



Oljoroorok v Returning Officer Oljoroorok Constituency & another (Judicial Review E007 of 2022) [2022] KEHC 12233 (KLR) (27 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12233 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
JUDICIAL REVIEW E007 OF 2022**

CM KARIUKI, J

JULY 27, 2022

**IN THE MATTER OF AN APPLICATION FOR LEAVE OF FILE FOR
JUDICIAL REVIEW OF ORDERS OF MANDAMUS AND PROHIBITION**

AND

**IN RESPECT OF THE DECISION AND ORDERS MADE
BY THE IEBC DISPUTE RESOLUTION COMMITTEE AT
NAIROBI IN COMPLAINT NO. 07 OF 2022 ON 17TH JUNE 2022**

AND

IN THE MATTER OF: ORDERS 53, RULE 1 (1) OF THE CIVIL PROCEDURE RULES, 2020

AND

**IN THE MATTER OF: SECTION 8 AND 9 OF THE
LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA**

AND

AND IN THE MATTER OF: SECTION 74 OF THE ELECTIONS ACT, 2011

AND

**IN THE MATTER OF: REGULATIONS 23 AND 39
OF THE ELECTIONS (GENERAL) REGULATIONS**

AND

**IN THE MATTER OF: SECTION 4 AND 9 OF THE
FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015**

AND IN THE MATTER OF: ARTICLE 88 (4) OF THE CONSTITUTION OF KENYA, 2010

AND ALL OTHER ENABLING PROVISIONS AND PROCEDURES OF THE LAW

BETWEEN

GEORGE NGURI OLJOROOROK APPLICANT



AND

RETURNING OFFICER OLJOROOROK CONSTITUENCY . 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND

RESPONDENT

RULING

1. The Applicant moved Court via Chamber Summons dated July 12, 2022 seeking prayers:
 - i That this Application be certified urgent and be dispensed with in the first instance
 - ii That a grant of leave to file for orders of *Mandamus* and *prohibition* in favour of the Applicant as against the respondents be issued.
 - iii That an interim order be made staying any further move towards the preparation of the elections by the respondents in respect of Oljoroorok Constituency do issue pending the hearing and determination of this Application
 - iv That the cost of this Application be provided for:
2. The same was supported by grounds on the face of the chamber summons, namely:
 - a The Applicant being an independent aspirant seeking nomination for Member of National Assembly, Oljoroorok constituency presented himself to the 1st Respondent who refused to clear the Applicant for purposes of vying for the seat of Member of the National Assembly for above Constituency.
 - b This prompted the Applicant to file a complaint with the 2nd Respondent's Dispute Resolution Committee (DRC) against the 1st Respondent (Returning Officer), thus the applicant lodged complaint with the DRC which was heard and resolved in his favour on June 17, 2022. Accordingly, the 1st Respondent was directed to clear the Applicant within 48 hours of the said date.
 - c The Applicant, in compliance with the orders of the Dispute Resolution Committee, was instructed by the 1st Respondent to appear before him at the 2nd Respondent's Centre at the Bomas of Kenya Grounds on June 18, 2022 for clearance purposes and therefore he presented himself at the Bomas of Kenya on the said date. Still, upon calling the 1st Respondent on his mobile phone number -0708 99 77 77, he picked up and asked the Applicant to meet him at the 2nd Respondent's Olkalou offices on Monday June 20, 2022.
 - d With that, the Applicant sought to know why the 1st Respondent had pushed the Applicant's clearance timelines past the 48 hours granted by the Dispute Resolution Committee, to which he answered that the clearance had allegedly been issued for Seventy-two (72) hours.
 - e Upon the Applicant's insistence, over the seventy-two (72) hour clearance, the 1st Respondent informed the Applicant that it was his mandate to clear him and that he would be the one to create time and tell him of the same. It was not until the evening of June 21, 2022 that the Applicant received a communique from the 1st Respondent via WhatsApp, informing him to present himself for clearance on June 22, 2022 at the Olroorok Constituency offices between the hours of 9.00 hrs to 16.00 hrs.



