



**Republic v Independent Electoral and Boundaries Commission
& another; Kimathi (Exparte) (Miscellaneous Judicial Review
E001 of 2022) [2022] KEHC 11550 (KLR) (5 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 11550 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS JUDICIAL REVIEW E001 OF 2022**

LW GITARI, J

AUGUST 5, 2022

**IN THE MATTER OF: AN APPLICATION BY MICHAEL KIMATHI FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

-AND-

IN THE MATTER OF: ARTICLE 47 OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLIC APPLICANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

**COUNTY RETURNING OFFICER , THARAKA NITHI COUNTY 2ND
RESPONDENT**

AND

MICHAEL KIMATHI EXPARTE

RULING

1. This court granted the ex-parte applicant leave to institute judicial review proceedings against the Respondents. The substantive judicial review application was filed vide the Notice of Motion dated August 3, 2022.
2. The application is expressed to brought under the provisions of Section 3A of the *Civil Procedure Act* (Cap 21 of the Laws of Kenya), Order 53, Rule (3) and (4) of the *Civil Procedure Rules* 2010 and the *Law Reform Act* (Cap 26 of the Laws of Kenya).



3. The orders sought in the application are, inter alia, for:
 - a. An Order of Certiorari quashing the Respondents decision to move the Tharaka Nithi County Tallying Centre from Kathwana Social Hall to Ciakariga Girls High School which decision is set out in Kenya Gazette Number 8785 of July 26, 2022 (Vol. CXXIV – No. 144).
 - b. An Order of Prohibition directed at the Respondents, their officers and any other authority acting on their instruction prohibiting them from moving the Tharaka Nithi County Tallying Centre from Kathwana Social Hall to Ciakariga Girls High School or any other location.
4. The application is premised on the grounds on the face of it, the grounds set out in the statutory statement annexed to it, and the verifying affidavit sworn by the ex-parte applicant on August 2, 2022.
 1. The Ex-parte Applicant was granted leave to commence the instant Judicial Review Proceedings on August 2, 2022.
 2. In Gazette Notice Number 7993 Vol. CXXIV-No.128 published on 1st July 2022, the Respondents caused the gazettment of Kathwana Social Hall as the County Tallying Centre in Tharaka Nithi County.
 3. Through Gazette Notice Number 8785 of July 26, 2022 (Vol. CXXIV-No.144) , The Respondent have, in flagrant abuse of their administrative powers, law and procedure, moved the Tharaka Nithi County Centre from Kathwana Social Hall to Ciakariga Girls High School.
 4. In arriving at the aforesaid decision, the Respondents failed, neglected and or refused to involve all the relevant stakeholders by way of public participation hereby making a mockery of Article 10 of *the Constitution* of Kenya.
 5. The Ex-Parte Applicant as well as the people of Tharaka Nithi County are aggrieved by the aforesaid unlawful, unprocedural and flagrant abuse of administrative powers by the Respondents for following reasons:-
 - (i) The 1st Respondent did not consult or involve the residents of Tharaka Nithi County before arriving at the impugned decision.
 - (ii) In terms of location, Kathwana Social Hall is located at the County Headquarters, in Chuka Igamba Ng'mbe Constituency and thus there is no justification for moving the County Tallying Centre from Kathwana Social Hall to Ciakariga Girls High School, which is located in Tharaka Constituency.
 - (iii) The purported relocation of the County Tallying centre from Kathwana Social Hall to Ciakariga Girls High School was done on July 26, 2022, just under two weeks to the General Election. As such, it is safe to conclude that the Respondents' decision was made maliciously and/or in bad faith.
 6. According to Regulation 84(2) of the Election (General) Regulations, 2012, the requirements for selecting a tallying centre as are as follows:-

“84(2) A tallying centre shall be selected subject to the following requirements.

 - (a) The presidential elections tallying centre shall be located in Nairobi.
 - (b) The county tallying centre shall be located at the county headquarters.



(c) All tallying centres shall be located at public buildings.”

