IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KIAGE & GATEMBU JJA.)

CIVIL APPEAL NO. 180 OF 2013

BETWEEN

ISAACK OSMAN SHEIKH …….....…….…….. APPLICANT

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & OTHERS....1ST RESPONDENT

THE NATIONAL ALLIANCE PARTY …….....…..……. 2ND RESPONDENT

THE ATTORNEY GENERAL…….....……..…….…….. 3RD RESPONDENT

***(Being an Appeal from the Judgment of the Decree of the High Court of Kenya at Nairobi (Mumbi, Korir & Majanja JJ.) dated 12th July, 2013* in**

H.C. Judicial Review NO. 160 OF 2013)

****

JUDGMENT OF THE COURT

This appeal stems from a brief judgment of the High Court delivered on 12.7.13 dismissing the appellant's Notice of Motion by which he had sought an order of mandamus compelling the 1st respondent to gazette and publish a Party List for the 2nd respondent with the appellant as representative of marginalized minority group for the Laikipia County Assembly.

The judgment was a mere two pages long but the appellant has filed before us a memorandum of appeal raising some twelve grounds of grievance at the end of which he prays that we set aside the judgment of Ngugi, Korir and Majanja JJ. and in its place order that the applicant be included in the final list of nominees to the Laikipia County assembly in place of Rose Wangu Karuri.

We need to mention at the outset that the said Rose Wangu Karuri, a person who would most definitely, directly and adversely be affected by this appeal in that she would be removed and replaced as member of the county assembly were the appellant to succeed, is not named as a respondent in this appeal. This is clearly in contravention of **Rule 77(1)** of the Court of Appeal Rules which makes it

mandatory that all persons directly affected by an appeal be served with a notice of the same. This has to be followed, in due course of time, with a record of appeal. The requirement is a practical and sensible one that effectuates the fundamental natural justice notion that nobody should be condemned unheard. We shall say no more on this in view of what we shall say hereafter.

With due respect to the appellant, the memorandum of appeal is replete with generalized statements about the learned judges' alleged failures and errors such as; failing to appreciate the values and principles underpinning certain aspects of the Constitution; failing to appreciate the principle of fair trial, and access to justice; and abdicating its constitutional mandate. Such generalizations, while nice-sounding, do not really advance a party's case not least because they fail to adhere to the basic requirement for a memorandum of appeal as set out in **Rule 86(1)** of the Court of Appeal Rules;

> **"A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court of make."**

Needless to state, the memorandum of appeal before us runs afoul that provision in several respects thereby obfuscating the issues which are quite simple and straight-forward namely;

i. Whether the learned judges properly understood and applied their judicial review jurisdiction.
ii. Whether the learned judges should have declared the appellant the 2nd respondent's nominee for the Laikipia county assembly.

On the issue of the High Court's mandate and jurisdiction in a judicial review application, the learned judges' expressed themselves as follows;

> **"…the mandate of the court is confined to checking the respondent's decision for any illegalities, unreasonableness or procedural improprieties i.e. non-compliance with the rules of natural justice. In judicial review the court looks at the procedure under which the decision was arrived at and not the merits of the decision".**

With respect we agree. A judicial review of administrative, judicial and quasi judicial action and decisions of inferior bodies and tribunals by the High Court in exercise of its supervisory jurisdiction flowing from **Article 165(6)** of the Constitution is not in the nature of an appeal. It concerns itself with process and is not a merit review of the decision of those other bodies. And it does not confer on the High Court a power to arrogate to itself the decision-making power reserved elsewhere.

The law in this respect was well-put by the former English House of Lords in **CHIEF CONSTABLE Vs. EVANS [1982] 3ALL ER 141**. The Lord Chancellor, Lord Hailsham of St. Marylebone in his speech stated as follows, with which we agree;

> **"This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for declaration, is intended to protect the individual against abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner".** (at p 143)

In the leading judgment of that case, Lord Brighman was emphatic that judicial review is concerned, not with the decision, but with the decision-making process. This is in keeping with the settled position as to the proper purpose of judicial review expressed by Lord Evershed in **RIDGE Vs. BALDWIN [1963] 2 ALL ER** 66, [1964] AC 40 at (96);

> **"I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision is reached, …"**

"The circumstances in which it is reached" is what we refer to as the decision making process and the learned Judges were unable to find anything amiss with the process of making the decision that was challenged before them. They found that the 1st respondent's Disputes Resolution Committee had heard Complaint No. IEBC/NDRC/PL/256/2013 filed by the appellant against the second respondent and dismissed the complaint because it was based on the question of ethnic composition yet "the Constitution precludes the county assemblies from being tied to ethnic composition." The judges were of the view that this was consistent with Article 90(2) (c) of the Constitution. They also found that the 1st respondent had acted on the list submitted to it by the 2nd respondent in obedience to the Elections Act.

