REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 291 OF 2017

In the matter of Alleged contravention of Rights and Fundamental Freedoms under articles 38 (3), 47 and 48 of the constitution of Kenya 2010

and

In the matter of Fair Administrative Action Act

and

In the matter of Doctrine of Legitimate Expectation

Between

WYCLIFFE KHISA
LUSAKA.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....RESPONDENT

JUDGEMENT

Petitioners case

This petitioner states that he is an aspiring independent candidate seeking to vie for Member of County Assembly for Marakaru/Tuuti Ward in Kanduyi Constituency in Bungoma County. He claims that he fully complied with the requirements for an independent candidate and that he submitted his documents to the Respondent but the Respondent declined to clear him due to "a mistake that was created by the Respondents in ability to sort out its I.T. System before the clearance period lapsed."

*His complaint was dismissed by the I.E.B.C. Dispute Resolution Committee in a decision rendered on 8th June 2017 in complaint no. **143** of 2017. This petitioner seeks to nullify the said decision and to compel the Respondent to issue the petitioner with a clearance certificate to contest in the forth coming elections in the said ward.*

The petition is opposed. On record is the Replying affidavit of Gregory Odhiambo Ouko filed on 19th June 2017. He was the returning officer for the said ward. He received nomination papers submitted by the petitioner, but upon scrutinizing for compliance, he discovered that the number of supporters did not meet the threshold of 500 required under the constitution. Consequently, he rejected the petitioners nomination papers.

He also averred that the IEBC I.T. system was operational all the time and that they cleared candidates who complied with the requirements. He also stated that the petitioner attempted to present his papers out of time but was barred. Hence, the decision rendered by the IEBC Dispute Resolution committee was grounded on the law.

Analysis of the law and the facts

Both parties filed written submissions which I have carefully considered. I have also considered the affidavit evidence filed by both parties.

The I.E.B.C draws its mandate from clear provisions of the constitution, the I.E.B.C. Act and the Elections Act. Also, there are regulations that govern the nomination of candidates. It follows that the constitutional and statutory tests for clearance either as independent candidates or as party members apply to the petitioners nomination. 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 to avoid inevitable rejection of their nomination papers.

*Evidently, the petitioners' application for nomination was disqualified for non compliance with the law and the regulations. An examination of the reason(s) offered will help in determining whether the rejection was founded on valid legal grounds and whether there are grounds upon which this court to allow this petition. The decision rendered in complaint number **143** of 2017 in which the petitioner was the complainant clearly shows that the petitioner did not have the requisite number of supporters which rendered his nomination papers invalid.*

*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. I need not emphasize that this is a constitutional requirement and it binds all.*

*Also relevant is Regulation **36 (1)** of the Elections (General) Regulations, 2012 which provides that the person delivering nomination application to the Returning officer shall at the same time deliver standard **A4** sheets of paper bearing names, respective signatures and electoral numbers of fine hundred voters registered in the ward.*

*Regulation **43 (2) (d)** of the Elections (General) Regulations, 2012 provides that a returning officer shall hold a nomination paper invalid on the grounds that so many supporters as would reduce the number of qualified supporters to less than the required number of supporters are not qualified to be supporters.*

*In my view, it is evident that the petitioner did not satisfy the above regulations and the constitutional requirement prescribed under article **193 (1) (c)** of the constitution, hence his papers were validly rejected.*

What is the threshold for granting Judicial Review orders

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**[1]***

> *"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.[2]

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.**[3]*** 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.[4] 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.[5] 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*,[6] 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.[7] 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**.[8]

I am not persuaded that the petitioner has established a case for granting of judicial review orders.

Determination

The mandate of IEBC to conduct nominations and resolve nomination disputes is provided for under the constitution, the Electrons Act and the I.E.B.C Act. There is no allegation that the Respondent beached either the constitution or the law in the entire process. There is no evidence that the 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 the petitioner and I am persuaded that the disqualification was premised 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 of 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 petitioner has not satisfied the threshold for this court to grant orders sought. This petition has no merits at all.

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

Orders accordingly.

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

John M. Mativo

Judge

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

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

[3] (1922) 2 AC 128 at p. 156 (E)

[4] See'Halsbury, 2 nd edition, Vol. IX, page 880.

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

[6] (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).

[7]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.

[8] 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).