7. Whereas the law makes it mandatory for a County Tallying Centre to be located at a public building and at the County Headquarters, the Respondents have violated the law by moving the County Tallying Centre from Kathwana Social Hall (a public building at the County Headquarters) to Ciakariga Girls High School, a school in Tharaka Constituency and thus outside the County Headquarters.
8. The Ex-parte Applicant reiterates that the sudden change of the County Tallying Centre from Kathwana Social Hall to Ciakariga Girls High School was done abruptly, without consultation and or justification.
9. The respondents have not shown why the County Tallying Centre was moved from Kathwana Social Hall, which has all the requisite facilities, to Ciakariga Girls High School.
10. In Sum, it is manifestly clear that the decision by the Respondents was made devoid of public participation and in flagrant abuse of the Election Regulations and thus amenable to Judicial Review.
11. The Ex-parte Applicant avers that the place of a tallying centre is of utmost importance in any election. Indeed, the significance of tallying centres is no longer in doubt as he in the case of *Maina Kiai & Others -v- Independent Electoral and Boundaries Commission and Others* (2017) eKLR and affirmed by the Court of Appeal in *Independent Electoral and Boundaries Commission & Others -v- Maina Kiai & Others* [2017] eKLR where the Appellate Court held election results declared by the returning officer at the Constituency are final.
12. Strictly speaking, the Social Hall at Kathwana is big enough and it will easily help the electoral officials meet the Constitutional requirement that results from polling stations/ constituency tallying centres must be openly and accurately collated and promptly announced by the returning officer. This means that those results should be collated and announced in the presence of candidates, their agents, observers, election officials and all those permitted to witness the exercise.
13. The respondents are bound by *the Constitution* and must act to promote national values and principles of governance in Article 10(2) of *the Constitution* including: the rule of law democracy and participation of the people, human rights, equity, social justice, inclusiveness, equality, non-discrimination, good governance, integrity, transparency and accountability.
14. The Ex-parte Applicant contends that in gazetting the tallying centres, the respondents were undertaking an administrative action which is subject to scrutiny by this court. The respondents were required to comply with the requirements of *the constitution* regarding the openness of the electoral process.
15. Considering the foregoing, unless this matter is heard and determined as a matter of urgency and appropriate orders issued, the Respondents intend to conduct the General Elections scheduled for on August 9, 2022 at Ciakariga Girls High School notwithstanding the manifest irrationality and illegality of the impugned decision.
16. The respondents shall suffer no prejudice whatsoever should the orders sought herein be granted as prayed.
17. It is in the interests of justice and fairness that the orders sought herein do issue as prayed.



5. Below is a summary of the respective cases for the parties.

The Applicant's case

6. The Applicant contends that the decision by the Respondents ((hereinafter the “impugned decision”)) to move the Tallying Centre for Tharaka Nithi County (hereinafter the “County”) from Kathwana Social Hall (hereinafter the “Social Hall”) to Ciakariga Girls High School was unlawful, unprocedural and a flagrant abuse of administrative powers by the Respondents for reasons that:
 - a. The 1st Respondent failed to involve all the relevant stakeholders by way of public participation before arriving at the impugned decision.
 - b. There was no justification for the move from the Social Hall, which is located at the County Headquarters, in Chuka Igamba Ng’ombe Constituency to Ciakariga Girls High School which is located in Tharaka Constituency.
 - c. The impugned decision was made in bad faith as it was done on July 26, 2022, just under two weeks to the Kenya General Elections 2022 scheduled to take place on 9th August 2022 (hereinafter the “upcoming General Elections”).
7. The Applicant relied on the provisions of Regulation 84(2) of the Election (General) Regulations (hereinafter the “Regulations”) and supported their case by citing the case of Maina Kiai & others v Independent Electoral and Boundaries Commission and other [2017] eKLR which was affirmed by the Court of Appeal in *Independent Electoral and Boundaries Commission & others v Maina Kiai & others* [2017] eKLR. The Applicant thus urged this court to grant the prayers sought therein.

The Respondents' Case

8. The Respondents opposed the application vide the Replying Affidavit sworn by Mohamed Raka on August 4, 2022. He deponed that he is the 2nd Respondent herein, duly appointed by the 1st Respondent pursuant to Regulation 4 of the Regulations hence competent to respond to the application on his own behalf and on behalf of the 1st Respondent.
9. The 2nd Respondent deponed that on May 21, 2022, he telephoned candidates vying for the different electoral seats in the upcoming General Elections to attend a pre-registration meeting at the 1st Respondent’s offices located at the Social Hall. During the said meeting, the 2nd Respondent contends that he asked the candidates to raise their concerns (if any) regarding the activities of the 1st Respondent in their conduct of the upcoming general elections.
10. According to the Respondents, the Social Hall was gazetted to be the County Tallying Centre for the County pursuant to Regulation 84 of Regulations and vide Gazette Notice No. 7993 Vol. CXXIV – No. 128. They further deponed that between 2nd July 2022 and 10th July 2022, the 2nd Respondent received numerous telephone calls from candidates who raised the following concerns:
 - a. Ciakariga Girls High School has served as Tallying Centre for the County since 2013 and the change to Kathwana Social Hall ought to have been preceded by wide public consultations.
 - b. The Social Hall is the property of the County Government of Tharaka Nithi and is associated with the incumbent governor who is a candidate in the upcoming elections.
 - c. The Social Hall has been an incomplete building for many year and its completion was rushed by the County Government of Tharaka Nithi in the eve of its gazettelement and this further dented its neutrality as expected of tallying centres.