- f Immediately, the Applicant informed him that he could not make it to the Oljoroorok Constituency offices since he was in the Hospital, having been involved in a road traffic accident. However, after the said communication by the Applicant, there was no response from the 1st Respondent herein.
- g Since that day, the 1st Respondent was constantly ducking him. Thus the applicant concluded that the 1st Respondent was in a deliberate attempt to thwart his parliamentary aspirations owing to the above-cited actions of the 1st Respondent on the ground that the 1st Respondent deliberately declined to clear the Petitioner as ordered within 48 hours and instead misled the Petitioner in a letter dated June 21, 2022, where he deliberately and unconstitutionally stated the ruling orders were valid for 72 hours.
- h That, the gross misconduct by the 1st Respondent was in stark contradiction of the Orders of the 2nd Respondent's Dispute Resolution Committee, whose sole intent was to derail, delay and frustrate, the applicant constitutional right to contest thus a clear manifestation of electoral fraud.
- i That the 1st Respondent and, by extension, the 2nd Respondent have knowingly committed electoral violations and malpractices aimed at delaying, deferring, and denying the Petitioner the opportunity to be cleared to contest for the Oljoroorok parliamentary seat.
- j That the 2nd Respondent has taken no remedial action against the 1st Respondent due to his misdeeds and failure to enforce the ruling orders issued and ensure that the Applicant was cleared, gazetted, and that his name appears on the ballot paper. All this despite his numerous complaints made against the 1st Respondent.
- k The Applicant lamented that, from the point he presented himself before the Constituency Returning Officer, he been subjected to what can only be said to be ill-treatment for the reasons:
- i. He was never invited to the pre-nomination candidate registration meeting for all members of National Assembly Aspirants.
 - ii. He was not provided with adequate electoral material detailing the documentary requirements for clearance to enable sufficient participation in the electioneering process. This fact prompted the Applicant to write to the 2nd Respondent on May 30, 2022, seeking clarification.
- l The long and short of the 1st Respondent's errant behaviour is that he has refused to answer the Applicant's call, and neither has he responded to text messages sent out to him by the Applicant.
- m This led to the Applicant writing a third letter of complaint and clarification addressed to the 2nd Respondent's Chairman on June 28, 2022. The said letter never elicited any response or action from the Respondents herein.
3. The Application is accompanied by a Statutory Statement retaliating same grounds in Chamber Summons and a verifying affidavit sworn by Applicant on July 12, 2022, plus a bundle of documents. Upon being served with two replying Affidavits by the Respondents, he filed a further Affidavit in rebuttal of the Respondents' averments.



