



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW APPLICATION NO.393 OF 2017**

**IN THE MATTER OF MEMBER OF COUNTY ASSEMBLY CALIFORNIA WARD,  
KAMUKUNJI CONSTITUENCY, NAIROBI COUNTY**

**MATHIAS MUTISO MULI.....**

**APPLICANT**

**VERSUS**

**INDEPENDENT ELECTORAL BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE RETURNING OFFICER, KAMUKUNJI.....2<sup>ND</sup>RESPONDENT**

**RULING**

The Applicant herein was aggrieved by the decision of the Independent Electoral and Boundaries Commission (IEBC) Committee which dismissed his complaint against the decision of the Returning Officer, Kamukunji Constituency who barred him from contesting as an independent candidate for the Member of County Assembly for California Ward of Nairobi County. According to the Applicant, the Returning Officer disqualified him on the ground that he had not fulfilled the requirements to offer such candidature for the said seat. The IEBC Committee in dismissing the Applicant’s complaint held thus:

***“The complainant failed to comply with guidelines including ensuring that he provided a photograph with the prescribed specifications. The Returning Officer was entitled to reject the complainant’s nomination documents.”***

According to the Applicant, this decision was made without his input. He complained that the IEBC Committee denied him the right to be heard and therefore the said decision ought to be quashed by this court issuing an order of Certiorari. He further prayed for an order to compel the Returning Officer of the said constituency to accept his nomination papers. In that regard, the Applicant sought the leave of the court to enable him file the substantive motion for Judicial Review.

The Applicant’s application seeking leave was opposed by the Respondents. The Respondents reiterated that the Returning Officer acted within the law when he refused to accept the Applicant’s nomination because the Applicant failed to meet and comply with the required guidelines regarding the specification of the passport photograph that was submitted by the Applicant. The Applicant was given a chance to rectify the said problem but still failed to meet the operational and legal requirements set in **Section 33** of the **Election Act**. Therefore, the IEBC Committee did not err when it upheld the decision of the Returning Officer. It was the Respondents’ case that the Applicant laid no basis before this court for the

court to exercise its judicial discretion to grant leave to the Applicant to lodge an application for Judicial Review.

During the hearing of the application, this court heard oral rival submission made by the Applicant who was acting in person and by Ms. Olao for the Respondents. The issue for determination by this court is whether the Applicant laid sufficient basis for this court to grant him leave to file the substantive motion for the Judicial Review orders of certiorari. The thrust of the Applicant's application is that the 2<sup>nd</sup> Respondent, without any justification, denied him the constitutional right to offer his candidature as a Member of County Assembly for California Ward of Nairobi County. The Applicant was further aggrieved that the IEBC Committee did not give him a fair hearing to ventilate his complaint against the decision of the Returning Officer. Again the Applicant cited the constitutional provisions in support of his argument. The Respondents opposed the application seeking the grant of leave essentially on the ground that the Applicant's complaint did not meet the threshold established by the law for the grant of leave to institute Judicial Review proceedings.

This court has carefully considered the facts in support of this application. The Applicant seeks to be included by the Respondents in the list of candidates to contest for the Member of County Assembly seat for California Ward, Nairobi County. During the hearing of the application, this court inquired from the Applicant why it took him so long to lodge his application before this court after the IEBC Committee had rendered its decision. The decision was delivered on 9<sup>th</sup> June 2017. The Applicant lodged the present application on 27<sup>th</sup> June 2017. That is eighteen (18) days after the decision was rendered. The Applicant explained the delay by stating that he succeeded to obtain the written decision from the 1<sup>st</sup> Respondent on 15<sup>th</sup> June 2017. Even if this court were to accept the Applicant's explanation, it took him a further twelve (12) days to lodge the present application.

This court is aware that all disputes relating to nominations were supposed to be concluded at least forty-five (45) days to the election. The Applicant was therefore supposed to have filed and prosecuted his application by 23<sup>rd</sup> June 2017. The reason why IEBC requires the 45 days prior to the election is to enable it verify and print the ballot papers for the respective seats that are on offer during the August 8<sup>th</sup>, 2017 General Elections. Notwithstanding the weighty issues that the Applicant raised in his application touching on his constitutional right to be heard, this court is of the view that the Applicant brought his application before this court when he was too late. The timelines specified in the **Election Act** and the **Constitution** cannot be varied. For all intents and purposes, it can be said that the timelines may as well be cast in stone.

In that regard, the decision in **Ferdinand Waititu –vs- Independent Electoral and Boundaries Commission (IEBC) & Others Civil Appeal No.137 of 2013** is instructive. The court held in regard to timelines set for settlements of electoral disputes:

***“These timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any court for whatever reason. It is indeed the tyranny of time, if we may call it so. That means that a trial court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously...”***

This decision was rendered in respect of timelines in which Election Petitions are supposed to be heard. The reasoning therein equally apply to nomination disputes. Much as this court may sympathize with the predicament that the Applicant finds himself in, this is one case whereby his personal rights will have to give way to public interest which mandates that the General Election must be held within the time specified by the law. This court cannot render any decision that can frustrate the 1<sup>st</sup> Respondent from performing its constitutional mandate to conduct the General Elections scheduled for 8<sup>th</sup> August 2017.

In the circumstances therefore, this court cannot grant the leave sought by the Applicant to institute Judicial Review proceedings in the nature of certiorari. The Applicant came to court too late in the day. He has been caught up by the tyranny of time. The application seeking leave is hereby dismissed but with no orders as to costs. It is so ordered.

**DATED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE 2017**

**L. KIMARU**

**JUDGE**