- d. The Social Hall is very close to the office of the incumbent governor.
 - e. The Social Hall neighbours an unfinished building that poses security threats.
 - f. The Social Hall lacks sufficient parking space.
 - g. The Social Hall is not fenced and is unsafe for the 1st Respondent's officers and her property.
 - h. Ciakariga Girls High School is fenced, is secure, has ample parking space and it is not associated with any candidate.
11. In view of the above concerns, the 2nd Respondents contends that he notified the 1st Respondent via email on 13th July 2022 and suggested that Ciakariga Girls High School be reinstated as the Tallying Centre for the County. According to him, the 1st Respondent concurred with his suggestion and that is why the Social Hall was replaced with Ciakariga Girls High School as the Tallying Centre for the County vide Gazette Notice No. 8785 Vol. CXXIV – No. 144 published on 26th July 2022. He relied on the decision in *Mobamud Ibrahim Alio & 2 Others v Independent Electoral and Boundaries Commission* [2017] eKLR to maintain that the impugned decision was lawful. The Respondent thus prayed for the application to be dismissed with costs for want of merit.
 12. The application was heard through virtual proceedings that took place on August 4, 2022. Below is a summary of the submissions by the respective parties.

Submissions

13. The legality of the impugned decision has been challenged on several fronts. First, the counsel of the Applicant maintained that the Respondent did not comply with the provisions of Regulation 84 of the Regulations which provides the requirements that should be met when the 1st Respondent is selecting a venue as a Tallying Centre.
14. The counsel for the Applicant emphasized that a Tallying Centre should be at the County Headquarters as per Regulation 84(2) of the Regulations. In this regard, it was submitted that the Social Hall is at Igamaba Ng'ombe Constituency which is the Headquarters of the County whereas Ciakariga Girls High School is in Tharaka which is not the headquarters of the County. It was thus the Applicant's submission that the Respondent could have chosen any other near school that was within the municipality.
15. In response, it was submitted by counsel for the Respondents that the Tallying Centre in Tharaka is a semi-arid area. He conceded that Kathwana is the Headquarter of the County but stated that it is not the commercial centre. He stated that Ciakariga Girls High School was the first tallying centre for the County in 2013 and that the Social Hall was only gazetted in an attempt to comply with the regulations. In a rejoinder, the Applicant submitted that the fact that Ciakariga Girls was the last Tallying Centre was an illegality and that the Respondent should not use their past conduct to justify the illegality.
16. The second issue addressed by the Applicant was that the Respondent did not name the candidates from whom he received concerns about the Social Hall being a Tallying Centre. In this regard, the Respondents submitted that due to restrictions of time, he could provide all evidential material he had but maintained that the change of tallying centre was aimed at ensuring that the upcoming general elections would be free and fair.
17. The Respondent contends that Kathwana Social Hall was not fit in terms of its structure of the building as well as the security around the area. That the hall was not fenced and that he consulted



security agents who raised issues with the security of the officers of the 1st Respondent. In response, the Applicant contends that candidates were cleared in that Hall hence the Respondent must have found it fit. In addition, the Applicant submitted that the Respondents were only speculating as there was no proof in terms of minutes or communication of any allegation of security threats. He further stated that the Hall has parking space.

