



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & M'INOTI, J.J.A)

CIVIL APPEAL NO. 263 OF 2017

BETWEEN

EUNICE KHALWALI MIIMA APPELLANT

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION RESPONDENT

UNITED DEMOCRATIC PARTY.....1ST INTERESTED PARTY

(An appeal from the Judgment of the High Court of Kenya at Nairobi (L. Njuguna, J) dated 14th July, 2017 in Judicial Review Misc. Appl. No. 357 of 2017)

JUDGMENT OF THE COURT

1. On the face of it this appeal appears to be academic, arising as it does from events that took place before the last General elections held on 8th August, 2017. But the appellant seeks to persuade us that it raises weighty issues of law that need the guidance of this Court on matters of Political Party nominations.

2. The Ruling under challenge was made by the High Court sitting in Nairobi (**Njuguna, J.**) on 14th July, 2017 in which orders of *certiorari* and *mandamus* sought in a Judicial Review (**JR**) application were rejected on the ground that the applicant was challenging the merits of the decision rather than the process of decision making. At the end of the day, however, the only issue which we have to determine is whether the High Court exercised its discretion in a judicious manner before rejecting the JR application.

3. The facts attendant to the appeal are not seriously disputed and may be briefly stated.

On the 2nd of May, 2017, a certificate of nomination was issued to the appellant herein by the United Democratic Party (**UDP**) to contest the position of Women Representative for Kakamega County in the General Election then due on 8th August, 2017. Subsequently, she presented herself before the respondent (**IEBC**) for clearance on the 31st May, 2017, but the Returning Officer rejected her nomination on account of her failure to resign timeously from the Ministry of Industry, Trade and Co-operatives in accordance with the law. The letter submitted and relied on by the appellant confirmed that she had resigned on 25th May, 2017. But the law required her to have resigned from the civil service by 8th May, 2017. According to the appellant, however, the letter had a typing error since she had in fact resigned on 24th April, 2017. Her oral explanation of the discrepancy to the Returning Officer fell on deaf ears.

4. Aggrieved by the rejection, the appellant filed a complaint to the Dispute Resolution Committee (**DRC**) of IEBC on 2nd June, 2017 but on checking the position six days later, she found that it had been dismissed on 8th June, 2017. She contended that the dismissal was made without giving her an opportunity to be heard and that the whole process was unreasonable, in contravention of the provisions of the law, the principles of the Constitution and the right to fair administrative action. In her view, the typographic error was capable of being cured if she was given an opportunity to be heard.

5. Undaunted, the appellant took the battle to the High Court on 27th June, 2017 where she sought and was granted leave to seek JR orders of *certiorari* to quash the decision of the DRC and an order of *mandamus* to compel IEBC to include her as the UDP party nominee to contest

the Kakamega Women Representative post. The leave operated as a stay of the decision of the DRC. The motion was then filed on 29th June, 2017 seeking the substantive orders aforesaid.

6. In response to the motion, IEBC contended that the appellant was in clear breach of the **Elections (General Regulations) 2012** and did not meet the prescribed requirements for successful nomination. The evidential material before the DRC was given careful consideration and it was clear that the **Elections Act, 2011** and the relevant regulations thereunder were not complied with, hence the dismissal. Furthermore, asserted IEBC, the appellant had knowledge of the hearing date but made no attendance. According to IEBC, the appellant was pursuing an appeal against the decision of the DRC whilst JR was not concerned with the merits of the decision but the process. As no illegality, irrationality or procedural impropriety was demonstrated by the appellant, asserted IEBC, the application was for dismissal.

7. The trial court considered the matter and agreed with IEBC that the appellant was in truth seeking to challenge the merits of decision of the DRC whilst JR is only concerned with the decision making process. In dismissing the application, the trial court stated thus:

"The applicant has moved this court by way of Judicial Review. The remedy of Judicial Review is concerned with reviewing not the merits of the decision of which the application for Judicial Review is made, but the decision making process itself. see the case of R. vs Kenya Revenue Authority Ex parte Yaya Towers Limited (2008) eKLR. The same principle is enunciated in the case of Municipal Council of Mombasa vs Republic & Umoja Consultants Limited Civil Appeal No.185/2001 where the court held;

"Judicial Review is concerned with the decision making process, not with the merits of the decision itself".

When considering an application for Judicial Review, the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the maker took into account irrelevant matters and failed to take into account relevant matters. The court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself- such as whether there was or there was not sufficient evidence to support the decision.