4. Applicant further depones that, on June 19, 2022, he was involved in the accident and was admitted to Plainview Hospital on the same date; thus, he never appeared as asked by respondent No 1 on June 20, 2022.
5. The Applicant received an invitation for clearance for June 21, 2022 via WhatsApp. He replied to the same, but Respondent No 1 did not respond to Applicant's reply.
6. Thus, he avers that Respondent No 1 disregarded the DRC decision to clear Applicant within 48 hours.
7. The Applicant visited the 2nd Respondent on June 24, 2022, and Respondent No 1 was called and instructed to clear the Applicant in compliance with DRC Ruling.
8. On June 25, 2022, he appeared before the Director of Voter Registration and Electoral Operation (DVRE0), and 1st Respondent was called, and 1st Respondent asked the Applicant to appear before him in Constituency officers Oljoroorok.
9. On June 27, 2022, he was in the offices but was informed Respondent No 1 was in Bomas of Kenya Grounds Nairobi. Thus, on October 28, 2022, he wrote to the 2nd Respondent Chairman, praying for the orders sought.
10. On the Respondent's side, two (2) Replying affidavits have been filed and one by Julius Maingi sworn on July 20, 2022, and another by Christine Otieno Owiye Sworn on July 20, 2022 and also further affidavit by Julius Maingi sworn on July 21, 2022 and filed on July 22, 2022.
11. The Respondents' side is a rebuttal via Affidavit of Julius Maingi to the effect that on 31, 2022, at around 11.00 a.m., the Applicant presented his nomination papers to him. Upon scrutinizing the same, he noted a variation between the Applicant's name as shown on his identity card and one appearing on the IEBC register of Candidates.
12. Respondent no1 endorsed his decision on the Petitioner's nomination papers and why he found the Applicant's nomination papers invalid, signed, stamped, and returned the nomination papers to the Applicant in accordance with Regulation 43(4) of the Elections (General) Regulations 2012. The Applicant subsequently challenged the 1st Respondent's decision before the Independent Electoral and Boundaries Commission Dispute Resolution Committee (hereinafter referred to as the DRC), and his complaint was.
13. The decision of the DRC was delivered on June 17, 2022, Late in the evening, and thus he called the Applicant. They agreed that the Applicant would present his nomination papers to the 1st Respondent at Bomas of Kenya in Nairobi the following day June 18, 2022) in the morning for clearance as per the decision of the Dispute Resolution Committee.
14. On June 18, 2022, 1st Respondent waited for the Applicant at Bomas of Kenya for the whole day, but he did not present his nomination papers. It was only around 8.00-9.00 p.m. when the Applicant called him, and the 1st Respondent informed Applicant that he had traveled back to Oljoroorok. They agreed that he would appear before 1st Respondent on Monday morning, June 20, 2022, in IEBC offices at Oljoroorok for clearance.
15. Come June 20, 2022, the Applicant, for an unexplained reason, did not present his paper as agreed in said offices even though 1st Respondent spent the whole day in the offices. Therefore, on June 21, 2022, 1st Respondent decided to schedule a formal candidate registration forum on June 22, 2022 and invited Applicant in writing and sent via WhatsApp to the Applicant as conceded in the ground(ix) of the Application and paragraph (ix) of the statement of facts.



16. The Applicant neither acknowledged receipt of the said invitation nor did he call 1st Respondent to seek any indulgence from him.
17. The Applicant had a right to present his nomination papers through an agent in the event of incapacitation; therefore, his failure to present his papers was inexcusable and deliberate.
18. The copy of police abstracts he subsequently sent to 1st Respondent via WhatsApp on June 21, 2022 at 20:46 Hours was not like an abstract issued after a road accident. Instead, it merely shows that the vehicle's windscreen cracked upon being hit by its bonnet.
19. The decision of the Dispute Resolution Committee directed the Applicant to present his papers to the 1st Respondent within forty-eight (48) hours. Still, it did not bar him from clearing the Applicant after the expiry of the forty-eight (48) hours while noting that a candidate can be validly be removed any time not later than sixty (60) days to the date of the general election as provided in section 33 (1) (b) of *Elections Act* 2011.
20. Thus, 1st Respondent avers from there June 22, 2022 the Applicant went to slumber, and it is apparent from his letter dated June 28, 2022 that he was inactive until July 1, 2022 when he delivered a letter to the Commission vide the date of the receiving stamp on that letter.
21. The invitation of candidates for pre-registration was done publicly through the media, public announcement by loudspeakers throughout the wards in the Constituency notices on Independent Electoral and Boundaries Notice boards, and through the Independent Electoral and Boundaries Commission website, but Applicant ignored the same.
22. The 1st Respondent further avers that the Applicant got sufficient briefing from the Commission staff when receiving his nomination documents on June 28, 2022, and failure to attend the candidate's pre-registration meeting did not prejudice him. In any event, this did not form part of his complaint before the Dispute Resolution (Committee).
23. Further in rebuttal of applicant averment, an affidavit of Christine Otieno Owiye sworn on July 20, 2022 was also filed. The same in sum avers that the ballot papers for August 9, 2022 general election in respect to Oljoroorok Constituency Parliamentary seat have already been printed and delivered into this county.
24. That the orders sought in the Application, if granted, will occasion irreparable prejudice not only to the Commission but to the entire Kenya Citizenry because those orders, if granted, will imperil the election preparations.
25. In general election preparations, the Commission operates under a tyranny of time with very stringent timelines. Consequently, any interruption of the process has a real likelihood of compromising orderly elections preparations and ultimately may adversely impact the integrity of the elections.
26. That public interest and the letter and spirit of *the Constitution* demand that election preparation processes run seamlessly and thus, urge the Court to consider that the reliefs sought by the Applicant are unmerited in the first place and will prejudice election preparations.
27. The parties agreed to canvass the instant Application via submission, but only the Respondent filed the same within the agreed timelines. Applicant submissions was brought to court's attention on July 25, 2022.



