



Republic v Independent Electoral & Boundaries Commission; Kajwang (Exparte) (Application 473 of 2017) [2023] KEHC 26704 (KLR) (Judicial Review) (21 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26704 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION 473 OF 2017
J NGAAH, J
DECEMBER 21, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**INDEPENDENT ELECTORAL & BOUNDARIES
COMMISSION RESPONDENT**

AND

T.J. KAJWANG EXPARTE

RULING

1. On 4 October 2023 I reserved judgment on an application dated 18 August 2017 but on condition that the applicant submits an original copy of the application together with the receipt for the payment he made upon filing of the application. This order was informed by the fact that there was no evidence on record that the applicant had filed a substantive motion upon being granted leave to do so. Neither the application nor a copy of the receipt for fees paid upon filing of the application was on record.
2. More so, by an application dated 10 November 2017 the respondent had sought for, among other orders, an order for this Honourable Court to vacate the interim stay it had granted the applicant on 4 August 2017 upon grant of leave to file the substantive motion. The respondent’s application was provoked by the fact that the applicant had failed to file the substantive motion after leave was granted.
3. It would appear that the applicant never responded to the respondent’s application but on 11 July 2023, he submitted a copy of the substantive motion purporting it to have been filed on 25 August 2017. The copy that was submitted to court did not bear the original court stamp and neither was it submitted together with the receipt for fees paid upon the filing of the motion. It is for this reason



that the court insisted that the original application bearing the original court stamp and the receipt be submitted to court.

4. According to the copy of the substantive motion that was submitted to court, the applicant had sought for the primary prayer that:

“ 1. The orders of certiorari do issue to remove and deliver to the Honourable Court for quashing all proceedings before the Independent Electoral and Boundaries Commission Electoral Code of Conduct Enforcement Committee being IEBC/ECCC/43/2017; Hon. Elizabeth Ongoro versus T.J. Kajwang including but not limited to statement of complaint dated 16th July 2017, charge sheet dated 25th July 2017, summons dated 25th July 2017, the proceedings and judgement dated 3rd August 2017 and all consequential orders emanating therefrom.”

5. Earlier, more particularly on 4 August 2017, the court (Lessit, J. as she then was), had granted the applicant leave to file the substantive motion and in granting the leave the court had granted stay in the following terms:

“ 3. That leave be granted to operate as stay of all proceedings before the Independent Electoral and Boundaries Commission Electoral Code of Conduct Enforcement Committee being IEBC/ECCC/43/2017; Hon. Elizabeth Ongoro versus T.J. Kajwang including but not limited to statement of complaint dated 16th July 2017, charge sheet dated 25th July 2017, summons dated 25th July 2017, the proceedings and judgement dated 3rd August 2017 and all consequential orders emanating therefrom pending hearing and determination of the motion for judicial review.”

6. When the court granted leave it did not stipulate the time within which the motion was to be filed and, therefore, according to Order 53 rule 3(1) of the [Civil Procedure Rules](#), the motion ought to have been filed within twenty-one days of the date when leave was granted. This rule reads as follows:

3.

- (1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

7. It is apparent from this provision of the law that leave to file the substantive motion lapses after twenty-one days from the date of grant of the leave. It follows that an application filed outside the leave period would be an incompetent application and an abuse of the process of the court.

8. The applicant’s application would be such an application. I say so because when the respondent sought the order of stay to be vacated on the ground that the substantive motion had not been filed within the twenty-one-day period, and when the court sought proof that the motion was filed as directed, it was always incumbent upon the applicant to provide the original copy of the application duly stamped with the court stamp and the receipt for the court fees which the applicant ought to have paid when the motion was filed. The applicant did neither of these things; he, instead, supplied a photocopy of the application without the receipt.

9. A copy of the application submitted shows that the motion was served upon the respondents long after long after the respondent had filed the application to set aside the order of stay. To be precise, the



stamps on the face of the motion show that it was served on 13 December 2017 yet the application to vacate the stay order was filed on 16 November 2017. If the motion was filed on 25 August 2017 as the applicant suggests, no reason has been given why it took the applicant four months to serve the application.

10. In the absence of any explanation for the delay, and in the absence of any evidence to the contrary, the court is entitled to conclude that the motion was either not filed within the prescribed time or at all. It follows that, everything else being equal, there would be no proper motion for determination before court.
11. But upon careful perusal of the record, I have noted that there is an order that renders the question whether the motion was filed or not moot. The record shows that as early 31 January 2018, the matter was marked as settled by Odunga, J. as he then was. Even then, for some reason the registry still issued a notice to show cause why the “suit” should not be dismissed.
12. The notice was obviously issued in error because, in the first place, in the absence of a substantive motion, there was no suit to be dismissed. Secondly, even if there existed a suit it had been marked as settled on 31 January 2018.
13. For the avoidance of doubt, the record of the proceedings of the court on the material date appears as follows:

31/1/2018

Coram: Hon. Odunga

C/A Ooko

Mr. Mapesa for Muyundo for the respondent/applicant

Mr. Onyango for the applicant

Court: It is clear that these proceedings have since been overtaken by events. Accordingly, the matter is marked as settled.”

14. The matter was brought before me for the very first time on 11 July 2023. On the material date, Mr. Atonga, the learned counsel for the applicant, informed me that the matter was coming for the notice to show cause why it should not be dismissed. But Mr Amimo for the respondent informed the court that the substantive motion had never been filed after leave was granted.
15. In view of the order made by Odunga, J., (as he then was) on 1 January 2018, all that counsel informed the court, and the subsequent proceedings thereafter, are of no consequence. Considering that the matter was marked as settled as early as 1 January 2018, and that order still subsists, there is no other order that I can make on this matter except to mark this file as closed. It is so ordered.

SIGNED, DATED AND POSTED ON CASE TRACKING SYSTEM PORTAL ON 21 DECEMBER 2023

Ngaah Jairus

JUDGE

