



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 285 OF 2017

**IN THE MATTER OF ENFORCEMENT OF HUMAN RIGHTS AND FUNDAMENTAL
FREEDOMS, ARTICLES 3 (A) (B), 20, (1) (2), 21, 22, 23, 24, 38 (3) (C),
47 (1) (2), AND 165 (3) (B) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE ALLEGED VIOLATION OF THE RIGHT TO CONTEST FOR
ELECTIONS AS MEMBER OF COUNTY ASSEMBLY UNDER ARTICLE 38 (3) (C)
AND ARTICLE 193 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED INFRINGEMENT OF THE RIGHT TO FAIR
ADMINISTRATIVE ACTION
ENSHRINED IN ARTICLE 47 AND ARTICLE 10 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF NOMINATION FOR MEMBER OF COUNTY ASSEMBLY IN
GITHUNGURI CONSTITUENCY**

BETWEEN

STEPHEN KIGUTA GICHINGA.....1ST PETITIONER

JOSHUA NJOROGE NJAU.....2ND PETITIONER

ESTHER WANJIRU NDIRANGU.....3RD PETITIONER
EZEKIEL WAIGURU KAMAU.....4TH PETITIONER
BENSON NENE GITHINJI.....5TH PETITIONER
STEPHEN KORIO KANJA.....6TH PETITIONER
WAIGANJO DAVID NGANGA.....7TH PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....1ST RESPONDENT

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

JUDGEMENT

Introduction

Even as the Court seeks to do justice, it cannot be lost to it that despite having a conscience, it is a court of law and not of mercy.[\[1\]](#) It is also bound by the law and more so the Constitution which binds all. Consequently, the constitutional, statutory and applicable regulations governing election nomination processes must apply with equal force so as to effectively serve the desired purpose of guaranteeing a smooth, transparent, fair and credible election process.

Petitioners case

This petition challenges seven decisions rendered by the first Respondents' Dispute Resolution committee upholding decisions made by the first Respondents' Returning officers in which the returning officers declined to clear the nominations sought by the petitioners to contest in their respective wards within Githunguri constituency, in Kiambu County.

The challenged decisions rendered in complaint numbers 70 of 2017, 56 of 2017, 60 of 2017, 52 of 2017, 51 of 2017, 59 of 2017 and 282 of 2017 are annexed to the petitioners' supplementary affidavit filed on 21st June 2017.

The background information is that all the petitioners sought nomination to be cleared to vie as Members of Kiambu County Assembly in their respective wards in the forth coming general elections. Their nominations were declined on various grounds. Save for the sixth Respondent who sought nomination as a member of the Maendeleo Chap Chap Party, the other six petitioners sought nomination as independent candidates. Evidently, the constitutional and statutory tests for clearance either as independent candidates or as party members applied to their applications. Also applicable are the relevant provisions of the Elections (General) Regulations, 2012 and the Elections (General) (Amendment) Regulations, 2017.

I need not emphasize that a person seeking clearance either as a party member or as an independent candidate must satisfy as of necessity all the requisite constitutional and statutory requirements and the provisions in the applicable regulations. This is because the electoral process is grounded on the constitution and the law and regulations enacted to give effect to the said process. Such regulations aim at ensuring a smooth and credible process. Non compliance with any of the requirement leads to disqualification. Therefore, it is incumbent upon persons seeking nomination to familiarize themselves with all the constitutional and statutory requirements and also the applicable Regulations governing the process, because non compliance will inevitably render the nomination sought liable to rejection.

All the petitioners were disqualified for non compliance with either the regulations or the law as shown below. An examination of the reasons offered will help in determining whether the rejections were founded on valid grounds and whether there are grounds upon which this court to allow this petition:-

i. The first petitioners proposer was a member of the Jubilee Party, yet he sought to contest as an independent candidate. It is important to mention that Regulations 35, 38, 39 of the Elections (General) Regulations 2012 and Section 16 of the Elections (General) (Amendment) Regulations, 2017 govern the nomination of independent candidates and political party candidates.

ii. The second petitioner failed to raise the required number of supporters. Section 39 of the Elections (General) Regulations 2012 requires that the nomination form must be signed by a proposer and a seconder who shall be voters registered in the respective electoral areas but who shall not be members of any political party. Article 193 (1) (c) of the constitution states that a person is eligible for election as a member of a county assembly if the person is either nominated by a political party or an independent candidate supported by at least 500 registered voters in the ward concerned.

