2. An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on."

22. It is noteworthy that, whereas Article 47 of *the Constitution* and sections 7(1) and 11(1) of the *Fair Administrative Action Act* affirm one's right to assert fair administrative action as enforceable by, inter alia, judicial review orders, subsection (2) of both sections empower courts and tribunals to review administrative actions or decisions, but do not provide the procedure independent of the Civil Procedure Rules for the institution of appropriate proceedings in the enforcement of one's right to fair administrative action.

23. It therefore goes without saying that, in the absence of specific rules tailored to suit applications for judicial review orders, Order 53 of the *Civil Procedure Rules* necessarily applies. In view of the fact that the prescriptive provisions of Order 53 Rule 1 are mandatory, failure to comply therewith renders a Motion for judicial review incompetent, fatally defective and deserving of nothing short of dismissal.

Accordingly, we find nothing to fault the learned Judge for dismissing the appellant's application for failure to comply with the mandatory provisions of Order 53 Rule 1 of the *Civil Procedure Rules.*

24. In so concluding, we affirm the High Court decision in *Republic vs. Retirement Benefits Authority, ex parte Alex Anyona Momanyi and 6 Others* [2021] eKLR where the learned Judge had this to say on the matter:

> "I am also minded that the applicant has invoked various provisions of the *Fair Administrative Action Act*, 2015, in particular, sections 7, 8, 9, 10 and 11 none of which provide for application for leave as the preliminary step in lodging the application for judicial review. However, none of those provisions expressly oust the application of Order 53 (1) of the Civil Procedure Rules in applications for judicial review. The specific provision in the Fair Administrative Actions Act relating to procedure is section 9 of the Act ... The Act does not say how the application is made and, in my humble view, this is a deliberate omission because the procedure for invoking judicial review jurisdiction remains Order 53 of the Civil Procedure Rules. One very important point to remember is that the common law principles upon which the requirement for leave was grounded still subsist today and are as much relevant today as they were before. I suppose it is for this reason that section 12 of the Fair Administrative Actions Act is express that the Act is complementary to and not a substitute of the general principles of common law; that section reads as follows:
>
> 12. Principles of common law and rules of natural justice.
>
> This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.
>
> However, none of those provisions expressly oust the application of Order 53 (1) of the Civil Procedure Rules in applications for judicial review. The specific provision in the Fair Administrative Actions Act relating to procedure is section 9 of the Act; it provides as follows:
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> 9. Procedure for judicial review.
>
> 1. Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred Pursuant to Article 22(3) of *the Constitution*.
>
> 2. 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.
>
> 3. 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).
>
> 4. 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.

5. A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

25. In view of the foregoing, we reach the inescapable conclusion that Order 53 Rule 1 applies in mandatory terms. It is the procedure therein prescribed that the appellant ought to have complied with before approaching the High Court without first seeking leave, as though his Motion were an appeal to the High Court.

26. The above-mentioned procedural defects rendered the application before the Court fatally defective. In addition, however, the learned Judge observed that the applicant had also failed to annex the decision sought to be reviewed. Failure on the appellant's part to annex the impugned decision to the affidavit in support of his application meant that he submitted nothing to be reviewed. The learned Judge so concluded in view of the fact that the appellant's affidavit in support did not contain any annexures relating to the decision which the applicant sought to rely upon. In the absence of marked and sealed annexures, there was nothing for the court to consider on review. In effect, the application alone stood bare and devoid of substance for review. Even had the appellant followed the correct procedure, that glaring omission would have rendered his Motion defective and fatally incompetent.

27. A question then arises as to whether the appellant's Motion as characterized by the foregoing procedural defects would find cure in Article 159(2) (d) of *the Constitution*, which mandates courts and tribunals to administer justice without undue regard to technicalities of procedure. It would not. We agree with the learned Judge that Article 159(2) (d) of *the Constitution* could not come as a saving grace to the applicant. That Article cannot be used to circumvent mandatory rules of procedure laid down in statute law.

28. In this regard, the Supreme Court decision in *Raila Odinga vs. the Independent Electoral and Boundaries Commission and 3 Others* [2013] eKLR is instructive.

In its decision, the Supreme Court had this to say:

> "Our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of *the Constitution* which obliges a court of law to administer justice without undue regard to procedural technicalities. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law."

29. We do not tire to remind litigants that mandatory rules of procedure, as is Order 53 Rule 1 of the *Civil Procedure Rules*, are not merely a cosmetic add-on to substantive law. They cannot be likened to a pack of cherries from which one's choice to pick is as good as the choice not to. Indeed, the observance of such rules is mandatory, and for good reason. As Kiage JA. observed in this Court's decision in *Nicholas Kiptoo Arap Korir Salat vs. the Independent Electoral and Boundaries Commission and 6 Others* [2013[eKLR:

> "I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in

the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

30. We have said enough of this matter, which to some might appear trivial, though fundamental in the determination of the issue as to whether the appellant's Motion for review of the 1st respondent's decision stood the competency test weighed against mandatory rules of procedure. Having carefully considered the appeal before us, the judgment of the High Court and the respective positions of the parties considered against *the Constitution*, the statute and judicial precedents relevant to the issue, we reach the inescapable conclusion that the appellant's appeal must fail. It is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2022.

S. ole KANTAI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR