



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 592 OF 2017

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

JESSICA NDUKU MBALU.....INTERESTED PARTY

EX PARTE APPLICANT: PROFESSOR PHILLIP KALOKI

JUDGMENT

1. Professor Philip Kaloki, the *ex parte* Applicant herein, is aggrieved by a decision made on 23rd June 2017 by the Electoral Code of Conduct Committee of the Independent Electoral and Boundaries Commission, which he has sued as the 1st Respondent herein. The said decision was with regard to a complaint lodged by Hon. Jessica Nduku Mbalu, who is joined in this suit as an Interested Party. The *ex parte* Applicant has accordingly moved this Court by way of a Notice of Motion application dated 5th August 2019, in which he is seeking orders of Certiorari to remove into this court and quash the decision of the 1st Respondent's Electoral Code of Conduct Enforcement Committee made on 23rd June, 2017, and of the costs of these proceedings.

2. The application is supported by the grounds on its face, a statutory statement and a verifying affidavit and supplementary affidavit sworn by the *ex parte* Applicant on 25th September, 2017 and 12th September, 2019 respectively. He averred that on 21st June, 2017 he was summoned to appear before the 1st Respondent's Committee with regard to the complaint lodged by the Interested Party, and that the summons and complaint were served on him on 21st June 2017, which was the day scheduled for hearing. Further, that he was required to file a response within 24 hours of service, and the 1st Respondent's Committee indicated that the hearing was to proceed as scheduled, despite the fact that he had not been served with any supporting documentation and/or evidence accompanying the complaint.

3. It was the *ex parte* Applicant's averment that it was only after his advocate pointed out that he had not been supplied with supporting documentation that the Committee directed that the same be supplied to him and that he files a response within ten minutes, and that the hearing would proceed thereafter. It was further his deposition that he subsequently filed his replying affidavit as well as an affidavit by one Syangithi Nyagah, and also gave oral testimony at the hearing. The 1st Respondent's Committee thereupon made its decision on 23rd June, 2017 and found that the *ex parte* Applicant and his supporters were in breach of the Electoral Code of Conduct, and imposed a fine of Kshs. 500,000/- on him.

4. The *ex parte* Applicant annexed the complaint and pleadings filed with the 1st Respondent's Committee, as well the decision by the said committee dated 23rd June 2017. His case is that the 1st Respondent's Committee disregarded the evidence that he placed before it and failed to take notice of the material discrepancies in the oral testimony of the complainant and her witness. Furthermore, he averred that the Committee seemed to have taken into account facts not placed before it, as the Committee's decisions is not rationally connected to the information and materials placed before it.

5. He further averred that the Returning Officer for Kibwezi East Constituency testified in the proceedings that the *ex parte* Applicant and the Interested Party both supplied him with their campaign schedules and there was nowhere where their campaign schedules clashed. However, that the Committee failed to take into consideration the said testimony and campaign schedules in making their determination, and it is clear from the evidence that it was the Interested Party who was in violation of the Electoral Code of Conduct. The *ex parte* Applicant annexed a video clip in electronic format of the said returning officer's testimony.

6. Lastly, the *ex parte* Applicant averred that the Committee's insistence that the hearing proceeds when he had not been served with the supporting documentations was a calculated attempt to deny his right to fair hearing, and that the proceedings before it were not in any way aimed at serving the ends of justice. He also pointed out that in its decision read at 11am on 23rd June, 2017, which was a Friday, the Committee directed that the fine be paid within 24 hours otherwise he would stand disqualified from participating in the general elections. However, the Commission's account held at Central Bank was only open till midday, a move he stated was calculated to lock him out of the elections, but that he complied nonetheless. It was also his averment that in exercising a quasi-judicial function, it was incumbent upon the 1st Respondent's Committee to consider all facts placed before it, failure of which would render the proceedings before it and the resultant decision procedurally unfair.

The Respondents' Case

7. In response, the 1st Respondent filed a Replying Affidavit sworn on 6th March, 2020 by Mohamud Jabane, the 1st Respondent's Manager for Legal Services. He averred that for an order of certiorari to be granted, the court must be satisfied that there was procedural impropriety, illegality and irrationality in the process leading to the decision subject of the judicial review. In addition, he averred that the purview of judicial review is limited to the procedure used to arrive at a particular decision and it does not extend to the merits of the decision. In his view therefore, the present application falls short of the standards set above.

8. He further averred that on 5th June, 2017, the Committee received a letter of complaint from the Interested Party's advocate providing the particulars of conduct of the *ex parte* Applicant that amounted to breach of the Electoral Code of Conduct. It was his deposition that the *ex parte* Applicant herein was summoned by way of a letter dated 19th June 2017 for a hearing in respect of the matter, and was required to appear before the Committee on 21st June, 2017. It was the deponent's view that this was ample time for preparation of the hearing, as disputes relating to breach of code of conduct ought to be decided expeditiously. As such, the Committee had to handle the matter swiftly with due regard to the rule of law, and accorded the *ex parte* Applicant the chance to submit his evidence, which he did.

9. On the alleged irrationality and illegality of the 1st Respondent's Committee's decision, the deponent averred that the 1st Respondent's Committee is empowered to impose sanctions on, and punish anyone who breaches the Electoral Code of Conduct. Accordingly, the Committee having found the *ex parte* Applicant guilty of infringing the Code of Conduct, rightfully exercised its mandate by imposing a fine upon him which was reasonably within its powers and jurisdiction. It was also his averment that the *ex parte* Applicant has raised issues of evidence before the court, and is inviting the Court to consider the merits of the Committee's decision, and to substitute its decision of for that of the Committee. Therefore, that his application falls short of the threshold for judicial review proceedings.

The Interested Party's Case

10. The Interested Party filed a replying affidavit she swore on 10th March, 2020. She deposed that she is the Member of Parliament of Kibwezi East constituency, having been duly elected on 8th August, 2017. That in the run up to the elections, the *ex parte* Applicant conducted campaigns that were marred with acts of aggression and obstruction towards other candidates, leading to the complaint filed on 5th June, 2017 with the 1st Respondent's Electoral Code of Conduct Enforcement Committee. Following the complaint, the *ex parte* Applicant was summoned on 21st June, 2017 and parties were directed to file affidavits in support or opposition of the compliant. She further averred that both parties were also allowed to adduce oral evidence. Furthermore, the *ex parte* Applicant was represented by an advocate who did not record protest as he submitted his replying affidavits. In her view the proceedings were therefore fair and lawful.

11. It was the Interested Party's further averment that the 1st Respondent's Committee observed the rules of natural justice, reached a just and fair determination and did not act in excess of its jurisdiction. In view of the foregoing, she deposed that the application lacks merit and ought to be dismissed as the *ex parte* Applicant complied with the decree of the Committee without protest, and the matter is closed.

12. She further averred that the present application is an extension of the election petition filed by the *ex parte* Applicant at the Makueni High Court immediately after the general election, which petition was dismissed, and that the decision of the High Court was affirmed by the Court of Appeal. The Interested Party therefore believes that the present application was filed for reasons other than the pursuit of a legitimate right.

The Determination

13. The firm of B. M Kituku & Co Advocates appearing for the *ex parte* Applicant filed written submissions dated 28th May, 2020, while Gumbo and Associates Advocates filed submissions dated 4th June 2020 on behalf of the 1st Respondent. Mr. Dennis Mung'ata appearing for the Interested Party filed written submission dated 16th June 2020.

14. Arguments were made by the 1st Respondent and Interested Party as regards the reference by the *ex parte* Applicant to matters of evidence that were adduced before the 1st Respondent's Committee during the hearing of the Interested Party's complaint, and the role of this Court in this regard. The 1st Respondent was of the view that the *ex parte* Applicant is inviting this Court to delve into the evidence that was presented before the said Committee, and its submission was that judicial review is concerned with the decision making process and not the merits of the case, and that this Court therefore does not sit as an arbiter of disputes to determine whether the decision was based on evidence, but whether the decision maker complied with the law in arriving at the decision.

15. Further, that is not the duty of the Court in cases where facts are disputed to determine who between the decision maker and the applicant is right. Reliance was placed on the decisions in the cases of **Republic vs National & Safety Transport Authority & 10 Others ex parte James Maina Mugo, (2015) eKLR** and **Wilfred Josiah Manda & Another vs Patrick Mukua Muthani & 2 Others, (2016) e KLR** for these submissions.

16. Counsel for the Interested Party likewise submitted that a court sitting to judicially review a decision does not sit as an appeal chamber, but will concern itself in evaluating whether the decision complained of was made without or in excess of jurisdiction, whether the decision was irrational and whether the applicant was heard in accordance with the rules of natural justice. Accordingly, he argued that the application before this Court is an appeal of the decision of the 1st Respondent's Committee, which is not a province of judicial review.

17. It is therefore necessary to delineate and clarify the role of this Court as a judicial review court at the outset, with regards the dispute between the *ex parte* Applicant, Respondent and Interested Party, before further consideration of their arguments. The parameters of judicial review were explained in detail in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** at pages 303 to 304 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)*.

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

18. Additionally, judicial review is now entrenched as a constitutional principle pursuant to the provisions of Article 47 of the Constitution, which provides for the right to fair administrative action. Section 7 of the Fair Administrative Action Act in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. In addition, it was emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** that **Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveal an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.**

19. This Court as a judicial review court therefore cannot interrogate any of the issues raised as to the merits of the 1st Respondent's Committee's decision, in terms of whether it was the right or wrong decision. This is especially so with regard to the arguments made by the *ex parte* Applicant that the said decision was erroneous in light of the evidence that was before the Committee. The merit review that can be undertaken by this Court is limited to aspects of the lawfulness of the said decisions, as delineated by the grounds set out in section 7(2) of the Fair Administrative Action Act which provides as follows:

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if

(a) the person who made the decision

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

- (d) the action or decision was materially influenced by an error of law;
- (e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant; (f) the administrator failed to take into account relevant considerations;
- (g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
- (h) the administrative action or decision was made in bad faith;
- (i) the administrative action or decision is not rationally connected to
 - (i) the purpose for which it was taken;
 - (ii) the purpose of the empowering provision;
 - (iii) the information before the administrator; or
 - (iv) the reasons given for it by the administrator;
- (j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
- (k) the administrative action or decision is unreasonable;
- (l) the administrative action or decision is not proportionate to the interests or rights affected;
- (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;
- (n) the administrative action or decision is unfair; or
- (o) the administrative action or decision is taken or made in abuse of power.

(3) The court or tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that (a) the administrator is under duty to act in relation to the matter in issue; (b) the action is required to be undertaken within a period specified under such law; (c) the administrator has refused, failed or neglected to take action within the prescribed period.

20. With this delineation in mind, the three substantive issues that arise for determination from the parties' pleadings and arguments herein are firstly, whether the decision of the 1st Respondent's Enforcement Committee made on 23rd June 2017 was made lawfully; if so, secondly, whether the decision made by the 1st Respondent's Electoral Code of Conduct Committee made on 23rd June 2017 was procedurally fair; thirdly, whether the said decision was rational; and lastly whether the remedies sought are merited.

On legality of the decision

21. The *ex parte* Applicant's counsel submissions on this issue were that the provisions of paragraph 15 (10) of the Electoral Code of Conduct requiring that a complaint be examined and determined by the 1st Respondent Committee, only if not satisfactorily resolved by the peace committee were not followed. Therefore, that the Interested Party's complaint was clearly rushed and was never placed before the peace committee in the constituency for investigations.

22. Furthermore, that pursuant to section 20 of the Elections Offences Act, the breach of the Electoral Code of Conduct is an offence, and the Director of Public Prosecutions have exclusive power to order investigations and to prosecute offences under section 21 of the Act. Accordingly, there is a conflict between the two statutes. And the *ex parte* Applicant argued that the 1st Respondent's Committee lacked jurisdiction to hear the matter and its decision should be quashed and he should be refunded the monies he paid as a fine. Lastly, that paragraph 8 of the Electoral Code of Conduct makes it mandatory that any fine imposed by the 1st Respondent be registered with the High Court, which was not done.

23. The 1st Respondent's response was that the *ex parte* Applicant's submissions that the complaint was rushed and was never placed before the Peace Committee for investigations was not pleaded anywhere in the documents filed by the *ex parte* Applicant, and he cannot therefore, begin to address such issues at this point in time, in complete disregard of the principle that parties should be bound by their pleadings. Reliance was placed on the decision by Kimaru J. in **Mahamud Muhumed Sirat v Ali Hassan Abdirahman and 2 Others, [2010] eKLR** that it is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. Likewise, that the *ex parte* Applicant's submissions that the offences committed fell within the jurisdiction of the Office of the Director of Public Prosecutions, was not initially pleaded.

24. The 1st Respondent nevertheless submitted that the Electoral Code of Conduct Enforcement Committee is established under the Elections Act, 2011 ("The Act") by dint of section 110 and that its mandate and powers are described in paragraph 15 of the second schedule to the

Act. Therefore, that the Committee had the legal mandate to hear and determine the complaint by the Interested Party. Further, that the *ex parte* Applicant's submissions are based on a complete misapprehension of the provisions of paragraph 15(10) of the Electoral Code of conduct, which provides that matters that are not satisfactorily resolved by the Peace Committees are to be examined and determined by the Electoral Code of Conduct Enforcement Committee. It was the 1st Respondent's submission that the said provisions do not impose a mandatory requirement that all disputes must be determined by the Peace Committees before they are referred to the Code of Conduct Enforcement Committee.

25. In addition, that there is a distinction between the offences relating to the breach of code of conduct which are provided for under paragraph 6 of the Electoral Code of Conduct, and those outlined in the Election Offences Act. Reliance was placed on the decision in **Republic vs Independent Electoral & Boundaries Commission, Ex Parte George Mbogo Ochilo Ayacko, (2017) eKLR** that the Committee can only handle charges stated to be brought under the Electoral Code of Conduct, as set out in the 2nd Schedule to the Elections Act, while the court handles criminal charges framed as brought under section 20 of the Election Offences Act. Therefore, that there is no jurisdiction at all in the Committee to try anyone of the offence created under section 20 of the Election Offences Act.

26. The Interested Party on her part submitted that the 1st Respondent is established under Article 88 of the Constitution and is responsible for conducting or supervising referenda and elections to any elective body offices established by the Constitution. Further that pursuant to Article 87(1), Parliament enacted the Election Act No. 24 of 2011 which provides that every political party and every person who participates in an election shall subscribe to and observe the Electoral Code of Conduct.

27. Therefore, that the 1st Respondent and its Electoral Code of Conduct Enforcement Committee are empowered to impose sanctions which may include imposition of a fine, and Committee was within its jurisdiction to receive, hear and determine complaints relating to enforcement of Electoral Code of Conduct and to sanction offenders by way of a fine. The Interested Party cited the case of **Samson Owimba Ojiayo v Independent Electoral and Boundaries Commission and Another, (2013) eKLR** where the court stated that 1st Respondent being an independent body must be given the discretion to assess the situation and intervene when a particular situation demands such interventions.

28. I have perused the *ex parte* Applicant's pleadings, and note that it indeed is the case that the ground of illegality of the 1st Respondent's decisions was never pleaded. It is nevertheless important for this Court in the exercise of its supervisory jurisdiction to identify the legislative powers that a statutory body is relying on, as any act or decision made outside such powers will be null and void, whether this fact is pleaded or not. In this regard, Lord Diplock described an illegality in **Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410** as a failure by a public body to understand correctly the law that regulates its decision making power, or a failure to give effect to that law.

29. It is therefore necessary when deciding whether a statutory power or duty has been lawfully exercised or performed, to identify the scope of that power and duty, and which involves construing the legislation that confers the power and duty. In the present application, the establishment of, and powers of the 1st Respondent's Electoral Code of Conduct Enforcement Committee are provided for in paragraph 15 of the Second Schedule pursuant to the provisions of section 110 of the Elections Act on the observance and enforcement of the Electoral Code of Conduct. The powers are as follows:

“(1) The Commission shall set up the Electoral Code of Conduct Enforcement Committee which shall comprise of not less than five members of the Commission and shall be chaired by a member appointed by the Chairperson; the Commission may nominate a member of its staff to be the secretary to the Committee. (2) The Chairperson of the committee shall be a person who is qualified to hold the office of Judge of the High Court.

(3) Every candidate, official and agent shall—

- (a) acknowledge the authority of the Committee to enforce the provisions of this Code on behalf of the Commission;**
- (b) ensure compliance with summons issued to the party, its candidates or representatives by the Committee;**
- (c) co-operate in the official investigation of issues and allegations arising at election period; and**
- (d) respect and comply with the orders issued by the Committee.**

(4) The Committee shall issue summons to the person, political party or referendum committee against whom a complaint has been received as having infringed the provisions of this Code and any other person who the Commission has reason to believe to have infringed the provisions of this Code to attend its meetings. The meetings will be convened at any place which the Committee may deem fit.

(5) In its proceedings, the Committee may examine the person summoned and may allow a person to have legal representation.

(6) The committee shall not be bound by the provisions of the Criminal Procedure Code (Cap. 75) or the Evidence Act (Cap. 80) in its proceedings.

(7) Every person who is summoned by the Committee and who attends the meetings of the Committee shall be accorded the right to be heard.

(8) The Committee shall exercise the powers provided under this Code to punish any person found to have infringed this Code.

(9) The Committee shall deliver its verdict expeditiously and inform the parties of the decision.

(10) Notwithstanding the provisions of this Code, any complaint submitted in writing alleging any irregularity with any establishment of the electoral process at any stage if not satisfactorily resolved by the peace committee shall be examined and determined by the Committee.”

30. The peace committees referred to in sub- paragraph 10 may be formed by the 1st Respondent in each constituency pursuant to paragraph 17 of the Second Schedule, and their mandate is provided in Paragraph 17 sub-paragraph 3 as follows:-

“ The peace committee shall have power to—

(a) reconcile warring parties;

(b) mediate political disputes in the constituencies;

(c) liaise with government security agencies in the constituency and report suspected election malpractices; and

(d) report any violation of this Code to the Committee for appropriate action.”

31. The above provisions give jurisdiction and powers to the 1st Respondent’s Electoral Code of Conduct Enforcement Committee to punish any person found to have infringed the Electoral Code of Conduct that is set out in Schedule Two of the Elections Act, and the sanctions are set out in paragraph 7 of the Schedule, including imposition of a fine. In addition, the Committee is specifically exempted from the requirements of the Criminal Procedure Code, which are the ones which would apply to the prosecution of criminal offences including the offences under the Elections Act.

32. The Peace Committee on the other hand appears not to have any jurisdiction to act on violations of the Code of Conduct, and can only report them to the Committee for further action. Likewise, the 1st Respondent’s Committee appears to only have an appellate jurisdiction over matters which the Peace Committee has jurisdiction, by way of referrals to it by a party dissatisfied with the Peace Committee’s decision. There is no specific requirement that allegations of violation of the electoral code of conduct must first be heard by the peace committee, and a construction of the provisions of the Second Schedule on the contrary divest the peace committees of that jurisdiction.

33. It is not in dispute that the Interested Party’s complaint was on the alleged breach of the Code of Conduct by the *ex parte* Applicant, and arising from the foregoing reasons, this Court finds that it was therefore properly before the 1st Respondent’s Electoral Code of Conduct Enforcement Committee, which had jurisdiction to hear it and impose a sanction in relation thereto.

On procedural fairness

34. The *ex parte* Applicant submitted that he was never afforded a fair hearing as a result of the failure to give him adequate time to prepare for his defence to the Interested Party’s complaint. Therefore, that the *ex parte* Applicant’s right to fair administrative action under Article 47 of the Constitution and pursuant to Sections 2, 3(1), 4(1), 7 and 12 of the Fair Administrative Action Act was violated.

35. The 1st Respondent submitted that it followed due process and accorded the *ex parte* Applicant a fair hearing. Further, that, the *ex parte* Applicant was summoned by way of a letter dated 19th June 2017 for a hearing before the 1st Respondent’s Committee on 21st June 2017 which was ample time for preparation. The 1st Respondent contended that paragraph 15 sub-paragraph 9 of the 2nd Schedule to the Elections Act 2011, requires that disputes relating to breach of code of conduct ought to be decided expeditiously, and as such the Committee had to handle the matter swiftly, but with due regard to the rule of law, and in this regard accorded the *ex parte* Applicant a chance to submit his evidence.

36. These submissions were reiterated by the Interested Party, who in addition contended that the *ex parte* Applicant was not only afforded an opportunity to be heard, and was as a matter of fact heard through his own affidavit and oral testimony was received from him. Further, that the *ex-parte* applicant was represented by legal counsel at the Committee hearing, and did not protest that the time granted prevented him from eliciting or calling particular evidence. Lastly, that the right to be heard does not invoke any particular time frame to be given to a party, and what is reasonable time depends on particular circumstances of a case. In addition, that the *ex parte* Applicant does not say how much time would have been reasonable or adequate.

