IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MWILU & OUKO, JJ.A)

CIVIL APPEAL NO. 206 OF 2013

BETWEEN

MICHAEL MUNGAI…..…….....….....….....
…….....APPELLANT

AND

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

FORD KENYA ELECTIONS AND NOMINATIONS BOARD & OTHERS.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL FOR SPEAKER OF THE NATIONAL ASSEMBLY....3RD RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya at Nairobi (Hon. Justices I. Lenaola, Mumbi Ngugi, P. Nyamweya, D.S. Majanja, and W. K. Korir on 27th June, 2013

in

IN THE MATTER OF NOMINATION OF A FORD -K CANDIDATE FOR THE EMBAKASI CENTRAL PARLIAMENTARY SEAT

JR CAUSE NO. 53 OF 2013)

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JUDGMENT OF THE COURT

This is an appeal from the ruling of a five judge bench of the High Court, (I. Lenaola, Mumbi Ngugi, P. Nyamweya, D.S Majanja and W. K. Korir, JJ) delivered on 27th June 2013 in Nairobi Judicial Review Cause No. 53 of 2013 in which the learned Judges dismissed an application for review of an earlier decision of a three judge bench of the same court (differently constituted) for lack of merit.

The factual background from the record is that sometime in the year 2012, Ford- Kenya, a political party published an advertisement inviting applications from its members who were interested in the various electoral seats in the then forth coming general elections of 2013.

At the close of the deadline, the appellant was the only person who had applied for the nomination as the Ford -Kenya candidate for the Embakasi Central Parliamentary seat. The appellant thereafter on 7th January 2013 applied for a certificate of nomination from the party headquarters but surprisingly he was informed on 21st January 2013 by the party officials that the certificate for Embakasi Central Constituency had been issued to one Jeffrey M. Maloba.

Aggrieved by the party decision, the appellant filed a complaint with IEBC Nomination Dispute Resolution Committee (the Committee) being Case No. 188 of 2013 alleging among other things that; (i) he was not informed of the nomination exercise; (ii) the party did not comply with its own nomination rules; (iii) the party's Elections and Nomination Board had not given its decision and (iv) that the nominee, Jeffrey Maloba had decamped from ODM a few days to the nomination exercise. The complaint was heard by the Committee and dismissed for want of evidence.

The appellant being dissatisfied by the Committee's decision filed a Judicial Review application **No. 53 of 2013** in the High Court (D.S. Majanja, W. Korir & G.V. Odunga JJ) under certificate of urgency seeking that:

> "(**a).....**
>
> **(b) The Hon Court order (sic) Ford Kenya to issue Michael Munai Mungai with a certificate of nomination to vie for the Embakasi Central Parliamentary seat on a Ford Kenya ticket.**
>
> **(c) The Hon Court order the IEBC and Ford-Kenya to replace the name of Mr. Jeffrey M. Maloba with the name of Michael Munai Mungai in the list of Ford Kenya nominees.**
>
> **(d) That the Hon Court extend the time for presentation of the nomination documents for Michael Munai Mungai to the IEBC...***"*

The superior court below heard the parties, considered the relevant laws and dismissed the application. The basis of the court's decision is captured in the following passage in the 4th paragraph of its ruling;

> **"4. The application before us is in the nature of an appeal and having considered the material before us and the proceedings before the Committee, we are satisfied that the Committee addressed itself to the facts and determined the matter according to the law. We do not detect any departure from the legal principles hence there is no reason to interfere with the decision of the Committee**."

The appellant thereafter filed an application dated 15th February 2013 seeking for review of the above decision. The said application was expressed to have been brought under ***Articles 38, 91, 92*** and ***165*** of ***the Constitution***, ***the Elections Act***, the ***Political Parties Act*** and ***Regulations*** thereto.

Due to the fact that Majanja J. who was one of the Judges on the bench was away on official duties for 3 months, Justice Odunga directed that the file be placed before the Chief Justice for further directions. Consequently, on 14th March 2013, the Chief Justice empanelled a five Judge bench comprising I. Lenaola (presiding), P. Nyamweya, Mumbi Ngugi, D.S. Majanja and W.Korir JJ to review the decision of the three judge bench.