In order to succeed in an application for Judicial review, the applicant has to show that the decision or the act complained of is tainted with illegality, irrationality and procedural impropriety."

8. That is the decision that provoked the appeal before us which was filed on 31st July, 2017 - barely one week before the general elections. It is common ground that the elections were held as scheduled, but it is not clear what became of the appellant. It follows that even if she was successful in this appeal, the orders sought in the original application and in the appeal would no longer be efficacious and would thus be made in vain, except perhaps the order on costs. Be that as it may, five grounds are set out in the memorandum of appeal and were urged in written submissions and a short highlight by learned counsel for the appellant, **Ms. Anyango**, instructed by M/s Gitonga Mureithi & Company Advocates.

9. The grounds of appeal and the submissions thereon speak at length to the decision of the DRC which is said to have held that the appellant was an independent candidate when in truth she was sponsored by a political party; and the finding on resignation which is said to have been based on the incorrect facts. It is submitted on those grounds that the decision was therefore unreasonable, irrational, unconstitutional and void. For some reason, however, which the appellant's counsel did not explain, neither the complaint lodged with the DRC nor the decision reached on that complaint is anywhere in the record! A supplementary record of appeal was indeed filed on 4th August, 2017 to introduce other missing documents but the ones referred to above are left out and it is not clear whether they were part of the record before the trial court. We shall revert to this state of affairs later in this judgment.

10. The written submissions dwell on the principles of law relating to the right to be heard and the right to fair administrative action. Both are well protected in the Constitution and are the cornerstone of the rule of law, it was submitted. The provisions of **Article 47** of the Constitution and numerous decisions illustrating the law on those rights were cited, including: **Richard Ncharpi Leiyagu vs IEBC & 2 Others, Nyeri C. A. No. 18 of 2013, Narok County Government & Another vs Richard Bwogo Birir, Civil Appeal No. 74 of 2014, Selvaranja vs Race Relations Board (1976) 1 All E.R 12, Eric Cheruiyot & 11 Others vs IEBC & 7 Others Petition No. 1 of 2017, Associated Provincial Picture Houses Ltd vs Wednesbury Corp. (1948) 1 KB 223 and Suchan Investment Limited vs Ministry of National Heritage and Culture & 3 Others (2016) eKLR.**

11. Applying the principles to the facts, counsel submitted that the DRC did not inform the appellant about the hearing date and that IEBC admitted that fact. That rendered the decision a nullity and a breach of Article 47. It was also submitted that the DRC had a duty to investigate the facts relating to the date of resignation which was erroneously stated by the employer instead of ignoring it and in doing so violating the appellant's rights in an irrational and unreasonable manner. According to counsel, judicial review has expanded in scope to encompass the merits of a decision and the decision in this matter fell squarely within JR and ought to have been considered as such. On this, she cited and relied on the case of **CCSU vs Minister for Civil Service (1984) 3 All ER 935** where Lord Diplock explained the scope of JR as including illegality, irrationality and procedural impropriety.

12. In response, learned counsel for the respondent **Ms. Olao**, instructed by M/s L. M. Kambuni & Associates, relied on written submissions stating that the dismissal of the JR application was proper since the appellant failed to satisfy the trial court that the DRC did not give him an opportunity of being heard or acted in any illegal, irrational, or unprocedural manner. On the contrary, urged counsel, the DRC summoned all parties including the returning Officer who attended and justified the decision for rejecting the appellant's nomination papers. It was also clear from the documents submitted to IEBC in support of the nomination that the appellant had not resigned from the Civil Service in accordance with the law. As such, submitted counsel, this Court cannot be called upon to interfere with the merits of that decision since the law was followed. Counsel blamed the appellant for her indolence and failure to meet the requirements of the law. According to her, if IEBC had acted otherwise, it would have been in breach of the law.

13. We have considered the matter fully in the manner commanded by **Rule 29 (1)** of the **Court of Appeal Rules**. As stated earlier, the issue before us is whether the trial court judiciously exercised its discretion before coming to the conclusion that the judicial review application was not meritorious. It is common ground that whether or not an order of judicial review will issue lies in the unfettered discretion of the trial court. As to when an appellate court may interfere with that discretion, the principles are now old hat, but we shall restate them anyway:

14. Sir Charles Newbold in ***Mbogoh & Anor vs Shah [1968] EA 93*** stated that the appellate court has to satisfy itself "***..that the judge in exercise of his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.***"

15. Subsequently, Madan, JA (as he then was) in ***United India Insurance Co. Ltd, Kenindia Insurance Co. Ltd & Oriental Fire & General Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd [1985] eKLR*** developed the principle further urging appellate courts to resist the temptation of readily substituting the discretion of their members for that of the trial court. He stated:-

"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. [It] is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

We shall be guided by those principles in considering this appeal.