Applicant's submissions

28. The applicant contends that the 1st respondent actions are illegal, procedurally unfair and violates the basic tenets of the rule of law, principles of the electoral system captured in the [Constitution](#) and the requirements of the said Regulations.
29. The applicant submits that he had prior to presentation of his documents for clearance on the material day he had expressed in writing to the 2nd Respondent in a letter dated May 30, 2022 reminding them of comply as well as ensure that the applicants particulars were correctly updated on the voter register in its I T System.
30. The applicant, an independent candidate submitted his documents to the 1st respondent for clearance to vie for Member of National Assembly for Oljororook Constituency on four different occasions all which the 1st Respondent neglected his duties.
31. The Applicant submits that on the first occasion despite qualified, the 1st Respondent declined to clear him due to a mistake that was created by the 2nd Respondent's in ability to sort out its I T System before the official election clearance period for member of National Assembly lapsed on May 31, 2022.
32. The Applicant further contends that the actions of the 1st Respondent were contrary to Articles 29,47,50 and 81 of the [Constitution](#), Regulation 3 of the [Elections \(General Regulations, 2021\)](#) and the [fair Administrative Action Act](#).
33. The applicant asserts that he had a legitimate expectation that the Respondents shall at all times be guided by the laws of the Republic in executing its mandate and that it shall respect and uphold the principles enshrined under the [Constitution](#) and the Rule of Law. However, the respondent has in the present circumstances acted unreasonable, irrationally arbitrarily and in blatant disregard of the law and the principles of the [Constitution](#).
34. The Applicant avers that the 1st Respondent act constitutes a threat to the rights and freedoms of the voters of Oljororook Constituency and a substantial portion of the people of Kenya to have free fair and democratic elections administration in an impartial manner by referees selected in a manner that is consistent with the Principles of the Electoral system captured in the [Constitution](#) and Provisions of the Electoral Laws in Kenya.

Respondent submissions.

35. The Respondents submit that the powers to grant a stay upon grant to leave is provided for under Rule 1(4) Order 53 [Civil Procedure Rules](#). It is not automatic that once the court grants leave, the leave operates as a stay. The Court, exercising its discretion on whether or not to grant the stay, has to consider all factors surrounding the case, including public interest.
36. The Respondent contends that events overtake the Applicant's Application for a stay because the ballot papers have been printed and brought into the Country in readiness for the August 9, 2022 general election. The preparations for the elections have been made, and all that is outstanding is the polling day activities. The Applicant, in his Application, does not specify what preparations the orders for stay is intended to target.
37. It is a cardinal principle of the law that court orders should not issue in vain and particularly when the event in which the Applicant seeks to arrest through the orders has since taken place. With the printed ballots, the Applicant has not demonstrated how suspending further preparations would benefit him.