18. It was further submitted for the Respondents that the Social Hall was built by the County Government. It was however the Applicant's contention that there was no evidence that the Social Hall belongs to the County. Counsel for the applicant stated that the Social Hall is a public building which is not owned by the County Government and that the financing of the Social Hall using public funds does not mean that it belongs to any public office. He relied on the case of Mohamud (*supra*) and submitted that County Government of Tharaka Nithi is "Government" and its offices are adjacent to the Hall hence there will be an inference of micromanaging of the upcoming general elections.
19. The applicant's counsel stated that the Respondents reached the impugned decision without consulting the relevant stakeholders. They submitted that lack of evidence on consultation meant that there was no public participation conducted by the Respondent as required by *the Constitution* of Kenya, 2010.
20. The final issue was raised by the counsel for the Respondents. They expressed their fear of the upcoming general elections being postponed in the County if the application is allowed. They stated that Ciakaraga Girls High School has been paid with public funds and various materials including scanners, printers and a strong room for official documents installed. They further stated that KIEMS kits have been configured and dispatched with the information that Ciakaraga Girls High School is the Tallying Centre and that reconfiguration of the KIEMS will have to be done in Nairobi and would take 10 days. In addition, they stated that officers of the 1st Respondent have already been trained and dispatched and that they were informed of the Tallying Centre of the County will be Ciakaraga Girls High School. As such, counsel submitted that if the tallying centre changes, it would be difficult to relay the change of venue to the said officers with within the limited time left to the upcoming general elections.
21. In response, it was submitted by the Applicant's counsel that there can be no postponement of the election. According to them, the Respondents are trying to hoodwink this Court by stating that it will take 10 days to reconfigure the KIEMS Kits while 10 days have not lapsed since the gazettelement of Ciakaraga Girls High School as the County's Tallying Centre. Further, counsel for the Applicant submitted the Respondents could communicate with the officers and let them know that the location has changed.

Issues for determination

22. I have considered the pleadings on record as well as the respective submissions of counsel for the parties. In my view, the main issue for determination by this court is whether the applicant has made a case for illegality, unprocedurality, and impropriety with regard to the impugned decision of the Respondents.

Analysis

23. Before delving into the merits of the application, I find it is necessary to address the issue raised by the Respondent that the Applicant's verifying affidavit was improper for being sworn in Chuka and Commissioned in Nairobi as striking it out would collapse the application. In this regard, it is my view that an oath can be taken before any commissioner of oaths regardless of their location. I thus opine that the affidavit was properly sworn. As submitted by the respondents we are in the era of technology



which has changed the way we used to do things and it is possible for the deponent to be in Chuka and have the affidavit commissioned elsewhere . See Order 19 Rule 7 Civil Procedure Rule.

24. As an independent Commission, the 1st Respondent is authorized with the sole responsibility of conducting elections in Kenya. In undertaking its duties under the authority bestowed on it, the 1st Respondent has a mandate to designate venues that act as tallying centres during elections. Article 88 of *the Constitution* establishes the 1st Respondent its functions are contained in Article 88 and other principles in Articles 81 and 86 of *the Constitution* for undertaking its mandate.

Article 88 of the Consitution states:

- “(1) There is established the Independent Electoral and Boundaries Commission.
(2) A person is not eligible for appointment as a member of the Commission if the person—
- (a) has, at any time within the preceding five years, held office, or stood for election as—
 - (i) a member of Parliament or of a county assembly; or
 - (ii) a member of the governing body of a political party; or (b) holds any State office. (3) A member of the Commission shall not hold another public office. (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—
 - (a) the continuous registration of citizens as voters; (b) the regular revision of the voters’ roll; (c) the delimitation of constituencies and wards; (d) the regulation of the process by which parties nominate candidates for elections;
 - (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results; (f) the registration of candidates for election; (g) voter education; (h) the facilitation of the observation, monitoring and evaluation of elections; (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election; (j) the development of a code of conduct for candidates and



parties contesting elections; and (k) the monitoring of compliance with the legislation required by Article. 82(1)(b) relating to nomination of candidates by parties. (5) The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation.”

25. Apart from the above functions, Section 26 of the IEBC Act, No 9 of 2011 provides that:

“Except as provided for in *the constitution*, the commission shall, in performing its functions, not be subject to the direction or control of any person or authority but shall observe the principle of public participation and the requirement for consultation with stakeholders.”(emphasis added)

26. In gazetting the tallying centres, the 1st Respondent was undertaking an administrative action which is subject to scrutiny by this court. The 1st Respondent was required to comply with the requirement of *the constitution* regarding the openness of the electoral process. The law is also clear on the considerations to be taken into account in choosing a venue to act as a tallying centre.

