IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, M'INOTI & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 201 OF 2013

BETWEEN

PENINAH NANDAKO KILISWA……..……..……..…….....……APPELLANT

AND

THE INDEPENDENT ELECTIONS & BOUNDARIES COMMISSION…...….1ST RESPONDENT

FORD KENYA…….…….....…….2ND RESPONDENT

EDITH WERE SHITANDI…….……..….....….…….……3RD RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Ngugi, Majanja & Korir, JJ.) dated 12th July, 2013

in

J.R. No. 223 of 2013)

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JUDGMENT OF THE COURT

The appellant, ***Peninah Nandako Kiliswa***, seeks to overturn a judgement of the High Court of Kenya that upheld a decision of the ***Independent Electoral and Boundaries Commission (IEBC) Nomination Disputes Resolution Committee*** recognising the 3rd respondent, ***Edith Were Shitandi,*** as the duly nominated Ford Kenya party member of the Bungoma County Assembly for the purposes of ***Article 177(1) (b) of the Constitution***. The facts of the dispute are fairly straight forward.

The appellant filed ***Complaint No. IEBC/NDRC/PL/200/2013, Peninah Nandako Kiliswa vs Ford Kenya***, before the ***IEBC Nomination Disputes Resolution Committee*** ('the Committee') contending, principally, that the 3rd respondent, who was nominated by ***Ford Kenya*** for the purposes of ***Article 177(1)(b) of the Constitution***, popularly known as the ***"Gender Top-up seats"***, was not in the original list submitted by the party to the ***IEBC*** and that in any event, she was not a member of ***Ford Kenya***.

After hearing the complaint, the Committee, in a ruling rendered on 7th June, 2013, dismissed the appellant's complaint. Aggrieved by that decision, the appellant filed ***Judicial Review Cause No 223 of 2013*** in the High Court, praying for an order of *certiorari* to quash the decision of the Committee, an order of *prohibition* to stop the ***IEBC*** from gazetting the 3rd respondent as the ***Ford Kenya*** Gender Top-up nominee for Bungoma County and an order of *mandamus* to compel the ***IEBC*** to gazette the appellant as the *bona fide* ***Ford Kenya*** nominee.

The application was based on the grounds that the ***IEBC*** did not have jurisdiction to nominate a person who was not in the party list and who was not a member of the party; that the Committee had failed to give reasons for its decision thereby violating the appellant's right to fair administrative action under ***Article 47 of the Constitution***; that the Committee had failed to afford the appellant a fair hearing; and that its decision was unreasonable, irrational, in bad faith and against the weight of evidence.

The application was duly heard by a bench of three judges, ***Ngugi, Majanja*** and ***Korir. JJ.,*** who on 12th July, 2013, dismissed the same, holding that the composition of the party list and the ranking of the names therein is an internal matter for the political party and that the Committee had considered all the evidence tendered before dismissing the appellant's claim. Accordingly the High Court held that the appellant had not established the grounds upon which the orders for judicial review were sought.

Aggrieved further by the judgment of the High Court, the appellant lodged the present appeal. In a memorandum of appeal dated 12th August, 2013, which was amended with the leave of the Court on 14th October, 2013, the appellant listed 6 broad grounds of appeal which were styled, verbatim, as follows:

"1. Grave misdirection in law;

2. Ignored, glossed-over and under-analyzed evidence;

3. Original party list vs amended party list;

4. Party membership;

5. Judicious silence on substantive material evidence; and

6. Non compliance with the law."

Under each ground, the appellant's complaints were elaborated and details given. A closer look at the elaboration of the above grounds reveals that the appellant's complaints, in the main, comprise challenges of findings of fact by the Committee and by the High Court. For example, it is repeatedly stated in the memorandum of appeal that ***"the learned honourable judges erred in law and fact"*** by among other things, ignoring the evidence before them, by not finding that the 3rd respondent was not a member of ***Ford Kenya,*** by not finding that the 3rd respondent was a member of the ***Orange Democratic Movement*** party; by not finding that the 3rd respondent's name was not in the original ***Ford Kenya*** list of nominees; and by making their decision against the weight of the evidence.

