



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW MISC. APPLICATION NO. 373 OF 2017**

**IN THE MATTER OF AN APPLICATION BY SAFINA PARTY FOR LEAVE**

**TO APPLY**

**FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI MANDAMUS AND PROHIBITION**

**AND**

**THE ELECTIONS ACT 2011**

**AND**

**IN THE MATTER OF THE DECISION BY THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION IN THE COMPLAINT NO. 119 OF 2017 CONTAINED**

**IN THE DECISION DELIVERED ON THE 8<sup>TH</sup> DAY OF JUNE, 2017.**

**AND**

**IN THE MATTER OF THE INDEPENDENT ELECTIONS AND BOUNDERIES ACT**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015**

**AND**

**AND IN THE MATTER OF ARTICLES 90 AND 93 OF THE CONSTITUTION.**

**REPUBLIC.....APPLICANT**

**EXPARTE- SAFINA PARTY**

**VERSUS**

**INDEPENDENT ELECTORAL & BOUNDERIES COMMISSION.....RESPONDENT**

**AND**

**JUDGEMENT**

By a Notice of Motion dated the 27<sup>th</sup> day of June 2017, the ex-parte Applicant herein Safina Party through its director of elections John Wamagata has moved this honourable court seeking the following orders; -

1. That this court be inclined to grant **AN ORDER OF CERTIORARI** to move into this honourable court for the purpose of quashing the decision of the respondent made on the 8<sup>th</sup> day of June, 2017 dismissing the applicant's complaint thereby disqualifying the applicant's candidature for the member of Parliament for Kikuyu Constituency.
2. That this honourable court be inclined to grant **AN ORDER OF MANDAMUS** to compel the 1<sup>st</sup> respondent to consider the applicant for clearance with regard to the August 8<sup>th</sup> General Elections for the Member of Parliament seat for Kikuyu Constituency.
3. That this honorable court be inclined to grant **AN ORDER OF PROHIBITION**, prohibiting the 1<sup>st</sup> respondent from barring the applicant's candidature for Member of Parliament for Kikuyu Constituency.

The application is premised on the grounds set out on the body of the same and its supported by the statutory statement and the verifying affidavit annexed thereto and sworn by John Wamagata who is the director of elections for Safina Party.

The applicant's case is that its candidate for member of parliament for Kikuyu Constituency, withdrew his candidature the last minute and in the circumstances, the party replaced him with Paul Kariuki (the interested party herein). The interested party had wanted to vie for the Gubernatorial seat for Kiambu County before the said replacement.

The deponent to the verifying affidavit avers that he visited Independent electoral and Boundaries Commission headquarters with a view to having them effect the changes and he was advised to write a letter to the chairman of IEBC who has powers to authorize the changes. That he wrote the letter only for him to learn later that their candidate had been disqualified from running as a member of parliament. That he proceeded to the IEBC dispute Resolution Committee and filed complaint no. 119/2017 which was heard and dismissed on 8<sup>th</sup> day of June, 2017.

**THE INTERESTED PARTY'S CASE**

He submitted that the party (Safina Party) called him on 2<sup>nd</sup> June, 2017 and requested him to vie for member of parliament for Kikuyu Constituency, as their candidate had withdrawn, to which he agreed. That he visited the polling station on the same day and at 3pm he was given a go-ahead to present his papers as a member of National Assembly. That he only managed to process the documents at 4.15pm by which time the respondent could not accept them as he was already late and his pleas for more time were not accepted. He argued that as long as he was on the queue, he ought to have been served and that it is his right to vie for a political seat like any other person.

**THE RESPONENT'S CASE**

The Respondent opposed the application based on the facts and the evidence that appears on the statement of facts annexed by the exparte applicant. Counsel for the respondent submitted that Article 88 (1) of the Constitution creates the respondent while Article 88 (4) (d) provide as one of its duties, the process by which parties nominate their candidates. Article 88 (4) (e) gives the Respondent a duty of settlement of all disputes arising from nominations through its dispute resolution committee.

That the decision attacked herein is to the effect that the interested party did not present his original ID to

enable him to be cleared to contest as a member of parliament for Kikuyu Constituency. That by 4pm the interested party did not have his original ID card having forgotten it at the commissioners for oath's offices and that is what informed the returning officer in refusing to accept the papers.

He relied on sections 13 and 16 of Elections Act and Regulation no 12 of the Regulations (General Elections) 2012 that requires the Respondent to issue a Gazette notice to the public giving timelines within which specific activities are to be carried out after a vacancy occurs in the National Assembly or the Senate. That in accordance with that regulation, the Respondent issued Gazette notice no. 2692.

It was submitted that the interested party did not have an original ID and that his name had not been gazetted as running for member of parliament for Kikuyu Constituency and therefore he could not be cleared. The court was also told that according to section 13 (2) of the Elections Act, a political party should not change the name of the person the party has nominated, after the nomination of that person has been received by the commission and the last day for such a change was 10/5/2017.

The court was told that as at 10<sup>th</sup> May, 2017 the interested party's name had been submitted as an aspirant for Gubernatorial position and as such for him to purport to change the position for which he was contending on 20th June, 2017 was null and void and that explains why his name was not on the list.

It was further submitted that the exparte applicant and the interested party were given a chance to be heard before the IEBC Dispute Resolution Committee and they made their submissions. He averred that the returning officer was well guided by rule 43 (2) the Regulations (General Elections) 2012 in invalidating the interested party's papers for failure to have the original ID.

Counsel for the Applicant argued that the court does not have jurisdiction to entertain the application in that the exparte applicant is challenging the merits of the decision which is not a ground for an application Judicial Review. He cited the cases of County Assembly of Nyeri VS Mirichi Kihagi & Another Judicial Review No. 3/2016 and that of Hubai Gedi Abdille Vs. Secretary County Public Board & Another J.R Application no. 271/2014 which sets out the grounds upon which one can succeed in an application for judicial review and submitted. He submitted that the exparte applicant and the interested party had not satisfied those requirements.

### **RESPONSE BY INTERESTED PARTY**

He submitted that an illegality was done to him by the IEBC when it gave him papers at 3pm which left him with little time to sought them out. He also contended that he was not given a fair hearing. He averred that the decision making process was wrong and that the respondent was not fair to him. He blamed the IEBC failure to inform him in good time that his name was not in the system as an aspirant for member of parliament.

### **DETERMINATION**

The court has considered the application and all the other material before it. The exparte applicant is challenging the decision of the IEBC Dispute Resolution Committee, delivered on the 8<sup>th</sup> day of June, 2017. In doing so, the exparte applicant contends that the respondent declined to clear the interested party for the member of parliament for Kikuyu constituency and so far as they are concerned the said decision should be quashed and the respondent be compelled to consider the interested party for clearance with regard to the August 8<sup>th</sup> 2017 General Elections.

What has emerged from the evidence on record and the submissions by the exparte applicant and the interested party is that the interested party latter visited the polling station on 2<sup>nd</sup> day of June, 2017 to present his papers but by 4.15pm, he did not have all the required documents ready. It has not been denied that as at that time he did not have his original ID which is one of the requirement as it's the only sure way to identify a candidate. The explanation he has for it is that the person who was helping him to process the documents had forgotten it in an advocate's office where he had taken the documents to be

commissioned.

Under the regulations (General Elections Rules) 2012, the original identity Card is one of the vital documents that a candidate should present to the returning officer when presenting his papers but in this case, the interested party did not have it at the material time when he was scheduled to present his papers. In fact, in his remarks on form 15, the returning officer has noted that the interested party failed for the second time to provide his original ID.

The interested party and the exparte applicant also complained that the papers could not be accepted as the interested party's name was not in the system as an aspirant for a parliamentary seat for Kikuyu Constituency. As ably submitted by counsel for the respondent, in the gazette notice number 2692, the exparte applicant was supposed to present the names of their candidates before the primaries being on or before 5<sup>th</sup> April, 2017 after which the respondent would publish in the gazette the names of such candidates within 7 days of receipt of the names. It is clear from the record and submission, that the interested party's candidature was a substitute and this was only done at the eleventh hour and therefore his name had not been gazetted as an aspirant for member of National Assembly for Kiambu Constituency.

This court has perused the complaint before the IEBC Dispute Resolution Committee and the decision thereof. The only grievance is that of failure to provide the original ID and returning officers refusal to extend time to the interested party to procure the same. In this regard, gazette notice no. 2697 Vol. CXIX-No. 35 of 17<sup>th</sup> March, 2017 is very clear on the dates and the time of the day when nomination for candidates were scheduled to take place and this is between the hours of eight O'clock in the afternoon and between the hours of two O'clock and four O'clock in the afternoon at the place designated by the commission.

On the issue of the ID, regulation 43 (2) gives the returning officers powers to invalidate nomination papers which have been presented without the requisite documentation. The complaint was dismissed for failure to present the requisite documents together with the nomination papers within the statutory timelines.

The court also notes that the exparte applicant has moved this court by way of Judicial Review. As was held in the case of *RV Kenya Revenue Authority Exparte Yaya Towers Limited (2008) eklr*, the remedy of judicial Review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. The same principle is enunciated in the case of *Municipal Council of Mombasa Vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185/2001*, where it was held;

***“Judicial Review is concerned with the decision making process, not with the merits of the decision itself”.***

In considering an application for Judicial Review, the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the maker took into account irrelevant matters and failed to take into account relevant matters. The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself- such as whether there was or there was not sufficient evidence to support the decision.

In order to succeed in an application for judicial Review, the applicant has to show that the decision or the act complained of is tainted with illegality, irrationality and procedural impropriety.

From the analysis of the evidence and the submissions by the parties, it is very clear in my mind that the exparte applicant and the interested party are challenging the merits of the decision by the Respondent and not process. Though the interested party in his submissions averred that the decision is illegal and that the decision making process was wrong, he did not satisfy this court that this was so.

For the reasons stated over, this court finds that the application has no merits and its dismissed with no orders as to costs.

Dated, Signed and Delivered at Nairobi this 30<sup>th</sup> Day of June, 2017.

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... For the Applicant

..... For the Respondent