27. Regulation 84 of the Regulations provides that a tallying centre is a venue gazetted by the Commission for the purpose of tallying. In Regulation 84(2) requirements for selecting a tallying centre are stated as –

“84(2) A tallying centre shall be selected subject to the following requirements –

- a)
- b) The county tallying centre shall be located at the county headquarters;
- c) The constituency tallying centre shall be located at the constituency or district headquarters;
- d) All tallying centres shall be located at public buildings.”

28. In the instant application, it is the Applicant’s case that the 1st Respondent changed the tallying centre for the county without consulting the relevant stakeholders.

29. Public participation is enshrined in *the Constitution*. With that said, it is worth noting that a tallying centre is not open to all persons but to particular persons. Regulation 85 of the Regulations provides for the person allowed in the tallying centre as:-

“85 the returning officer shall allow the following persons to be present at the tallying centre –

- a) the presiding officers and other election officials on duty;
- b) a candidate;
- c) a person nominated as a deputy to the candidate, where applicable;



- d) a member of the commission;
 - e) authorized agents;
 - f) a police officer on duty;
 - g) duly accredited election observers; and
 - h) duly accredited medial persons.
- (2) Notwithstanding the provisions of this regulation, the returning officer shall not be obliged to admit more than one agent per candidate or political party to the tallying venue.”

The respondents have relied on the case of *Mohamed Ibrahim Alio & 2 others –v- IEBC* (2017) eKLR where it was stated concerning regulation 84 of Elections General Regulations, 2012.

- “25. The constitutional requirement that results from polling station be openly and accurately collated and promptly announce by the returning officer means that those results should be collated and announced in the presence of candidates, their agents, party agents, observers, election officials and all those present to witness the exercise. This means collation and announcement of results must be done in public. That is why even regulation 84 requires that tallying centres be in public places which would make them accessible by the public.
37. Furthermore, it was unreasonable to put a tallying centre in an office block belonging to the government. This would give a wrong impression that the government was controlling the process when that may not be the case. The making of such a decision called for public engagement in the decision-making process because the decision affected their right to witness tallying and announcement of election results.”

The respondents have contended that the tallying centre has always been at Ciakariga Girls High School. The 1st respondent is an Independent Commission and is charged with the sole responsibility of conducting elections in this Country. One of their mandates is to designate places that act as polling stations and tallying centres during elections. Regulation 84 (supra) gives the guidelines with respect to the tallying centres. The complaint by the applicant is that there was no consultation, that Kathwana is located at the County Headquarters and that the relocation was done only two weeks to the elections which shows that the decision was malicious and made in bad faith.

30. The contention by the respondent is that:
- a) Ciakariga Girls High School has served as County Tallying Centre since 2013 and the change of venue to the Social Hall ought to have been preceded by wide public consultations.
 - b) The social Hall is the property of the County Government of Tharaka Nithi and is associated with the incumbent governor who is a candidate in the elections slated for 9th August, 3022.
 - c) The Social Hall has been incomplete building for many years and its completion was rushed by the County Government of Tharaka Nithi in the eve of its gazettement and this further dented its neutrality as expected of tallying centres.
 - d) The Social Hall is very close to the office of the incumbent governor.



- e) The Social Hall neighbours unfinished building that poses security threats.
- f) The Social Hall lacks sufficient parking space.
- g) The social Hall is not fenced and is unsafe for the 1st respondent's officers and her property.
- h) Ciakariga Girls High School is fenced, is secure, with ample parking space and not associated with any candidate.

It is the respondents contention that the decision by the respondent was lawful.

The respondent has a responsibility to conduct free and fair elections conducted in an independent, transparent, impartial and neutral manner . Article 86 of *the Constitution* states:

“ At every election, the Independent Electoral and Boundaries Commission shall ensure that — (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”