16. The submissions made, and the authorities cited before us by the parties, appear to support a narrow view of the principles applicable in considering a JR application. As recently as November 2017, this Court in the case of ***Child Welfare Society vs Republic; ex parte Child in Family Focus & 11 Others; Civil Appeal No. 20 of 2015 (UR)***, analyzed at length several authorities before arriving at the conclusion that JR in Kenya has Constitutional underpinning which is fused with the common law judicial view. We may be excused for citing the relevant portions of that case *in extenso*, thus:

"For a long time in the history of the common law, JR has been tried and tested as the most efficacious remedy for control of administrative decisions. It was not concerned with private rights or the merits of the decision being challenged but with the decision making process. See *Commissioner of Lands vs Kunste Hotel Limited [1997] eKLR* It was also principally concerned with the 3. 'Is' -- "*Illegality, Irrationality and (procedural) Impropriety*"-- and many are the decisions which followed such narrow considerations....See for example, *Pastoli vs Kabale District Local Government Council and Others [2008] 2 E A 300*.

However, the dynamism of society and the events of recent history have decidedly thrust JR into a whole new trajectory. Nyamu, J. as he then was, clearly 'smelt' the impending extension of the scope of JR in 1998 when in the case of in ***Republic vs. The Commissioner of Lands, ex parte Lake Flowers Limited Nairobi Misc. Application No.***

1235 of 1998 he stated as follows:

"..Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis..... The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."

In the same year, this Court expressed similar views in the case of ***Bahajj Holdings Ltd. vs Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998*** stating that ***the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions. The trend continued in *Kuria & 3 Others vs Attorney General [2002] 2 KLR 69* where the Court expressed itself as follows:***

"So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions..... This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit."

The bells for expansion of the scope of JR rang even louder after the promulgation of the Constitution 2010. Odunga, J. for example, in ***Republic vs Commissioner of Customs Services ex parte Imperial Bank Limited [2015] eKLR*** recognized that

"Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision" and the "need to fully explore and develop the concept of judicial review in Kenya as a constitutional supervision of power and develop the law on this front". Mativo, J. similarly in the case of Ernst & Young LLP vs Capital Markets Authority & Another [2017] eKLR (decided on 7th March, 2017), extensively examined comparative jurisprudence before expressing the following view:-

"..Judicial review is available as relief to a claim of violation of the rights and freedoms guaranteed in the Constitution. The Constitution has expressly granted the High Court jurisdiction over any person, body or authority exercising a quasi-judicial function. The point of focus is no longer whether the function was public or private or by a statutory body, but whether the function was judicial or quasi-judicial and affected constitutional rights including the right to fair administrative action under Article 47, or the right to natural justice under Article 50. The Kenyan judiciary must guard against the development of a two-tracked system of judicial review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution's principles of judicial review [on the other]. Those two tracks are likely to undermine the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution... Judicial review is now entrenched in our constitution and this ought to be reflected in the court decisions and any decision making process that does not adhere to the constitutional test on procedural fairness, then the decision in question cannot stand court scrutiny..... Judicial review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The judicial review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution."

*One of the sources of that bold view by the High Court is our own Supreme Court which had earlier, in the case of Communication Commission of Kenya vs Royal Media Services & 5 Others [2014] eKLR held that *".. the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law."* and that *".. the power of judicial review in Kenya is found in the Constitution, as opposed to the principle of the possibility of judicial review of legislation established in Marbury vs Madison 5 U.S. 137 (1803)."**

Finally, as we settle the principles upon which we shall consider the matter before us, this Court, as recently as 20th July, 2017, in the case of Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR the court was in no doubt about the current place of JR in our system of governance. After extensively reviewing the CCK Supreme Court decision (supra) and other cases, including Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 Others (2016) eKLR 51, and Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others 2000 (2) SA 674 (CC) at 33, the five - Judge bench held:

"In our considered view presently, judicial review in Kenya has Constitutional underpinning in Articles 22 and 23 as read with Article 47 of the Constitution and as operationalized through the provisions of the Fair Administrative Action Act. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the Civil Procedure Act and Rules is a procedure for applying for remedies under the common law and the Law Reform Act. These common law remedies are now part of the constitutional remedies that the High Court can grant under Article 23 (3) (c) and (f) of the Constitution. The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review. A party is at liberty to choose the common law Order 53 or constitutional and statutory review procedure. It is not fatal to adopt either or both..... We hold that Kenya has one and not two mutually exclusive systems for judicial review. The common law and statutory judicial review are complementary and mutually non-exclusive judicial review approaches." [Emphasis added].

