



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW NO. 348 OF 2017**

**IN THE MATTER OF AN APPLICATION BY JAMES MWANGI KAMAU FOR ORDERS OF  
CERTIORARI AND MANDAMUS**

**IN THE MATTER OF THE ELECTIONS ACT**

**AND IN THE MATTER OF POLITICAL PARTIES ACT**

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

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**IN THE MATTER OF INDEPENDENT CANDIDATE MEMBER OF COUNTY ASSEMBLY**

**MOLO WARD, MOLO CONSTITUENCY**

**REPUBLIC.....APPLICANT**

**VERSUS**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....RESPONDENT**

**JAMES MWANGI KAMAU.....EX PARTE APPLICANT**

**JUDGMENT**

**[1]** The *ex parte* Applicant, **James Mwangi Kamau** (hereinafter the Applicant), moved the Court under Certificate of Urgency, vide his Chamber Summons dated **15 June 2017**, seeking leave to apply for orders of Certiorari and Mandamus in respect of the decision made by the Respondent on **9 June 2017**. Leave having been granted as prayed, the Applicant proceeded to file his Notice of Motion dated **27 June 2017** on even date seeking the following orders:

**[a]** That pending the hearing and determination of the application, his name be included as an Independent Candidate for the electoral position of Member of County Assembly, Molo Ward, in the forthcoming August 8, 2017 General Elections;

**[b] That pending the hearing and determination of the application, the Respondent be compelled to include his name in the List of Candidates to be published in the Kenya Gazette;**

**[c] That pending the hearing and determination of the application, the leave granted herein do operate as stay to stop the implementation of the impugned decision;**

**[d] That pending the hearing and determination of the application, the Court be pleased to grant such other orders and/or relief as it may deem fit in the circumstances;**

**[e] That the costs of the application be provided for .**

**[2]** In support of the application, the Applicant filed a Supporting Affidavit, in addition to the Statutory Statement and Verifying Affidavit which were filed along with the Chamber Summons dated **15 June 2017**. What can be gleaned there from is that the Applicant is an aspirant for the elective position of Member of County Assembly for Molo Ward as an Independent Candidate. It was his contention that he diligently followed the laid down procedure and met all the requirements for nomination as an Independent Candidate, and subsequently appeared before the Respondent's Returning Officer on **31 May 2017** to present his nomination papers with a view of obtaining clearance to vie. He was however locked out of the process on the ground that he had not complied with all the requisite stipulations.

**[3]** The Applicant explained that when he presented his papers to the Returning Officer, he was alerted by the Returning Officer that his List of Supporters was deficient; and that although he availed a hard copy list as backup for verification, the Returning Officer declined to clear him. He added that this was despite the fact that his list contained more than the requisite number of supporters. Accordingly, being aggrieved with the decision of the Returning Officer, he filed a complaint with the Respondent's Dispute Resolution Committee on **5 June 2017**, being Complaint No. **IEBC/DRC/NM/1502017**.

**[4]** It was further the contention of the Applicant that the Committee did not accord him a fair hearing, and that the entire process was accentuated by ulterior political considerations; and that the decision of the Respondent is unreasonable and a violation of the Constitutional Principles of fair administrative action and the **Elections (General) Regulations, 2012**.

**[5]** The application was opposed by the Respondent on the basis of the five Grounds of Opposition filed herein on **23 June 2017**, namely:

**[a] The application does not lie and is bad in law;**

**[b] The Applicant was accorded a fair hearing; and that no unreasonableness, illegality and/or breach of procedural fairness had been demonstrated to warrant the Court's intervention;**

**[c] The Applicant did not meet the requirements for nomination as an Independent Candidate as required under Regulation 39 of the Elections (General) Regulations, 2012, and therefore the orders of Mandamus cannot issue in the manner sought;**

**[d] The Applicant had not demonstrated any breach of a right to warrant the Order of Certiorari as sought.**

**[e] The application is unnecessary, unwarranted and an abuse of the court process.**

**[4]** The Court has carefully considered the application in the light of the documents filed herein as well as the submissions made herein by the parties in support of their respective positions. It is manifest that, the Applicant having acted in person herein, he jumbled up issues as raised in the Chamber Summons application and the subsequent Notice of Motion. Nevertheless, given the constitutional imperative in **Article 159(2)(d) of the Constitution** that justice be administered without undue regard to technicalities, it is plain that what the Applicant seeks herein are the Orders of Certiorari and Mandamus. Indeed at

Paragraph B of the Statutory Statement, the reliefs sought are set out as hereunder:

[a] An Order of **Certiorari** to issue to remove to this Court for purposes of quashing the entire decision of the Respondent's Dispute Resolution Committee delivered on 9 June 2017 purporting to bar the Applicant from contesting for the position of MCA, Molo Ward as an Independent Candidate.

[b] An Order of **Mandamus** to compel the Respondent to include his name as an Independent Candidate for MCA, Molo Ward in the forthcoming August 8, 2017 General Elections.

Accordingly the issue to determine is whether he has made a good case to warrant the issuance of those orders.