38. While preparing for elections, the 2nd Respondent has to adhere to very stringent timelines. On that basis, on January 20, 2022, Kenya Gazette Notice Volume CXXXIV – No 14, which set out on pages 1-12 of the listed of authorities, with Gazette Notice No. 431 on page 2 of the bundle of authorities being the one relating to parliamentary elections.
39. In a nutshell, while organizing for elections, time is of the essence, and all preparation must be seamless and done efficiently. Accordingly, upon delivery of the Independent Electoral Boundaries Commission Dispute Resolutions Committee (DRC) decision on June 17, 2022, the 1st Respondent agreed with the Applicant that they would meet at Bomas for purposes of clearance which was within forty-eight (48) hours prescribed by the Dispute Resolutions Committee.
40. The Applicant did not present himself, although he disputes this position in his Affidavit. He was invited to appear before the 1st Respondent on June 20, 2022 and June 22, 2022, and he did not appear on both occasions.
41. In the further supporting Affidavit in paragraph 8, the Applicant's explanation for his failure to appear before the 1st Respondent on June 20, 2022 was alleged because he was involved in an accident and sustained injuries.
42. The copy of police abstracts annexed to the 1st Respondent's Affidavit as annexure JMS is unlike an accident report police abstract. Instead, it is in the form of an abstract usually issued concerning the loss of property because it even has a column providing the value of property and details of property recovered.
43. It was not issued by the traffic police department and did not disclose that the reportee suffered any injury. Thus, it is submitted that the document must have been stage-managed and is not authentic. Through a further affidavit, the Applicant introduced annexure G No. 3, a letter dated July 8, 2022 from plain views HospitalHospital.
46. This document does not indicate whether the Applicant was admitted in that HospitalHospital for treatment. Accordingly, the Applicant should have exhibited on June 19, 2022 and discharged on June 23, 2022, as alleged in paragraphs 8 and 18 of the further affidavits.
44. Most curiously, at the bottom of annexure G No 3, the date of issue is indicated to be February 15, 2019. This document thus submitted that the document is outrightly not authentic and was only obtained for purposes of this litigation. The Applicant ought to have exhibited a discharge summary bearing the discharge date and not a letter addressed to whom it may concern dated July 82022, a period of about two (2) weeks after his alleged discharge.
45. Again, the Applicant does not give an account for that delay from June 23, 2022, when he left HospitalHospital, to July 1, 2022, when he presented a letter to the Commission. Further from July 1, 2022, the Applicant went into inactivity again until July 13, 2022, when he lodged the instant Application.
46. It is abundantly clear that an Applicant is a person who, despite being aware of the stringent timelines applicable to the electoral process, evinces tardiness and laxity, which conduct should not be condoned.



47. The respondents rely on the case of *Harun Mwadali Mwaeni versus Independent Electoral and Boundaries Commission and another* (2017) eKLR in paragraphs 36, 37, and 38, where the Court made the following observation on electoral timelines.

“The timetable, timelines, and cut-off dates, time, in my view, impose an interdict on all participants in the elections scheduled for August 8, 2017. The Petitioner, the IEBC, and all other candidates or nominees are bonded. There must be no room for any delay, especially by the prospective candidates. As already identified by their political parties, the nominees must not be sluggish or lethargic. Attention to detail, alacrity, and speed must guide them once they are conscious of the cut-off date and time. This allows for certainty. Certainty for the political party nominating them and certainty for the IEBC as it prepares and organizes the elections.

The IEBC, as well as the *Elections Act* (see ss 13-19,31-35 &74), imposes timelines, timetables, and deadlines within which certain things must be done to enable the IEBC to prepare for the election properly. The IEBC is constitutionally bound to deliver free and fair elections. The Citizenry expects nothing short of this: see Articles 38(2) and 81 (e) of the *Constitution*. If timelines or timetables and deadlines are not adhered to, it may be impossible to conduct orderly elections. The Purpose consequently of timelines, timetables, and cut-off dates/times, whether imposed by the IEBC or by law, is to facilitate the smooth running of the election process. It allows for orderly elections. It provides for all parties to prepare for the polls. The IEBC can announce the contesting political parties and the candidates. The IEBC is also able to design and distribute ballots. The planning and preparation are relatively infinite but may only be achieved with success if there are timelines”.

48. The public interest would militate against issuing an order of stay at this stage. If given, the stay order would disarray the elections scheduled for August 9, 2022. This would affect the other candidates in the race and the public at large. Therefore, reliance is made on the decision of *Wilfred Nyaga Mutuamwari v Returning Officer & Another* Meru Petition No E009 of 2022, where the Court stated.

“However, perhaps most significantly, the 2nd Respondent has by further Affidavit sworn on 11th July 2022 deponed that the ballot papers for the upcoming general election have already been printed. Although Counsels for the Petitioner challenged the Affidavit on the basis that it did not attach any documentary proof of the ballot papers having been printed, the Court is not able to disregard the statement made on oath on such a serious matter as to the printing of ballots especially when there was no order of Court stopping such printing. If the ballots have been printed, the prejudice to the 2nd Respondent as a public agency mandated to conduct elections for the members of the public who are voters in the Constituency will outweigh the Petitioner’s personal right to contest for the position of Member of Parliament for that Constituency. It would appear that events also overtake the Petitioner’s case

49. The Court adopted a similar position in *Eunice Wangari Kiragu versus County Returning Officer & Another* (2017) eKLR page 36-39 of our bundle of authorities) where in paragraphs 11,12, and 13, the Court held:

“This Court has also been asked to issue an order of Mandamus to compel the Respondent to accept the Applicant’s nomination papers as a senatorial candidate for the Nyeri County...



I agree with the arguments of both sides that events have overtaken the Applicant's prayer for an order of *Mandamus*. The time the Respondent was required to receive nomination papers has lapsed. It is not in dispute, and it is also in the public domain that the ballot papers have already been printed; hence it's impossible to have the name of the Applicant included in the ballot. In the end, though I find merit in the Applicant's Application for an order for certiorari, I will apply the doctrine of proportionality to dismiss the motion in the public interest. Consequently, the motion is dismissed with no order as to costs."

50. Without pre-empting the merits of the substantive motion or otherwise, albeit yet to be filed, in paragraph C of the statutory statement, the Applicant intends to seek an order of prohibition to stop the respondents from refusing to clear him and include him in the ballot if a public body refuses to circumstances *mandamus* reliance is made in the case of *Kenya National Examination Council-Republic Exparte Geoffrey Gathenji Njoroge & 9 others* (1997) eKLR.
51. An order of prohibition does not lie where a decision has already been made. It is submitted that the Applicant sneaked a relief of prohibition into the statutory statement merely to prop his Application for a stay because, under Order 53 Rule 1 (4), a prayer for stay would not be entertained by the Court if he was to seek an order of *Mandamus* only.
52. Reliance is made on the Provisions of Order 53 Rule 1(4) verbatim as follows:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the judge orders otherwise.”
53. This provision talks of proceedings. There are no proceedings in place in this matter in which the Court can grant an order of stay.

Issues, analysis, and determination;

54. After going through the chamber summons, statutory statements supporting and opposing affidavits, and submissions on record, I find the issues are: Can the orders sought i e(stay of any further move towards the preparation of the elections by the respondents in respect of Oljororok Constituency) obtain in the circumstances of this case? If the above is in affirmative, does the Application have merit? What are the orders as to costs?
 1. The ex-parte chamber summons dated July 12, 2022 prayer 3 sought orders that, interim order be made staying any further move towards the preparation of the election by the respondents in respect of Oljororok constituency pending the hearing and determination of the instant application.
 2. Of course, grant of such order would have rendered application spent as leave was granted and the next move would have to file a substantive motion for substantive hearing of the Judicial review. The interim orders sought did not seek to stop the election of August 9, 2022 nor did it specify what preparation was to be halted pending hearing of the substantive motion, thus the court invited parties to argue that element of the sought order.
 3. Surprisingly, the applicant's submission belatedly availed to the court on Monday July 25, 2022, on page thirteen, states that, the petition seeks its prayers on the following grounds; it goes ahead to list ten prayers /reliefs sought namely;