17. Applying those principles to the case before us, it is clear to us that the trial court took a narrow view of the matter and omitted to consider the relevance and impact of the Constitutional provisions cited in the application before it, among them: **Articles 10, 24, 25, 27, 38, 41, 47, 50, and 81**. The process of decision making as well as the merits of the decision fell for consideration in equal measure. In those circumstances, we are entitled to interfere with the exercise of the trial court's discretion. We are however handicapped from doing so for the reasons that follow.

18. We are in no doubt about the powers of the IEBC to settle electoral disputes including disputes relating to or arising from nominations. **Article 88 (4) (e)** of the **Constitution** provides for it. The mandate is then spelt out in **section 74** of the **Elections Act, 2011** and fine-tuned further in **Rules 4 and 8** of the **Rules of Procedure on Settlement of Disputes** under Legal Notice No. 139 of 2010. The object of the rules is to provide:

" ..a procedure and mechanisms for the expeditious, efficient, lawful, reasonable and procedurally fair settlement of disputes including those contemplated under Article 88 (4) (e) of the Constitution and section 74 of the Act."

19. Rule 8 on 'Initiation of a complaint' states in relevant parts as follows -

"(1) A party to a dispute may, within twenty four hours of the occurrence of a dispute, notify the Commission and any adverse party of the dispute, in writing.

2. A complaint shall be filed by delivering to the returning officer or the Commission a duly filled Form 1 in duplicate.

3. An objection or complaint may be filed by --

.....

d. a person aggrieved by an electoral activity.

4. The complaint shall state -

a. full names and address of service of the complainant;

b. voter registration number or certificate of political party registration;

c. the date, time and location of the occurrence of the act complained of;

d. Information about the person whose conduct is complained against;

e. information as to the identity and contacts of witnesses, if any;

f. a concise statement under oath of the ultimate facts constituting his cause or causes of action;

g. the relief or redress sought;

h. a declaration by the complainant that the representations are true;

i. a statement - (i) that there is no other complaint pending;

ii. that there have been no previous complaints in any forum or tribunal between the complainant and the respondent over the same subject matter;

iii. showing the reasons why the complaint relates to the complainant named in the complaint.

5. A complaint shall be served on the respondent and the registered political party that nominated the candidate, where applicable."

[Emphasis added].

20. As regards the decision of IEBC, **Rule 12** provides:-

“The returning officer shall -

a. issue a written decision on an application or objection within seven days after the application or objection is made; and

b. record the reasons of the decision.”

There is provision for review of the Returning Officer's decision by a Committee of IEBC under **Rule 13**.

21. We have made copious reference to those provisions because it was incumbent on the appellant to make available before the trial court, and to this Court, copies of the complaint made before the Returning Officer, the proceedings recorded thereon and the decision made, the appeal laid before the DRC, and the proceedings and decision made. As stated earlier, we have carefully examined the record but have not found evidence of such documents. It becomes difficult therefore, nay impossible, to make any informed decision on the complaints made by the appellant. Having found that we are entitled to interfere with the discretion of the trial court, we would have examined those records to satisfy ourselves on the complaint that the appellant was not given an opportunity of being heard by the DRC. All we have, however, are oral bare assertions made on both sides of the case. We would also have examined the evidence of the Returning Officer before the DRC to satisfy ourselves on the explanation given for the decision made and whether it accorded with the law. In sum, the factual and legal basis for judicious exercise of discretion is lacking, and the appellant has herself to blame for it.

22. Being of that persuasion, we find no merit in this appeal and we order that it be and is hereby dismissed. In view of our finding that there was reason to interfere with the exercise of judicial discretion, we order that each party shall bear its own costs of the appeal, and in the court below.

Orders accordingly.

Dated and delivered at Nairobi this 21st day of March, 2018.

P. N. WAKI

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR