



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, GATEMBU & M’INOTI, JJ.A.)

CIVIL APPLICATION NO. SUP 23 OF 2013 (UR 14 OF 2013)

BETWEEN

BEATRICE NYABOKE OISEBE.....APPLICANT

AND

THE INDEPENDENT ELECTIONS &

BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT

MUSLIMA DIDA.....2<sup>ND</sup> RESPONDENT

(An application for certificate to appeal to the Supreme Court of Kenya from the Judgment of the Court of Appeal at Nairobi, (Maraga, Mwera & Mohammed JJ.A) dated 11<sup>th</sup> October, 2013

in

Civil Appeal No. 179 of 2013)

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RULING OF THE COURT

By a Motion on Notice dated 11<sup>th</sup> November, 2013, the applicant, *Beatrice Nyaboke Oisebe*, applies for certification that her intended appeal from the judgment of this Court to the Supreme Court involves a matter of general public importance within the meaning of Article 163(4) (b) of the Constitution of Kenya. The central issue in contention is the applicant’s alleged nomination as a member of the Kisii County Assembly by the *United Democratic Forum (UDF)* political party. That issue has been litigated before the *Independent Electoral & Boundaries Commission Nomination Dispute Resolution Committee (“the Committee”)*, followed by a judicial review application in the High Court, and to boot, an appeal to this Court. The applicant now seeks to have the dispute adjudicated a fourth time by the Supreme Court. It is worth noting that in all the previous three occasions, the findings have been consistently against the applicant.

The factual background of the application can be stated in outline as follows. On 13<sup>th</sup> April, 2013, the Independent Electoral & Boundaries Commission (“IEBC”) published the final list of persons nominated by various political parties for purposes of the special to-up seats provided for under *Article 177(b)* and

(c) of the Constitution. In response to the list pertaining to Kisii County, the applicant lodged complaint **No. IEBC/DRC/PL/130/2013** before the Committee, complaining that her name was among those that the UDF party had submitted to the IEBC for nomination as members of the County Assembly, but for inexplicable reasons, the IEBC had substituted her name with that of **Muslima Dida**, the 2<sup>nd</sup> respondent, who was not in the UDF party list. She therefore prayed for an order that the 2<sup>nd</sup> respondent was not validly nominated as a member of the Kisii County Assembly. On 7<sup>th</sup> June, 2013, the Committee dismissed the claim, after finding as a fact that the 2<sup>nd</sup> respondent was on the UDF list and that he had been validly nominated.

Aggrieved by the decision of the Committee, on 27<sup>th</sup> June, 2013 the applicant filed in the High Court an application for judicial review, namely **JR Case No. 215 of 2013**, praying for an order of prohibition to stop the nomination of the 2<sup>nd</sup> respondent as a member of the Kisii County Assembly, an order of certiorari to quash the decision of the Committee dated 7<sup>th</sup> June, 2013 and an order of mandamus to compel the IEBC to nominate her as the UDF Kisii County Assembly nominee in lieu of the 2<sup>nd</sup> respondent. On 12<sup>th</sup> July, 2013, the High Court (**Ngugi, Majanja and Korir, JJ.**) held that the application lacked merit and dismissed the same.

Undaunted, the applicant lodged in this Court **Civil Appeal No 179 of 2013**, challenging the findings of fact by the Committee and the High Court and alleging errors of law in the respective judgments. The appeal was head by **Maraga, Mwera and Mohamed, JJA** who, by a judgment dated 11<sup>th</sup> October, 2013 held that UDF had availed its list to the IEBC with the name of the 2<sup>nd</sup> respondent, and that the 2<sup>nd</sup> respondent was in the circumstances, properly nominated a member of the Kisii County Assembly.

It is in respect of that judgment of this Court that the applicant seeks certification to appeal to the Supreme Court. In a bid to demonstrate that the intended appeal to the Supreme Court raises issues of general public importance, **Mr. Ondieki**, learned counsel for the applicant, submitted that the intended appeal raised matters of exceptional public interest relating to nomination of candidates, which have hitherto not been interrogated by the courts in Kenya; that it presented a once-in-a-lifetime opportunity to unpack and unravel nominations, which presently are a grey area shrouded in mystery; and that the intended appeal was poised to lead to the development of what counsel called “trans-national” jurisprudence. Learned counsel further listed a host of errors of fact and of law allegedly committed by this Court in upholding the decision of the High Court; including in finding that the 2<sup>nd</sup> respondent was in the UDF party list and in failing to find that the 2<sup>nd</sup> respondent did not qualify for nomination as a member of the Kisii County Assembly.

**Mr Ondieki** relied upon a single authority in support of the application, namely the decision of this Court in the **BOARD OF GOVERNORS, MOI HIGH SCHOOL, KABARAK & ANOTHER VS MALCOM BELL, CA Nos. 12 and 13 of 2012 (consolidated)** and was rather surprised to learn that the certification by this Court in that case had been reviewed and reversed by the Supreme Court pursuant to Article 163(5) of the Constitution, in **MALCOLM BELL VS DANIEL TOROITICH ARAP MOI & ANOTHER, S C Application No. 1 of 2013.**

**Mr Mwangi**, learned counsel for the 1<sup>st</sup> respondent opposed the application on the basis of a replying affidavit sworn on 27<sup>th</sup> March, 2014 by **Moses Kipkogei**, the 1<sup>st</sup> respondent’s legal officer. Learned counsel submitted that the intended appeal did not raise any matter of general public interest; that the issues intended to be raised before the Supreme Court were exclusively for the personal interest of the applicant; that all the applicant sought to be adjudicated by the Supreme Court were issues of fact that had been conclusively settled by the Committee and the High Court; that there was nothing mysterious about the law on nominations as evidenced by various decisions of the High Court and of this Court; and that the application was a plain vexatious frivolity.

In our opinion, it bears repeating that in its constitutional conceptualization and by deliberate design, the Supreme Court was never intended to serve as a fourth tier in the hierarchy of courts, to which litigants, without let or hindrance, would routinely take their appeals after determinations by other courts below. As

the Supreme Court itself stated in **PETER ODUOR NGOGE V HON FRANCIS OLE KAPARO & 5 OTHERS, SC Petition No. 2 of 2012**, it is only in exceptional cases which raise “*cardinal issues of law or of jurisprudential moment*” that certification to the Supreme Court under Article 163(4) (b) of the Constitution is justified. (See also **CHARLES KARATHE KIARIE & 2 OTHERS VS THE ADMINISTRATORS OF THE ESTATE OF JOHN WALLACE MATHARE (DECESAED) & 5 Others C.A. Sup. No 12 of 2013** and **KOINANGE INVESTMENTS & DEVELOPMENT LTD VS ROBERT NELSON NGETHE, C.A No 15 of 2012**). Indeed, in **PETER ODUOR NGOGE VS HON FRANCIS OLE KAPARO & 5 OTHERS (Supra)**, the Supreme Court emphasized the fact that before invoking its jurisdiction, the guiding principle to be borne in mind is that the chain of courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence and proper safety designs to resolve all matters turning on the technical complexity of the law.

To entitle an applicant to certification that a matter of general public interest is involved in an intended appeal, the applicant must therefore demonstrate that the issue intended to be canvassed before the Supreme Court is one, the determination of which transcends the circumstances of the case and has a significant bearing on the public interest. Where the applicant alleges that the issue involved is a point of law, the point of law involved must be a substantial one, the determination of which will have a significant bearing on the public interest (See **HERMANUS PHILLIPUS STEYN V GIOVANNI GNECCHI-RUSCONE, (SC App. NO 4 OF 2012)**).

The jurisdiction of the Supreme Court under Article 163(4) (b) is not a jurisdiction to be invoked merely for the purpose of rectifying errors with regard to matters of settled law. (See **MALCOLM BELL VS DANIEL TOROITICH ARAP MOI & ANOTHER, SC App No. 1 of 2013**). Nor is it a jurisdiction to be invoked merely for the determination of contested facts between the parties. And lastly the Supreme Court has stated unequivocally that the mere apprehension of a miscarriage of justice without satisfying the requirements of ***Article 163(4) (b) of the Constitution*** will not suffice to justify certification.

Applying the above principles to the application before us, we are not satisfied that there is any cardinal issue of law or an issue of great jurisprudential moment at stake. On the contrary, all that the applicants seeks from the Supreme Court is primarily a finding of fact that the 2<sup>nd</sup> respondent was not in the UDF party list and was thereby unqualified for nomination as a member of the Kisii County Assembly. That issue of fact has been settled by the Committee and the High Court. This Court in its judgment that is sought to be appealed to the Supreme Court merely paid homage to findings of fact by the courts below it.

The best illustration that the applicant perceives the intended appeal to the Supreme Court to be no more than an ordinary appeal in which routine issues of fact and law are agitated, is borne out by a verbatim quotation of some of the issues she intends to ask the Supreme Court to adjudicate:

- ***“The Court of Appeal erred in law by failing to appreciate that a person who was not in the list submitted by political parties within the meaning of section (sic) 34, 35, 36 of the Election (sic) Act as read with Article (sic) 177 and 90(2) of the Constitution would not qualify for election/nomination.***
- ***The Court of Appeal erred in law by failing to appreciate that the 2<sup>nd</sup> respondent was not in the party list as required by the Constitution, the law and regulations.***
- ***The Court of Appeal erred in law by failing to appreciate that Article 90(2) (c) obligates the 1<sup>st</sup> respondent to nominate a candidate from the local community as read with section 3(h) and section 97 of the County Government Act, 2012 (sic).***
- ***The Court of Appeal failed to appreciate that the 2<sup>nd</sup> respondent did not qualify to be nominated under the category of gender top-up.***
- ***...[T]he Court of Appeal erred by condemning the Appellant to pay costs which was not given by the superior court.***

- *The Court of Appeal misapprehended the facts, misdirected itself on the applicable legal principles and drew wrong inferences to the prejudice of the applicant.*
- *The Court of Appeal erred by admitting an affidavit that was not in the High Court.”*

So much for cardinal issues of law and issues of great jurisprudential moment in the intended appeal. We find that the applicant has failed to satisfy the threshold for certification under Article 163(4) (b) of the Constitution. We accordingly dismiss this application with costs to the respondents.

**Dated and delivered at Nairobi this 6<sup>th</sup> day of June, 2014.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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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**

*jkc*