iii. The third, fifth, sixth and seventh petitioners failed to submit their papers within the prescribed time frame. Regulation 2 Elections (General) Regulations 2012 defines close of nominations to mean four o'clock in the afternoon of the last nomination day for respective elections. In this regard, the committee was guided by the decision rendered by the Supreme court in Raila Odinga & 5 Others vs IEBC & 3 Others[2]

iv. The fourth petitioner failed to comply with regulation 36.

Counsel for the petitioners submitted that the grounds offered are unreasonable, made in bad faith, unfair, abuse of the powers and that the returning officers denied the petitioners the opportunity to defend themselves. He cited violation of the petitioners rights to legitimate expectations.

Respondents Response

The petition is strenuously opposed. On record is the Relying affidavit of Douglas Bargorett, the first Respondents' Director of Legal affairs filed on 27th June 2017. She avers that article 193 (1) of the constitution provides for qualifications for elections as a member of county assembly, while article 193 (2) of the constitution and section 25 (2) of the Elections Act[3] makes provision for disqualification from being elected as a member of county assembly and section 22 (1) (a) and 25 of the Elections Act[4] and section 8 of the Election Laws (Amendment) Act[5] provide for qualifications for nomination. She also averred that independent candidates must meet the threshold set out under article 85 (a) (b) (ii) of the constitution.

Also cited are regulations 35, 38 and 39 of the Elections (General) Regulations 2012 and section 16 of the Elections (General) Amendment Regulations, 2017 which govern nomination of independent candidates and political party candidates. She averred that all the complaints were dismissed on valid grounds under the law.

On jurisdiction

Article 165 (6) of the constitution provides that "The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court." Article 165 (7) provides that "For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

On the scope of the jurisdiction of this court under Article 165 (6) & (7) of the constitution, I strongly opine that one of the fundamental principles in this regard is the issuing of prerogative orders in the form

of writs of *certiorari*, *mandamus* and *prohibition*. Such writs can be availed only to stop, quash, remove, adjudicate on the validity of judicial acts. The expression “judicial acts” includes the exercise of *quasi-judicial* functions by administrative bodies or other authorities or persons obliged to exercise such functions. Atkin, L.J. thus summed up the law on this point in *Rex v. Electricity Commissioners*^[6]

“Whenever anybody or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially acts in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.”

It is important to point out that in granting a writ of *certiorari* the superior court does not exercise the powers of an **appellate** tribunal. It does *not review* or *reweigh* the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The offending order or proceeding so to say is put out of the way as one which should not be used to the detriment of any person.^[7]

The supervision of the superior court exercised through writs of ‘*certiorari*’ goes on two points, as has been expressed by Lord Sumner in *King vs. Nat Bell Liquors Limited*.^[8] One is the area of inferior *jurisdiction* and the *qualifications* and *conditions* of its exercise; the other is the *observance of law in the course of its exercise*. These two heads normally cover all the grounds on which a writ of ‘*certiorari*’ could be demanded. In fact there is little difficulty in the enunciation of the principles; the difficulty really arises in applying the principles to the facts of a particular case.

‘*Certiorari*’ may lie and is generally granted when a court, a tribunal or a body has *acted without* or *in excess* of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceeding or from the absence of some preliminary proceeding or the court or tribunal or body itself may not be legally constituted or suffer from certain disability by reason of extraneous circumstances.^[9] I have examined the relevant provisions of the law and I find that the first Respondents' Dispute Resolution Committee acted within its legal mandate. Needless to say that its jurisdiction has not been challenged in this petition.

Such writs as are referred to above are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to me that it is not so wide or large as to enable the High Court to convert itself into a court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or the order to be made.^[10] The foregoing passage indicate with sufficient fullness the general principles that govern the exercise of jurisdiction in the matter of granting writs of ‘*certiorari*.’

