



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 67 of 2013

IN THE MATTER OF ARTICLE 97(1)(C) AND 90(2)(A) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 34 OF THE ELECTIONS ACT CAP 24 LAWS OF KENYA

BETWEEN

FREDRICK CHEGE WAMBUI.....APPLICANT

AND

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

JUDGEMENT

1. By a Notice of Motion dated 21st February, 2013 filed in this Court the same day the Applicant herein, **Fredrick Chege Wambui**, seeks the following orders:

1. That there be an order of Certiorari to bring to court and quash the decision of the Independent Electoral Boundaries Commission to accept from The National Alliance Party (TNA) a National Assembly Nominees list which does not include the name of the Applicant Fredrick Chege Wambui as Nominee number (1) one.

2. An order of Mandamus to compel the Independent Electoral Boundaries commission to only accept from the National Alliance (TNA) a list of National Assembly nominees that includes the

Applicant Fredrick Chege Wambui as the National Assembly Nominee number (1) one.

3. That the costs of this application be provided for.

2. The Motion is grounded on the following:

3. It is supported by an affidavit sworn by the ex parte applicant in which he deposes that he is a Member of The National Alliance Party (the Party) and that he participated in the Party's nomination held on 18th January, 2013 as an aspirant for Member of National Assembly Bahati Constituency under the Party. The Party, however, mistakenly inserted his name, which name was improperly indicated, in the positions of the seat of Senatorship and Member of Assembly Candidacy as a result of which confusion was engendered and the applicant lodged a complaint with the Party. On the failure by the Party to act on his complaint he filed a Complaint with The Respondent's Nomination Dispute Resolution Committee (the Committee). At the hearing before the Committee the Party conceded the mistake and a consent was recorded that the Party refunds the applicant the nomination fees and includes his name as the youth nominee to the National Assembly Party list. However, the applicant contends that it has come to his attention that the list received by the knowledge that of the list received by the respondent from the Party does not include his name as the first nominee as ought to have been. Despite demanding that his name be submitted by the Party the same has not been done but has been met with hostility hence the orders sought herein.

4. In opposition to the application, the Party, on 26th February 2013 filed the following grounds of opposition:

1. That here has been no list submitted to the respondent as is claimed in the applicant's supporting affidavit and the respondent has not gazetted any names as is provided in regulation 54 of the Election (general) regulations, 2012.

2. That the Application is premature and is based on a list provided by an internet gossip column and not the Respondent herein.

3. That the consent entered into between The National Alliance (TNA) and the Applicant did not state that the Applicants name shall be the first name on the list and further there were other consents entered into between The National Alliance (TNA) and other party members as is evidenced in IEBC/NDRC/128/2013(Page 25 Back of the Application).

4. That the applicant is fully aware that there has been no list printed out by the Respondent and this application has been instituted as a back door means of finding out who the National alliance has nominated. This amounts to an abuse of this honourable court's process.

5. That the application is otherwise misconceived, unfounded and has no merit.

5. In his submissions, **Mr Kariuki**, learned counsel for the applicant, contended that due to the consent and pursuant to the provisions of Article 97(1)(c) of the Constitution the list of nominees ought to start with the Youth hence the applicant's name ought to be first on the list. The Court was urged to take judicial notice of the press reports that political parties had submitted their list of nominees to the Respondent and that section 35 of the Elections Act mandates that the list of nominees be submitted on the same day as that of the elective posts. Despite requesting for the list to be furnished to the applicant, the applicant contends that the respondent has declined to do so. In his view, the factual issues deposed to in the affidavit have not been controverted by way of an affidavit by the respondent or the party hence the orders sought ought to be granted.

6. On behalf of the Respondent, **Mr Muhoro** submitted that the list annexed by the applicant does not bear his name and that there is no decision before the Court which is sought to be quashed. Further, in absence of the decision which the Respondent is being compelled to implement, the orders sought cannot be granted. In his view, the respondent has not made any decision with respect to the nomination and that

what the applicant is wants is to be considered as nominee number 1 in the list yet no list has been given to the Respondent. The consent, according to learned Counsel, was that the applicant's name be included in the list as a Youth nominee and not as the Youth nominee. In any case, it is contended, the list attached does not comply with the Constitutional provisions which require the list to contain 12 names rather than the 6 contained in the said list.

7. **Miss Milimo**, learned counsel for the party on the other hand associated herself with the submissions of **Mr Muhoro** and submitted that the Party's position is that there is no nomination list forwarded to the Respondent. Further under section 107 of the Evidence Act, it is upon the applicant to show that a decision has been made and the list submitted. In her view the applicant has based his case on social media yet the Respondent is supposed to Gazette the names of the party nominees and publish the same in two newspapers. According to her, the applicant is using the Court to seek information as to who is on the list and that amounts to an abuse of the process hence the application ought to be dismissed.

8. I have considered the foregoing. Order 53 rule 7(1) of the Civil Procedure Rules provides that in the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court. It is the applicant's case that he has sought several times a confirmation of the Party nominees list from the Respondent but such information has not been forthcoming. He however, asserts that the nomination list has been in the media and the Court ought to take judicial notice of the same.