[5] What then are the grounds that an applicant for judicial review should establish? In the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374**, at 401D Diplock, LJ expressed himself thus on the matter:

**“Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’...By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By ‘irrationality’ I mean what can now besuccinctly referred to as “Wednesbury unreasonableness’...it applies to 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...I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”**

[6] The Applicant, in a bid to explain why he filed a complaint to the Respondent's Dispute Resolution Committee, averred that on the **31 may 2017** when he presented his nomination papers to the Respondent's Returning Officer for Molo Ward, the Returning Officer scrutinized his documents and informed him that only 418 of the 600 names on his List of Supporters were qualified to vote. He contended that he explained to the Returning Officer that there was indeed a clerical error made in the process of having his list converted from a hard copy to a soft copy and requested for time to harmonize his list, having been assured that all those who were in the hall by the official closing time would be served t the last person regardless of the time taken.

[7] It was the averment of the Applicant that the Returning Officer acceded to his verbal request for time to harmonize his list and told him to return the following day; but that on the next day, the Returning Officer flatly refused to admit his harmonized List of Supporters and consequently rejected his nomination papers. He felt aggrieved and accordingly filed his complaint as aforesated; contending that he had been locked out of the nomination process unfairly.

[8] There is no question that the Applicant was accorded a hearing by the Respondent's Dispute Resolution Committee, whose decision was as hereunder:

**"Regulation 36(1) of the Elections (General) Regulations, 2012, states that the person delivering a nomination application under Regulation 35 shall at the same time deliver to the Returning Officer, standard A4 sheets of paper bearing the names, respective signatures and electoral numbers of five hundred voters registered in the ward. From the complaint, the Complainant has admitted that the number of supporters he submitted was below the requisite number. Regulation 43(2)(d) of the Elections (General) Regulations, 2012 entitles the Returning Officer to reject the nomination papers of a candidate.**

## Orders

**The Complainant failed to meet the requirement as to the number of supporters and the Complaint is therefore dismissed..."**

[9] With regard to the nomination of Independent Candidates for MCA positions, **Regulation 35 of the Elections (General) Regulations** provides that:

**"An independent candidate at a county assembly member election shall deliver to the returning officer on the day fixed for the nomination of candidates at that election, or an application for nomination in Form 18 set out in the Schedule."**

And **Regulation 36(1)** provides that

**"The person delivering a nomination application under regulation 35 shall at the same time deliver to the returning officer, standard A4 sheets of paper bearing the name, respective signatures and electoral numbers of five hundred voters registered in the ward."**

It is instructive that **Regulation 2 of the Elections (General) Regulations** defined "close of nominations" to mean **"...four o'clock on the last day of nomination for the respective election."**

[10] It is manifest from the foregoing that the Applicant was indeed accorded an opportunity to present his nomination papers and that he did present his nomination papers to the Returning Officer for the respective Ward, and that when the names were verified against the Respondent's data base, some of the names thereon were struck out for the reason that they were not registered voters in the Ward; with the result that his List of Supporters fell below the 500 minimum number to 418 only. The Applicant conceded that this was due to what he called a clerical mistake on the part of his own service providers, in the process of converting his List from a hard copy to a soft version that the Respondent required, and that he was allowed the opportunity to make amends but did not get to present the amended documents with the stipulated timelines. He did not, therefore make it in time for the deadline on the **31 May 2017** and was still awaiting to be served by **7.30 p.m.** long after the time set by **Reg. 2 of the Elections General Regulations**; had expired; consequently it was of no consequence that he availed himself the following morning on **1 June 2017**. To the contrary, it would have been irregular in my view for the Returning Officer to accept his nomination documents after 4.00 p.m. on **31 May 2017**.

[11] It has further been demonstrated, from the evidence placed before the Court, that the Applicant was accorded an opportunity to present his grievance to the Respondent's Dispute Resolution Committee and that he was accorded a hearing and a decision taken dismissing his complaint. In those circumstances, it cannot be said that he was treated unfairly. Neither can it be argued that the decision was illegal or irrational. Indeed in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, it was held thus by the Court of Appeal:

**"Judicial review is concerned with the decision making process, not with the merits of the decision itself: 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 decision maker took into account relevant matters or did take into account irrelevant 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... It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."**

[11] Moreover, it is now trite that an Order of Certiorari will only issue where a decision is made without

or in excess of jurisdiction or where the rules of natural justice have not been complied with, which is not the case herein; and needless to say that in the absence of an Order of Certiorari, an Order of Mandamus cannot issue. Conversely, an Order of Mandamus will only issue to compel the performance of a public duty which is imposed on a person or body of persons by a statute where that person or body of persons has failed to perform the duty to the detriment of the complainant. (see **Kenya National Examinations Council vs Republic, ex parte Geoffrey Gathenji Njoroge & Others [1997] eKLR**)

[12] The foregoing being my view of the matter, it is my finding that the Notice of Motion dated **27 June 2017** is lacking in merit, and is accordingly hereby dismissed with an order for each party to bear own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JUNE, 2017**

**OLGA SEWE**

**JUDGE**