In *Minerva Mills Ltd. vs. Union of India*,^[11] the court held that "the power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality." I am of the view that if there is one feature of our constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review, and it is un-questionably, to my mind, part of the basic structure of the constitution. The High Court's supervisory jurisdiction in relation to lower judicial agencies, is a recognized practice in Kenya; one indeed founded on the express terms of the Constitution of Kenya, 2010, Article 165(6) of which thus provides: “The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

The meaning of the term ‘supervision’ has not been formally set out; and thus its essence is to be drawn from the lexicon. The Concise Oxford English Dictionary thus defines the word ‘supervise’ as to “observe and direct the execution of (a task or activity) or the work of (a person).”

Judicial review is a form of court proceeding, in which the judge reviews the lawfulness of a decision or action, or a failure to act, by a public body exercising a public function. It is only available where there is no other effective means of challenge. Judicial review is concerned with whether the law has been correctly applied, and the right procedures have been followed. In order to succeed the claimant will need to show that either: A public body is under a legal duty to act or make a decision in a certain way and is unlawfully refusing or failing to do so.

Judicial review is a judicial invention to ensure that a decision by the executive or a public body was made according to law, even if the decision does not otherwise involve an actionable wrong. The superior Courts developed their review jurisdiction to fulfill their function of administering justice according to law. The legitimacy of judicial review is based in the rule of law, and the need for public bodies to act according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the rule of law. As with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the paramountcy of the law.

Broadly, in order to succeed, the applicant will need to show either:-

a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or

b. a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.

Mandamus is a judicial command requiring the performance of a specified duty which has **not been performed.** Originally a common law writ, mandamus has been used by courts to review administrative action.^[12] Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either.**^[13]

Determination

The mandate of IEBC to conduct nominations and resolve nomination disputes is provided for under the constitution, the Elections Act and the I.E.B.C Act. There is no allegation that the first Respondent breached either the constitution or the law in the entire process. There is no evidence that the first Respondent did not follow the provisions in the guidelines. None of the guidelines has been challenged as unconstitutional. One would wonder how an election process would be conducted without adherence to guidelines.

I have carefully considered the provisions of the constitution, the law and the regulations cited above and reasons offered for disqualifying each of the petitioners and I am persuaded that the disqualifications were all grounded on valid grounds premised on the constitutional and statutory provisions and also the applicable regulations. I reiterate that it is incumbent upon persons seeking nomination to not only comply with the constitutional and statutory requirements but also to adhere to the set guidelines and regulations including observing time frames and submitting the prescribed documents completed as required.

A decision made by a quasi-judicial body or an administrative decision can only be challenged on grounds of **illegality, irrationality and procedural impropriety.** A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or *ultra vires* and outside the functions of the first Respondent nor has it been shown to be irrational or procedurally wrong.

The grant of the orders or certiorari, mandamus and prohibition is discretionary. The court is entitled to

take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

Upon analysing the relevant constitutional provisions, the relevant statutory requirements and the applicable regulations and upon due consideration of all the material before me and upon considering the arguments advanced by both sides, I find that the petitioners have not satisfied the threshold for this court to grant orders sought.

The effect is that the orders sought are hereby refused and this petition is hereby dismissed with costs to the first Respondent.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this 29th day of June 2017

John M. Mativo

Judge

[1] Yusuf Gitau Abdalla vs. The Building Centre (K) Ltd & 4 Others, Petition 23 of 2014

[2] {2013}eKLR

[3] No 24 of 2011

[4] Ibid

[5] Act No 1 of 2017

[6] 1924-1 KB 171 at p.205 (C)

[7] Per Lord Cairns in – ‘Walsall’s Overseers v. L. & N. W.Rly. Co (1879) 4 AC 30 at p. 39 (D)

[8] (1922) 2 AC 128 at p. 156 (E)

[9] See ‘Halsbury, 2nd edition, Vol. IX, page 880.

[10] See Veerappa Pillai v. Raman and Raman Ltd, AIR 1952 SC 192 at pp. 195-196 (I)

[11] (1980) 3 S.C.C. 625. For a critical account see Upcndia Baxi, "A Pilgrim[^] Progress : The Basic Structure Revised**", in *Courage, Craft and Contention : The Supreme Court in the Eighties* 64-110 (1985).

[12] W. GELLo1RN & C. BYSE, *Administrative & Review Law, Cases and comments* 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[13] *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review*, 53 GEO. IJ. 19, 25-26 (1964).