The five Judges considered the submissions and the material placed before them in support of the application; the applicable laws in the area of review of orders and judgments as stipulated under **Order 45 Rule 1 (1)** of the **Civil Procedure Rules, 2010** and rendered themselves at paragraph 15 thus:

> **"15. Having carefully gone through the application and the material in support placed before us, we have come to the conclusion that the Applicant**

has not established any ground for review of the decision in question . We therefore find that the application lacks merit and dismiss the same...."

This ruling precipitated the instant appeal which for the record raises fifty five (**55)** grounds of appeal comprising narrative, repetitive and verbose averments. The memorandum of appeal is in itself an *"Application"* in nature.

This court has warned time and again and most recently in the case of **Law Society of Kenya v. The Center for Human Rights & Democracy, Judges & Magistrates' Vetting Board & 5 Others Civil Appeal No. 308 Of 2012 (per Kiage JA)** that litigants before this Court must comply with the provisions of **Rule 86(1)** of the Court of Appeal Rules which stipulates in mandatory terms that;

> **"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, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make."**(Emphasis added).

The memorandum of appeal filed herein is a classic repudiation of the foregoing. It is a worse version of what this court recently decried in **Abdi Ali Derevs. Firoz Hussein Tundal& Others Civil Appeal No. 310 of 2005** (unreported) as follows;

> **"The appellant filed a long-winded and repetitive memorandum of appeal raising 26 grounds of appeal. With all due respect to the appellant who appeared to labour under the false impression that prolixity and repetition of issues would enhance the chances of his appeal, this appeal, in our view, turns on the following five issues only…."**

This Court however, takes cognisance of the fact that the appellant has been unrepresented by counsel throughout these proceedings from the tribunal, in the High Court and even in this appeal and therefore may not have had the benefit of legal knowledge and court procedures. This appeal is headed thus:-

> **"In the matter of an appeal to the Court of Appeal for declaration that the Parliamentary Elections for Embakasi Central Constituency in Nairobi, that were held on the 4th of March 2013 by the IEBC and the others, were unfair, unprocedural, unjust, illegal, unlawful and unconstitutional. And to order the respondents and the others to pay for the losses, costs and damages (to the appellant/applicant) for contravening the rules and constitution of Kenya. And also for an order for a repeat of the parliamentary elections in Embakasi Central Constituency within Nairobi County, to be done in accordance with the laws and Constitution of Kenya."**

The memorandum of appeal can be crystallized into four main issues for determination:

1. Whether the High Court made any errors of fact or law in its decision.

2. Whether the appellant was nominated by Ford-Kenya or in the alternative whether Ford-Kenya should have nominated the appellant as their candidate?

3. Whether this court should order for a repeat of the parliamentary elections in Embakasi Central Constituency within Nairobi County, and

4. Whether the appellant is entitled to compensation for his losses.

It was the appellant's argument that he was the duly nominated Ford-Kenya candidate for the Embakasi Central Constituency; that IEBC acted unlawfully by replacing his name with that of Jeoffrey Maloba.

That his name should be included as a candidate for a repeat election because he was the candidate of choice by members of the Ford -Kenya party.

For that reason, he argues, the elections conducted on 4th March 2013 and the subsequent gazettment of the area Member of Parliament were a nullity, illegal, unlawful, unfair, un-procedural, unjust and therefore unconstitutional. He further contended that the election which was held in Embakasi Central constituency was not fair, free or verifiable as there are no documents to support the nomination and finally that he had paid **Ksh. 75,000/=** to Ford-Kenya as a nomination fee.

On the other hand Mr. Odhiambo, learned counsel for the 1st Respondent submitted that the appellant has raised in this appeal the same issues he raised before the Committee, in the High Court judicial review application and in an application for review before a five judge bench which were all dismissed. Counsel submitted that according to ***Section 35*** of the Elections Act, it was not the role of the IEBC to conduct the nomination exercise but the political parties. IEBC only received the list submitted to it by Ford Kenya party and therefore the appellant's contention is an internal party matter which should have been addressed by the Political Parties Dispute Tribunal; that this court has no jurisdiction to nullify the election of the current member of parliament since such jurisdiction arises only from a decision of a High Court in an election petition, and finally that the issue of damages does not arise.