- a) A declaration that the 2nd Respondent's decision not to enforce its ruling prejudices the Applicant's right to contest for the Member of National Assembly Oljoroorok Constituency election and further violates the Applicant's constitutional rights.
 - b) A permanent injunction restraining the Respondents from denying the Applicant the right to consent for the Member of National Assembly Oljoroorok Constituency Election.
 - c) That an order of injunction do issue barring the 1st and 2nd respondents from proceeding with the preparations to carry out the election of member of National assembly Oljoroorok Constituency until the Applicant is duly cleared as a candidate.
 - d) A declaration that the applicant having satisfied the threshold under Article 85 *Constitution* of Kenya is therefore qualified to be cleared to vie as an independent candidate on the election for member of National assembler OLjoroorok Constituency on the 9th August 2022 or until a time when it will happen.
 - e) A declaration do issue that the rejection of the Applicant as a candidate based on the failure to clear him by the 1st Respondent violates Articles 1, 3, 10, 24, 38 (3) (c) 85, 159 (2) (d) and 25 *Constitution of Kenya, 2010*. Thus, will adversely impact on the integrity of the election.
 - f) A permanent injunction restraining the 1st and 2nd respondents from denying the Applicant the right to consent for the member of National Assembly Oljoroorok Constituency election.
 - g) The 1st and 2nd Respondents are hereby ordered to forthwith admit and list the Applicant as a contestant to contest for the member of National Assembly Oljoroorok Constituency election as scheduled on August 9, 2022 or on any other date that the 2nd Respondent may schedule it or as the court may direct.
 - h) The applicant be at liberty to apply for any or all further, necessary and/or consequential orders as may be expedient in the circumstances
 - i) Any other order that this Honourable Court may deem fit and just to grant to ensure that rule of law is upheld by the Respondents in exercise of its legislative (sic) function. The 2nd respondent is on record that the printing of ballot papers is in progress and has threatened to postpone elections in which cases are before the honourable court.
 - j) The cost of the petition be paid by the Respondents.
4. I have reproduced the above portion of the applicant submissions because virtually the said submissions are canvassing the substantive matters not yet filed by motion or petition. In the matter before the court now, is simply whether the leave granted should halt the preparation of the elections and nature of elements to be stayed not the election itself.
 5. On whether leave should operate as a stay of the impugned actions by the Respondent, the applicable principle is that the grant of such leave is discretionary. Still, the Court should exercise such discretion judiciously.
 6. *In R (H) v Ashworth Special Hospital Authority (2003) 1 WLR 127*, it was held that;

“...such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the Purpose of a stay is to preserve the status quo pending the final



determination of the claim for judicial review. The main consideration is always whether or not the decision or action sought to have been fully implemented."

7. In *Taib A. Taib v The Minister for Local Government & Others Mombasa* HCMISCA. No. 158 of 2006, the Court held that: -

"... The Purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision-making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision-making process undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is, however, not appropriate to compel a public body to act...."

8. It is clear that where the action or decision is yet to be implemented, a stay order can usually be granted in such circumstances. However, where the action or decision is implemented, the Court needs to consider the completeness or continuing nature. If it is ongoing, it is still possible to suspend the implementation.
9. The yet to be filed substantive motion vide paragraph C of the statutory statement, the Applicant intends to seek an order of prohibition to stop the respondents from refusing to clear him and include him in the ballot. I agree with the respondents' submissions that if a public body refuses to grant a hearing in such circumstances, the way to go is to seek Mandamus. See the case of *Kenya National Examination Council- Republic Ex parte Geoffrey Gathenji Njoroge & 9 others* (1997) eKLR at page 7 .
10. The 2nd Respondent has by further affidavit sworn on July 11, 2022 that the ballot papers for the upcoming general election have already been printed and are in the county. Although Counsels for the Petitioner challenged the Affidavit on the basis that it did not attach any documentary proof of the ballot papers having been printed, the Court is not able to disregard the statement made on oath on such a serious matter as to the printing of ballots especially when there was no order of Court stopping such printing.
11. There is no order sought to stop elections at the moment but only the preparation of the polls by the respondents in respect of the Oljoroorok Constituency, which in any case are complete.
12. Thus, without going into the Application's merit, the Court finds that the stay sought under the provisions of Order 53 Rule 1(4) *supra* cannot obtain in the instant proceedings.
- (i) Therefore, the Court declines to direct that the leave granted to operate as the stay of the preparation of the elections by the respondents in respect of Oljoroorok Constituency.
- (ii) Costs in the main cause.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 27TH DAY OF JULY 2022.

.....

CHARLES KARIUKI

JUDGE