This appeal was heard by way of written submissions and limited oral highlights of the written submissions. In his submissions, ***Mr Ndettoh***, learned counsel for the appellant, elaborated further on the grounds of appeal and contended that the learned judges had erred by holding that the party list and the ranking of the names therein was matters for the political party; for finding that the Committee had considered the evidence adduced by the appellant; and for concluding that the Committee had given the reasons for its decision. Learned counsel submitted that the proceedings before the Committee had violated the appellant's right to a fair hearing under ***Article 50(1)*** of the ***Constitution*** and that the decision of the Committee was in violation of the ***Elections Act, 2011***, the ***Political Parties Act, 2011***, and the ***IEBC Act, 2011.***

Mr Ndettoh further argued that the ***IEBC*** had acted *ultra vires* by nominating the 3rd respondent who was

not a member of ***Ford Kenya*** party and that on the authority of the judgment of this Court in ***REPUBLIC VS NATIONAL EXAMINATIONS COUNCIL EXP GEOFFREY NJOROGE & ANOTHER, CA. No. 266 of 1996***, the decision of the ***IEBC*** was amenable to an order of *certiorari* as it was made in excess of jurisdiction and in violation of the rules of natural justice. Council also relied on ***REPUBLIC VS JUDICIAL SERVICE COMMISSION EXP PARENO (2004) 1 KLR 203*** and submitted that the decision of the Committee was unreasonable within the *Wednesbury principles* on the basis that no reasonable person could have reached such a decision.

Counsel concluded by submitting that the Committee had failed to take into account relevant facts before making its decision and that on the authority of ***R VS HOME SECRETARY EXP VENEBLES (1981) AC 407*** and ***RE RACAL COMMUNICATIONS LTD (1981) AC 383***, the decision of the Committee must be quashed.

Mr Mwangi, learned counsel for the 1st respondent opposed the appeal as one that was totally lacking in merit. Counsel submitted that the appellant was given an opportunity to be heard by the Committee, was in fact properly heard and a decision rendered on merit. Counsel invoked the opinion of ***Tucker LJ*** in ***RUSSEL VS DUKE OF NORFOLK (1949) 1 All ER, 109*** that the requirements of natural justice must depend on the circumstances of each case, the rules of the tribunal and the nature of the case and that what the appellant was entitled to was a reasonable opportunity to present her case, which she was given.

On whether the appellant was afforded a fair hearing, counsel argued that she indeed was, and that what is fair depends on the circumstances of each case. Counsel contended that the Committee was impartial and that it had not been proved that the ***IEBC*** had usurped the role and mandate of ***Ford Kenya*** in the preparation of the party list, because the list that was used by the ***IEBC*** had emanated from that political party. Counsel concluded by submitting that no breach of the Constitution or of any statute was proved by the appellant.

Mr Wena, learned counsel for the 2nd and 3rd respondents also opposed the appeal as one bereft of merit. Counsel submitted that the judicial review jurisdiction of the High Court is supervisory rather than appellate and that in the exercise of that jurisdiction, the High Court is not concerned with the merits of the decision, but rather with whether the decision is tainted by illegality or impropriety. Relying on ***COUNCIL OF CIVIL SERVICE UNION VS MINISTER FOR CIVIL SERVICE (1985) AC 374,*** learned counsel submitted that judicial review will issue only where there is illegality, irrationality or procedural impropriety and that an appeal to this Court from the judicial review jurisdiction of the High Court is limited to consideration whether the grounds for review were established.

Counsel concluded by urging us to dismiss the appeal on the ground that the High Court did not commit any error and the fact that the appellant was merely asking this Court to delve into the merits of her case and issues of fact already determined by the Committee, so as to arrive at a different conclusion.

We have carefully perused the record of appeal and anxiously considered the written, as well as the oral submissions by learned counsel for the respective parties. A central feature of the ***Constitution of Kenya, 2010*** is the introduction of devolution, entailing a national government and 47 devolved units. Under Chapter 11, the devolved units are made up of county governments and county assemblies. The county assembly is made up of the speaker and members who fall into three classes as follows:

a. ***Members elected by the registered voters of the wards, each ward constituting a single member constituency;***

b. ***The number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender; ("gender top-up seats"); and***

c. ***The number of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament.***

This appeal relates to membership of a county government under the gender top-up seats. In fairly broad

strokes, the following are the main constitutional and statutory provisions relating to those seats.

By dint of ***Article 90 of the Constitution***, election for the gender top-up seats is on the basis of proportional representation by use of party lists. Those seats are allocated to political parties in proportion to the number of seats won by candidates of the political party at the general election. Political parties wishing to nominate candidates for the gender to-up seats are required, under ***section 34 of the Elections Act***, to submit to the IEBC party lists in order of priority, alternating between male and female candidates. Such lists are required to be in accordance with the constitution or nomination rules of the political party.

A person nominated by a political party must, under ***section 34 (8) of the Elections Act***, be a member of the party as of the date of submission of the list, and such list cannot be amended during the term of the assembly but is valid for the term of the assembly.

Within thirty days after the declaration of the election results, the IEBC is required to designate, from each qualifying list, the party representatives on the basis of proportional representation. For purposes of the gender top-up seats, the IEBC is required to draw from the party lists such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender. Allocation of such seats is proportional to the number of seats won by the party under ***Article 177 (1) (a) of the Constitution***.

The ***Elections (General) Regulations, 2012***, make further provisions on nominations for party lists. The party list is to be compiled in accordance with the rules of the party and the IEBC has power to reject any nominee who does not qualify or any list that does not comply with the regulations. In such eventuality the party has an opportunity to substitute the candidate or to re-submit a compliant list.