On his part, Mr. Wafula, learned counsel for the 2nd Respondent while associating himself with the submissions by Mr. Odhiambo, acknowledged that the appellant is a member of Ford-Kenya and should have first resolved the dispute with the party's Dispute Resolution Tribunal but failed to do so; that the appellant chose to go to the High Court instead of exhausting the party's internal dispute resolution mechanisms. Counsel further submitted that the appellant only appeared in a few meetings and absconded others, that the evidence of minutes produced by the appellant were those of meetings in the early stages of the dispute resolution proceedings.

We have carefully considered the appeal and the foregoing submissions. We note from the record of appeal that the appellant has not annexed the proceedings before the Committee for our interrogation. This being a first appeal from the decision of the High Court, our task, as stated by this Court in **Selle v Associated Motor Boat Company Limited [1968] E A 123**, is to review the evidence before the High Court and to draw our own conclusions. In the case of **Mwangi v Wambugu (1984) K L R 453** this Court held that:

> "**A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on the wrong principles in reaching the finding, and an appellate court is not bound to accept a trial judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally**."

Applying those principles to the present appeal, the first issue, which we need to address, is whether the five Judge bench of the High Court made any errors of law or fact in the exercise of its discretion in dismissing the application by the appellant.

Article 88 and ***Article 90*** of the ***Constitution 2010*** enjoins the IEBC not only to conduct elections and to settle dispute arising out of nominations but also to supervise, regulate, monitor compliance and the processes by which a party nominates its candidates, to ensure compliance with the law. It was on this basis that the appellant filed a complaint before the committee citing non compliance with the law by his party. That complaint was dismissed for lack of evidence. His judicial review application to a bench of three High Court Judges was likewise dismissed.

The appellant's application before the five judge bench for review of the three judge bench ruling

which is the subject of this appeal was expressed to have been brought under ***Articles 38, 91, 92*** and ***165 of the Constitution 2010***. The Appellant prayed for among other orders that :

> ***(a). .....***
>
> ***(b) The Hon. Court review and correct the ruling and orders that were delivered on the 5th February, 2013***.

We note that such an application should have been brought by way of notice of motion under ***Order 45 Rule 1(1)*** of the ***Civil Procedure Rules, 2010*** and before the very bench that made the impugned decision, unless the bench or any of the Judges was precluded by absence or other cause for a period of 3 months after the application for review was lodged. An explanation was proffered for the absence of one of the Judges. But as we have noted the basis of the procedure of a five-Judge bench for review is not clear. However, no prejudice was suffered. **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.."** (Emphasis provided)

Section *80* of the Civil Procedure Act from which the above provisions is derived also provides that:-

> **"Any person who considers himself aggrieved** –
>
> a. **By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred, or**
>
> b. **By a decree or order from which no appeal is allowed by this Act**.
>
> **May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."**

Neither in that application, its grounds or supporting affidavit was any important matter or evidence which was not within the knowledge of the appellant at the time the decree was passed, raised nor was there any submission about any mistake or error apparent on the face of the record to warrant an order of review raised. In addition, we cannot see any other sufficient reason upon which the High Court would have been expected to exercise its discretion in favour of the appellant.

An electoral cause of action is established much in the same way as a civil cause, in that the legal burden rests on the petitioner, or applicant, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting.

In this case, the appellant failed to place any evidence showing that Mr. Jeoffrey Maloba the Ford-Kenya nominee was disqualified both at the county level and constituency level as he alleges. No evidence was provided to show that IEBC replaced the appellant's name with that of Mr. Jeoffrey Maloba. No party list was provided to show that the appellant's name was the one presented to IEBC as a nominee of the party.

With regard to claims for damages for violations of his fundamental rights, we wish to reiterate that this court cannot determine such a question, not arising from the impugned decision of the High Court.

We also take judicial notice that neither Jeoffrey Maloba nor any Ford -Kenya candidate won the Embakasi Central Constituency parliamentary seat. The seat was worn by Hon. John Ndirangu of TNA, who had nothing to do with internal disputes of another party, Ford-Kenya. Hon. Ndirangu is not a party to this appeal and was not a party to the application in the High Court. It is unthinkable that the happenings in a particular political party should affect the lawful and legal outcome of an election won by a person from a different party who had nothing to do with the *'mistakes'* of that other party.

For those reasons, the appeal fails and is dismissed with costs.

Dated at Nairobi this 27th day of February 2014.

R. N. NAMBUYE

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

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

REGISTRAR

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