Having ourselves conducted a thorough re-evaluation and analysis of the evidence before the High Court as we are mandated to do under Rule 29(1) of the COARules and accepted in a long list of authorities such as **SELLE Vs. ASSOCIATED MOTOR BOAT COMPANY** [1968] EA 123 and **GUDKA Vs. DODHIA** [1982] KLR 376, we find ourselves unable to disturb the findings of the High Court. We note in particular that the appellant's name was never originally presented to the 1st respondent by the second respondent under the marginalized category. Rather from the party lists placed before the High Court as annexture to the affidavit of Moses Kipkosgei, the 1st respondent's Legal Manager, his name was on the Gender Top up List for TNA, the 2nd respondent herein. That being so, it was not open to the appellant to change tune mid-stream and complain on the basis of ethnic marginalization when that was never his original list.

The 1st respondent's tribunal had addressed this issue in its decision as follows;

> ***"The complainant ….states that his name was initially in the gender top up category but now he wants to be considered in the marginalized category***.
>
> **The complaint had previously appeared before the Tribunal in IEBC/NDRC/PL/398/2013 where the complaint was dismissed as the Tribunal noted that [on] the allegations of ethnicity the Constitution precludes the county assemblies from being tied to ethnic diversity in the composition.**
>
> **It was further noted that 'the complainant is a male, and can therefore not feature in the Gender top up list, in replacement of Alice Wahito Ndegwa.'**
>
> **The complainant cannot now come before the Tribunal seeking to be considered in the marginalized category."**

As with the High Court, we cannot find fault with the decision arrived at by the 1st respondent's said Tribunal.

The situation might have been different had the appellant's claim always been founded on the marginalized premise, but it was not. It is true that **Article 90(2) (c)** excludes county assembly lists from the requirement that they reflect regional and ethnic diversity of the people of Kenya but we do not take that to be a ***carte-blanche*** for county assemblies to engage in naked ethnic jingoism or to practise and perpetuate ethnic hegemony and monopoly with the attendant exclusion of minorities. This is why we stated in **COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION Vs. THE ATTORNEY GENERAL AND OTHERS** CIVIL APPEAL NO. 351 OF 2012 (which dealt extensively with the question of the marginalized) as follows;

> **"Article 90 of the Constitution decrees that the party lists must comply with two discernible principles namely;**

i. ***The requirement for gender equity in that the qualified candidates must be listed in order of priority but that order must alternate between men and women.***

ii. ***The requirements for the lists to reflect the regional and ethnic diversity of the people of Kenya. <u>This is meant to ensure that no ethnic group or region of the country dominates the lists provided by the parties. The exception to this, naturally, is the county assembly which from the nature of things may be from an ethnic majority or from the one region in which the county is located. We would venture that on a proper reading of Article 90(2) (c), the requirement for regional and ethnic diversity should apply so as to reflect the face and diversity, not of the people of Kenya necessarily, but definitely of the county in question</u>."***
(our emphasis)

This theme was repeated by this Court in **<u>ROSE WAIRIMU KAMAU and THREE OTHERS Vs. IEBC</u>** CIVIL APPEAL NO. 169 of 2013 (UR).

> ***"Article 90(2) (c) of the Constitution excludes the criteria of 'regional and ethnic diversity of the people of Kenya' from consideration in the nominations at county level. …that however, is no certificate for failure to carry out the nomination exercise fairly. It is no certificate for party officials to pick their cronies or people from one area ignoring all others. Moreover, the criterion … is not to be understood as obviating any balance in the communities of the county concerned."***

In a proper case the courts would interfere where intra-county ethnic or regional balance and diversity is flouted in party lists. This is no such case.

In the premises the appeal fails in its entirety and it is hereby dismissed with costs.

Dated and delivered at Nairobi this 31st day of January, 2014.

W. KARANJA

……..……

JUDGE OF APPEAL

P.O. KIAGE

……...…

JUDGE OF APPEAL

S. GATEMBU KAIRU

……..……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

<u>DEPUTY REGISTRAR</u> /mwn