9. Section 60 of the Evidence Act, Cap 80 Laws of Kenya, provides:

(1) The courts shall take judicial notice of the following facts –

(a) all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Act, in any part of Kenya;

(b) the general course of proceedings and privileges of Parliament, but not the transactions in their journals;

(c) Articles of War for the Armed Forces;

(e) the public seal of Kenya; the seals of all the courts of Kenya; and all seals which any person is authorized by any written law to use;

(f) the accession to office, names, titles, functions and signatures of public officers, if the fact of their appointment is notified in the Gazette;

(g) the existence, title and national flag of every State and Sovereign recognized by the Government;

(h) natural and artificial divisions of time, and geographical divisions of the world, and public holidays;

(i) the extent of the territories comprised in the Commonwealth;

(j) the commencement, continuance and termination of hostilities between Kenya and any other State or body of persons;

(k) the names of the members and officers of the court and of their deputies, subordinate officers and assistants, and of all officers acting in execution of its process, and also of all advocates and other persons authorized by law to appear or act before it;

(l) the rule of the road on land or at sea or in the air;

(m) the ordinary course of nature;

(n) the meaning of English words;

(o) all matters of general or local notoriety;

(p) all other matters of which it is directed by any written law to take judicial notice.

10. From the foregoing, by a stretch of imagination, the closest that one can equate the media reports when it comes to matters that ought to be judicially noticed is that the matter is of general or local notoriety. Whereas the fact that a media house has published an article may be of general notoriety to stretch that to include the authenticity of the same report is to stretch the matters which ought to be judicially noticed too far. In **Gupta vs. Continental Builders Ltd [1978] KLR 83; [1976-80] 1 KLR 809**, the Court of Appeal held that the party who asks that judicial notice be taken of a matter has the burden of convincing the judge (a) that the matter is so notorious as not to be the subject of dispute among reasonable men, or (b) that the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy. The Court further held that the common cause of the business must first be proved or admitted, and then the court may presume that it has been followed in particular cases.

11. I am not convinced that Newspaper reports can be taken to be so notorious with respect to the truth of their contents that the Court ought to rely on them for the purposes of judicial notice.

12. It is important that a party who wishes the Court to quash a decision ought to exhibit the decision in question or account to the satisfaction of the Court the inability to do so. In this case the applicant has not even attempted to account to the Court his failure to do produce the decision, assuming one exists. In my view annexure marked "FCW-7" exhibited to the affidavit in support of the application which is a photocopy of a website page does not meet the threshold of a decision but may, if accurate amount to a report of a decision. Accordingly, I agree with the respondent and the party that there is no decision to be quashed hence *certiorari* does not lie.

13. With respect to the prayer for *mandamus*, the law, as a general rule, requires a demand by the applicant for action and refusal as a prerequisite to the granting of such an order. Of course there may be exceptions to the general rule but it is upon the applicant to satisfy the Court that in the circumstances of the case the exception applies. See **The District Commissioner Kiambu, vs. R and Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109; R vs. The Brecknock and Abergavenny Canal Co. 111 ER 395; and R vs. The Bristol And Exeter Railway Co 114 ER 859.**

14. In this case what the applicant has exhibited is a letter dated 12th February 2013 in which he requests the Party to supply him with a copy of the Party's Member of the National Assembly Nomination List. In my view, it is one thing to request for a list and another to demand that one's name be included in the list. What the law requires is the latter rather than the former. In the absence of the material upon which I can apply the exceptions to the general rule I am unable to excuse the requirement for the demand in light of the denial by the Party that it has submitted its list of nominees to the Respondent and in light of the position taken by the Respondent that it has not made any decision with respect to the Party Nominees.

15. Section 35(1), however, provides that a political party shall submit its party list to the Commission on the same day as the day designated for submission to the Commission by political parties of nominations of candidates for an election before the nomination of candidates under Article 97 (1) (a) and (b), 98 (1) (a) and 177 (1) (a) of the Constitution. Whether the Party has complied with this provision is another matter as that is a matter which is beyond the scope of this discourse. What is clear, however, is that the Party was obliged to comply with the decision made by the Respondent's Appeals Committee which was made by its consent. Therefore whereas, the applicant has not complied with the conditions precedent for the grant of *mandamus*, the Party may well be advised to adhere to the said decision and the Respondent

ought to take the same into consideration when it comes to the publication of the names of the nominees as the Party.

15. The applicant is, however, not contented with his name being on the list but demands that his name be the first one on the list. Article 97 (1)(c) which the applicant relies on states that the National Assembly consists of twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers. In the applicant's view since the Youth is mentioned first, the nomination of the Youth ought to be first on the list. With due respect, I beg to differ. The mere fact that the Youth is the first to be mentioned does not give priority to the Youth over other representatives of special interests otherwise the drafters of the Constitution would have expressly stated so. In any case the Article does not limit the nomination to the categories of interests specified since it employs the phrase "including". Accordingly the *ejusdem generis* principle would apply in such circumstances. In any case, I am not convinced that a party is only entitled to nominate one Youth in order to automatically reserve the first place for the applicant. The fact that the Party consented to the applicant's nomination, likewise, does not give him priority over other special interests representatives.

16. Apart from that in **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, the Court held:

“Mandamus is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant. *Fortiori* it should be an appropriate remedy to compel the performance of a constitutional duty...The court is perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice but such intervention would only be by way of prohibition (if the act is incomplete) or certiorari (if the act is complete) and not by way of mandamus...Mandamus cannot issue to compel the exercise of discretionary power let alone its exercise with a view to arriving at a particular result.”

17. To order the Party to list its nominees in a particular order would amount to compelling it to exercise its discretion with a view to achieving a particular result and that, the Court is not empowered to do

18. In the premises the Notice of Motion dated 21st February 2013 fails is dismissed but with no order as to costs.

Dated at Nairobi this 28th day of February 2013

G V ODUNGA
JUDGE

In the presence of Mr Kariuki for the applicant