37. I note in this regard that the Paragraph 15 subgraph 7 of the Second Schedule to the Elections Act specifically provides that every person who is summoned by the Committee and who attends the meetings of the Committee shall be accorded the right to be heard. In addition, sub paragraph 9 provides that the Committee shall deliver its verdict expeditiously and inform the parties of the decision. It is also now a core requirement under Article 47 of the Constitution that every person who is to be affected by a decision must be accorded fair administrative action, and the procedures are provided by the Fair Administrative Action Act of 2015.

38. Section 2 of the Fair Administrative Action Act, which was enacted to implement Article 47, in this regard defines an administrative action to include—

a. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

b. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

39. The core element of the duty to act fairly and the requirement of fairness is the need to ensure that a person affected by a decision has an effective opportunity to make representations before it is taken. This requirement is what informs the key procedural steps set down by the law of giving of notice of an administrative action, and provision of the evidence that will be relied upon during that administrative action. Section 4(4) of the Fair Administrative Action Act details the manner the opportunity to be heard and make representations should be accorded to the person against whom administrative action is taken as follows:

(a) to attend proceedings, in person or in the company of an expert of his choice;

(b) to be heard;

(c) to cross-examine persons who give adverse evidence against him; and

(d) to request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

40. Since the purpose of giving adequate notice is to ensure that an individual has effective opportunity to make representations in respect of a prospective decision, fairness will therefore require that any such notice be given in sufficient time to enable adequate preparation. The question of whether the time afforded is sufficient will depend on the circumstances. Relevant factors to consider is the extent to which an individual will be disadvantaged by the period of notice given, including by the complexity of the matter, the amount of materials needed to be considered, the familiarity with the issues and evidence, and whether the facts are disputed. The reasons and justification given by a decision maker for adopting a particular timeline will also be a relevant consideration.

41. Coming to the present case, the *ex parte* Applicant claims he was given notice of the complaint and supporting documents on the same day of the hearing of the complaint. The 1st Respondent states that the summons was issued earlier, and the complaint needed to be heard expeditiously. What is however not in dispute that the *ex parte* Applicant was able to file a replying affidavit to the complaint and call oral evidence at the said hearing of the complaint. In addition, the *ex parte* Applicant has not identified the prejudice he suffered by the short notice, and seems to more aggrieved with the findings of the 1st Respondent's Committee in light of the evidence he presented.

42. Lastly, it is also notable that electoral processes and elections are time bound, and in the circumstances, and there may be time limitations in hearing of electoral- related disputes. I therefore find that there was no unfairness in the procedure adopted in the circumstances of this application.

On the rationality of the decision

43. The *ex parte* Applicant further submitted that the 1st Respondent's Committee made an irrational decision, which failed to take into account the evidence and materials placed before it, and was hence out rightly biased. He argued that the 1st Respondent's Committee failed to take into consideration the Returning Officer's testimony, and disregarded undisputed facts and evidence placed before it on the campaign schedules of the *ex parte* Applicant and Interested Party.

44. The 1st Respondent cited the decisions in **Associated Provincial Pictures Ltd v Wednesbury Corporation [1948] 1 KB 223** and **Council of Civil Service Unions v Minister for Civil Service [1984] 3All ER 935** for the definition of irrationality as a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. It was its submission that any reasonable person looking into the circumstances of the Complaint before the 1st Respondent's Committee would have arrived at a similar decision. Further, that the 1st Respondent Committee in arriving at the decision took into account relevant considerations, and considered the complaint, the testimony of the complainant, the testimony of the *ex parte* Applicant and other witnesses who testified.

45. Section 7(2)(i) of the Fair Administrative Act expounds on the circumstances when a decision will be considered irrational, as being those where there is no demonstrated connection between the decision and its purpose, the evidence relied on, or its reasons. As regards what factors ought to be taken into account by a decision maker in reaching the decision, the general rule as stated in **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation, (1948) 1 KB 223** is that a public body when making a decision, must take into account all the factors which the legislation conferring the relevant function expressly or implicitly requires it to have regard.

46. The considerations that are relevant to a public authority's decision are therefore of two kinds: the mandatory relevant considerations that the statute empowering the authority expressly or impliedly identifies as those that must be taken into account; and the discretionary relevant considerations which the authority may take into account if it regards them as appropriate. The discretionary considerations to be taken into account will also depend on the circumstances of each case.