It is quite clear to us that ultimately, it is the responsibility of the political party, to determine which of its members is in the party list and the order of priority, subject, of course, to compliance with the necessary legal requirements.

Turning to the appeal before us, it is axiomatic that in an application for judicial review, the High Court is not concerned with the merits of the impugned decision of an inferior tribunal; the court is merely concerned with the tribunal's decision making process, to ensure that it has not acted without or in excess of jurisdiction, and that it has observed the rules of natural justice. A long line of decisions from this Court have consistently affirmed that position.

In ***ROSHANALI ESSA HASHAM VS REGISTRATION OF ACCOUNTANTS BOARD, C.A. No 42 of 1980***, ***Madan JA***, (as he then was), stated that judicial review is only available where the tribunal acts upon a wrong principle or omits to do or considers a matter which it should have done or where there is violation of any principle of natural justice and that the court will not make an order to tell the tribunal how exactly to conduct its business, as long as it does it reasonably within the framework of the statutory provisions which brought it into being.

In ***MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC & ANOTHER, CA No 185 of 2001***, this Court expressed itself as follows:

> ***"Judicial review is concerned with the decision making process, not with the merits of the decision itself: 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 decision maker took into account relevant matters or did take into account irrelevant 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."***

(See also ***KENYA NATIONAL EXAMINATION COUNCIL VS REPUBLIC C.A. No. 266 of 1996*** and the High Court decisions in ***REPUBLIC VS KENYA REVENUE AUTHORITY EXP YAYA TOWERS***

LTD [2008] HC Misc APP No 374 of 2006 and ***REPUBLIC VS. JUDICIAL SERVICE COMMISSION EXP PARENO [2004] 1 KLR 203).***

We agree with the respondents that the appellant appears to assume that her application before the High Court and the present appeal, are "appeals" in the conventional sense in which re-evaluation and re-consideration of the evidence before the Committee, and the merit of the Committee's decision, is the central concern. Before the Committee, the parties presented conflicting evidence on who was on the party list, where the list had originated from and whether the 3rd respondent was a member of ***Ford Kenya*** party or the ***Orange Democratic Movement.*** After considering the conflicting evidence, the Committee found in favour of the 3rd respondent. Even without delving on the merits of the case, a casual glance at the record of appeal shows that there was a ***Ford Kenya*** party membership card ***No 875842*** in the name of the 3rd respondent, issued on 18th January, 2013; there was an affidavit sworn by the party's Secretary General, ***Dr David Eseli Simuyu*** on 3rd July, 2013 confirming that the 3rd respondent was a member of the party; the same affidavit confirmed due inclusion of the 3rd respondent in the final party list; and the same affidavit disowned, as a forgery, a letter that was relied upon by the appellant to claim that she was the *bona fide* ***Ford Kenya*** nominee. Having weighed the conflicting evidence before it, the Committee preferred the evidence of the respondents to that of the appellant. That cannot be a ground, in judicial review proceedings, for impeaching the decision of the Committee, which in any event had the opportunity that the other courts singularly lacked; that of seeing and hearing the witnesses and assessing their credibility.

That the appellant persists in treating this as a merits appeal entailing evaluation of evidence, is borne out by her application to this Court on 23rd October 2013, for leave to adduce further evidence. That application was deservedly, in our view, dismissed on 28th February, 2014.

The only relevant ground of complaint advanced by the appellant relates to the argument that the Committee did not give reasons for its decision. Before the High Court and this before this Court, the appellant has insisted that the Committee, in dismissing her claim, merely held, without any reasons, that ***"All other complaints hereby stand dismissed".*** With due respect, we think that the appellant has been less than candid. The determination of the Committee dated 7th June, 2013 has a concluding part, in respect of which the appellant has maintained studious silence. That part reads as follows:

> ***"Conclusion***
>
> ***The detailed reasoned judgement of the Dispute Resolution Committee will be available at the IEBC headquarters and the website on Tuesday, 11th [June?] 2013."***

The appellant has not averred that the Committee did not give the reasons for its decision as promised in the above part of its decision; she has relied only on the part of the decision announcing dismissal of her claim, without disclosing that she was informed to collect the detailed reasons for the dismissal later. To rely on the portion of the decision dismissing the claim and asserting that no reasons were given for the dismissal while omitting to speak to the part of the decision that provided for availability of the detailed reasons is, to say the least disingenuous. We agree with the High Court that even on this ground, there was no merit in the appellant's application for judicial review.

We have come to the inescapable conclusion that, on the facts of this appeal, the High Court did not commit any error in declining to quash the decision of the Committee dated 7th June 2013. This appeal is totally bereft of merit and the same is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 20th day of June, 2014.

G. B. M. KARIUKI

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR

jkc