



**REPUBLIC OF KENYA**

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

**JR APPLICATION NO. 353 OF 2017**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....RESPONDENT**

***EX PARTE: NYAMBEGA BELDEN OTISO***

**JUDGMENT**

1. The applicant herein seeks judicial review orders of *certiorari* and *mandamus* against the Independent Electoral and Boundaries Commission (IEBC). He would like the decision of the respondent declining to accept his nomination papers to contest the forthcoming elections for the Gachuba Ward seat in the Nyamira County Assembly under the NARC ticket recalled and quashed. He would also like to have the respondent compelled to receive and accept his nomination papers.

2. I have carefully perused through the affidavit sworn to verify the statutory statement. I note that the same does not give a factual background to the application, in terms of giving a step by step narrative of the steps taken by him upto the point when his nomination papers were rejected. All what he does is to regurgitate the grounds upon which he relies on to seek relief as set out in his statutory statement.

3. A suit by way of judicial review is determined, not on the basis of the oral testimony of the applicant, but rather on submissions made at the bar, founded on facts deposed in the affidavit drawn to support the application for judicial review orders. The grounds upon which the application is brought rest on the facts as set out in the affidavit sworn to verify the statutory statement. The grounds cannot possibly stand without the facts, and, no doubt, no orders can be granted in the absence of facts, for the facts as stated in the verifying affidavit form the foundation of the applicant's case.

4. The procedure as set out in Order 53 of the Civil Procedure Rules envisages that the statutory statement and the verifying affidavit are to be filed at the stage of seeking leave. There is no requirement that upon grant of leave the substantive Motion to be filed under rule 3 be supported by an affidavit, for it is intended by rule 4 that the motion is to be grounded upon the statutory statement and affidavit or affidavits filed with the chamber summons at the leave stage. However, the court may, at the hearing, allow the applicant to file further affidavits, but only if they deal with new matters raised in the affidavits of the respondents and interested parties.

5. I note that upon grant of leave, the applicant filed a motion accompanied by a supporting affidavit. That is contrary to Order 53. The supporting affidavit was filed without leave of court, and in any event it was not the affidavit contemplated by Order 53 rule 4(2). The applicant did not ask at the hearing of his application to have the said affidavit admitted, and I shall therefore pay no regard to it, for it was filed contrary to the set procedure. That being the case, I shall also pay no regard whatsoever to the replying affidavit and the supplementary affidavit as they both address matters raised in the affidavit filed without leave, and not the affidavit filed to verify the statutory statement.

6. On the whole, it is my finding that as there is no proper affidavit to provide a foundation for the orders set out in the statutory statement and to support the grounds therein, I shall dismiss the application before me with costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>TH</sup> DAY OF JUNE, 2017.**

**W. MUSYOKA**

**JUDGE**