That is why *the Constitution* gives the respondent the mandate to designate places to act as tallying centres so as to ensure that the results from polling centres are openly collated and announced by the returning officer. The tallying centres are significant in an election as the returning officer announces results and the results as declared by the returning officer are final. See *IEBC & Others –v- Maina Kiai (C.A) 2017 eKLR* where this was affirmed. The respondents have given reasons for Gazetting Ciakariga Girls High School as the Tallying Centre. They have cited issues of security, incomplete building and lack of adequate space. They have also stated that the social hall is not a public place and that it houses the County offices including that of the incumbent governor. The regulation in issue requires that the tallying centres be in public places and tallying of results done in a public places and the results be announced in public. This is the requirement of the regulation. On the other hand IEBC is supposed to ensure that the elections are conducted as provided under *the Constitution*. In doing so respondent has a duty for promoting the integrity, transparency and accountability. When the respondent is gazetting tallying centres which is an administrative function it is supposed to comply with *the Constitution* and other considerations which are to be taken into account. The decision taken is subject to scrutiny. The court is called upon to consider whether the respondent acted within the law. The respondent has relied on the Supreme Court decision in *Penina N. Karisua –v- IEBC & Others (2015) eKLR* where the Supreme Court held that the court is not supposed to look at the merit but whether the applicant has made a case for illegality, procedural impropriety, irrationality. He has also relied on and procedural impropriety. *Republic – Public Procurement and City Body & 2 Others (2018) eKLR* where the court defined illegality to be a dicotomy into two whether the body had the power to make the decision and whether there were any excesses. The respondents submits that the respondent is empowered to gazette tallying centres. That in moving the tallying centre to Ciakariga, the respondent wanted to reach the requirement for impartiality, fairness as well as the consideration of the principle of neutrality. The respondent further states that Ciakariga Girls has been the tallying centre since 2013. The applicant has come by way of Judicial Review. In such an application the court does not concern itself with the merits of the decision but with the decision making process. Such considerations are whether the respondent had jurisdiction, whether the persons affected by the decision were heard before it was made and whether the respondent took into account relevant matters or acted on matters which were irrelevant. In other words, Judicial review is not an appeal. In this case the respondent has stated that



it gazetted Ciakariga Girls as it has always been the tallying centre in the last two general elections since 2013 and following complaints by some contenders in the general elections and primarily that the Social Hall is associated with the incumbent governor who is a contender and issues of security.

In *Liverpool Corporation Exparte Liverpool Tax Operation Association* (1972) 2 All E.R. 589 Lord Dehming it was stated-

“the writs of prohibition and certiorari lie on behalf of any person who is a “person aggrieved” and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busy body who is interfering in things which do not concern him but it does include any person who has a genuine grievance because something has been done or may be done which affects him.”

In this matter the respondent acted within the law as he has the mandate to gazette a tallying centre. The respondent based its decisions on relevant considerations to achieve the principles of which are laid down in *the Constitution*. Consultations were done and it would have been unreasonable, contrary to the regulation to have the tallying centre in the premises of the County Government which in my view cannot be termed to be a public place.

31. Although the participation of citizens is vital, it is required where a decision will affect a concerned individual or group. In this case, the Applicant stated that he has come before this court on his own behalf and on behalf of the residents of Tharaka Nithi County. The applicant also contends that the impugned decision affects the residents of the County as voters. It is however not clear if the Applicant is one of the persons who is accredited to access the Tallying Centre. On the other hand, the Respondents have explained that the change of the Tallying Centre in the County was as a result of concerns from some candidates, which concerns have been summarized herein above. Taking into account that the group concerned would be the election aspirants of the County and their accredited agents whose participation and interests were taken into account in the meeting held by the 2nd Respondent, it is my view that the Applicant has failed to establish the prejudice he will suffer if the tallying centre is not relocated to the Social Hall.

32. Regulation 84(1) of the Regulations provide that:

“A final tallying of results for the respective election posts shall be at a venue gazetted by the Commission for that purpose.”

33. As explained in the Replying Affidavit sworn by the 2nd Respondent, the Respondent weighed the factors in favour of Ciakariga Girls High School as opposed to the Social Hall as tallying centre for the County. They found that Ciakariga Girls High School was secure and would provide the impression of the elections being conducted are free and fair.

I have also taken note of the averment that if the application is allowed it would cripple the election or lead to postponement of elections for members of Senate, County Women Representative, Members of National Assembly and County Governor of Tharaka Nithi as they have put in place all the preparations to have the election conducted at Ciakariga Girls. It is only three days to the general elections. If such an eventuality takes place, it would affect aspirants as well as voters in Tharaka Nithi who were not parties to this case. It is a matter of public interest and would go against the rules of natural justice.

34. The upshot of the foregoing is that the application lacks merit and is dismissed. I make no orders as to costs.



DATED, SIGNED AND DELIVERED AT CHUKA THIS 5TH DAY OF AUGUST, 2022.

L.W GITARI

JUDGE

5/8/2022

The ruling has been read out in open court.

L.W GITARI

JUDGE

5/8/2022