47. Once a decision-maker determines that a particular consideration is relevant to its decision, the extent to which it will inquire into that factor, and the weight to be attached to the factor, are matters to be decided by the decision-maker, and the courts will not interfere with the decision unless the decision-maker has acted unreasonably. This is consistent with the principle that the courts are generally only concerned with the legality of decisions and not their merits.

48. In the present application, the Second Schedule of the Elections Act contains the code of conduct that the 1st Respondent's Committee is

required to take into account in dealing with complaints such as that made by the Interested Party, in addition to the requirements set out by the Constitution and Fair Administrative Action Act as regards fair administrative action. I have perused the judgment by the 1st Respondent's Committee dated 23rd June 2017, and note that after setting out the evidence presented by the Interested Party, *ex parte* Applicant and Returning Officer, the 1st Respondent's Committee proceeded to analyse the evidence and make its findings.

49. The particular observations made by the 1st Respondent's Committee after considering the evidence before it were as follows:

42. Prof. Kaloki also denied ever meeting the complainant Hon. Jesica at Mtito Andei and Nthongoni and asserts that there was not confrontation.

43. On the converse, he alleges that at Makutano area it is the complainant and her supporters who attacked his supporters with stones thereby damaging his vehicle's wind screen.

44. We note that despite the accused's counter accusation against the complainant, he did not favour this Committee with evidence of the alleged attack and damage to his motor vehicle. Moreover, his evidence was not corroborated by a witness.

45. It is interesting that despite the accused's claim against the complainant, he did not take any steps to file a formal complaint against the complainant before this Committee and /or IEBC.

46. We are not persuaded by the accused's counterclaim and see it as a reactionary afterthought purposed too defeat the complaint.

47. From the testimony of the Returning Officer that the campaign schedule of the two candidates does not clash, it was not expected that they clash or in the least meet.

48. The complainant has given a chronological account of the events of 2nd June 2017 on how the accused kept trailing her from town to town. We are not persuaded that all that was out of sheer coincidence.

49. From the evidence on record, it is patent that there were several in which Prof. Kaloki with his supporters trailed and violently encountered the complainant and her supporters. In fact, this was a case of hot pursuit with ulterior motive.

50. Section 110 of the Elections Act requires that every candidate who participates in an election must subscribe to and observe the Electoral code of conduct set out in the second schedule of the Elections Act. The Code binds every candidate nominated under the Electoral Laws for any election.

51. The overarching objective of the code is to promote conditions conducive to the conduct of free and fair elections and a climate of tolerance in which political activity may take place without fear, coercion, intimidation or reprisals."

50. These observations formed the basis for the findings by the 1st Respondent that the *ex parte* Applicant was in breach of the Electoral Code of Conduct, and of the sanctions meted against him. It is evident from the judgment that the 1st Respondent's Committee did consider the evidence before it, and the applicable law and factors it was to take into account, and I find that its decision is therefore not irrational. In particular it did make specific findings on the evidence by the Returning Officer and the campaign schedules, as shown in the foregoing. If the *ex parte* Applicant is of the view that these findings were wrong or erroneous in light of the evidence that was presented to the Committee, then this Court is not the appropriate fora to decide that question, and he should have proceeded by way of appeal.

On the orders sought

51. The *ex parte* Applicant has sought an order of certiorari to quash the decision of the 1st Respondent's Electoral Code of Conduct Enforcement Committee. **This remedy was discussed in the case of Republic vs. Kenya National Examinations Council ex parte Gathenji & Others. (1997) e KLR**, wherein it was held that such an order **quashes a decision already made and will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with.** The findings by this Court in the present case however are that the 1st Respondent's Committee acted legally, fairly and its decision was rational. The order of certiorari cannot therefore issue to quash a decision that was properly made within the 1st Respondent's Committee's jurisdiction.

52. The *ex parte* Applicant's Notice of Motion dated 5th August 2019 is accordingly found to be without merit, and is hereby dismissed. The *ex parte* Applicant shall meet the costs of the Interested Party, in line with the general principle that costs follow the cause.

53. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF AUGUST 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant's and Respondents' Advocates on record.

P. NYAMWEYA

JUDGE