



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

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW APPLICATION NO. 331 OF 2017**

**REPUBLIC .....APPLICANT**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...1<sup>ST</sup> RESPONDENT**

**THE RETURNING OFFICER LAIKIPIA COUNTY.....2<sup>ND</sup> RESPONDENT**

**EX-PARTE SAMWEL IRUNGU KABUCHWA**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 15<sup>th</sup> June, 2017, the *ex parte* applicant herein **Samwel Irungu Kabuchwa**, seeks an order of certiorari directed to the 1<sup>st</sup> Respondent, quashing the decision dated 6<sup>th</sup> June, 2017 in Dispute Resolution Committee Complaint No. 24 of 2017, dismissing the *ex parte* applicant's complaint. He also sought an order prohibiting the 1<sup>st</sup> Respondent from implementing and action on the same decision. Also sought was an order of *mandamus* compelling the 2<sup>nd</sup> Respondent to receive the applicant's nomination papers out of time. As is the norm, there was also a prayer for costs.

**Applicant's Case**

2. According to the applicant, an aspirant for the Senate Seat for Laikipia County in the 8<sup>th</sup> August, 2017, on 29<sup>th</sup> May, 2017 he presented his nomination papers to the 2<sup>nd</sup> Respondent with a list of 2604 supporters but his papers were rejected at 3.15 pm by the Respondent on the grounds that only 1431 were registered as voters in the County.

3. It was averred that the applicant was permitted by the 2<sup>nd</sup> Respondent to seek 569 more supporters to top up the 1431 earlier approved in order to reach the threshold of 2000 supporters. However when the applicant returned to the nomination venue at 4.26pm the 2<sup>nd</sup> Respondent was nowhere to be found and could not be reached on cell phone till 5.00pm when she informed the applicant that he was time barred and his papers could not be received.

4. It was the applicant's case that by her action, the 2<sup>nd</sup> Respondent created a legitimate expectation on the applicant that upon coming back his papers would be received and he would be cleared to run for the said seat. The applicant therefore contended that he was unfairly locked out of the race hence the decision

was unfair.

5. Though the applicant filed a complaint with the 1<sup>st</sup> Respondent's Dispute Resolution Committee in claim no. 24 of 2017 vide a verbal ruling of 6<sup>th</sup> June, 2017, the same was dismissed. To the applicant the 1<sup>st</sup> Respondent failed to consider and appreciate the applicant's explanation for arriving at the venue at 4.26 while the 1<sup>st</sup> Respondent failed to justify why she left the venue hurriedly in violation of the applicant's right to fair administrative action under Article 47 of the Constitution as well as his rights under Article 38(3)(c) of the Constitution.

6. In his submissions in support of the application **Mr Abuor**, learned counsel for the applicant, contended that the decision of the Committee was unreasonable as it failed to consider that the 2<sup>nd</sup> Respondent had exercised her discretion in the matter which created a legitimate expectation in favour of the applicant.

7. He therefore prayed the orders sought be granted.

### **Respondent's Case**

8. In response to the application, the 1<sup>st</sup> Respondent filed the following grounds of opposition;

**1. That the ex parte applicant has not demonstrated that the decision by the 1<sup>st</sup> Respondent was arrived at unfairly, unprocedurally and/or was biased.**

**2. That the ex parte applicant is not per se challenging the process before the 1<sup>st</sup> Respondent.**

**3. That the ex parte applicant has admitted that he was time barred as he arrived at the nomination venue on 29<sup>th</sup> May 2017 at 4.26pm when the station had already closed at 4.00pm as per the gazetted time.**

**4. That the ex parte applicant is basically appealing against the decision of the 1<sup>st</sup> Respondent and this Honourable Court ought not to entertain the appeal which is disguised as judicial review.**

9. **Mr Muchoki** learned counsel for the Respondents submitted that the Gazette Notice No 2695 is clear that the papers were to be produced between 8-1pm and 2-4pm. Before then the applicant had attended the pre-nomination meeting at which he was made aware of the requirements yet he did not comply therewith.

10. It was submitted that the applicant was only informed to bring the names and that there was no evidence that the time for nomination was extended for him to do so. In any case the Returning Officer had no power to extend time in light of the fact that the system automatically shut down at 4.00pm and could not be reopened by the Returning Officer.

11. In the circumstances it was submitted that the decision of the Committee was not unfair.

### **Determination**

12. I have considered the application filed herein and the submissions made herein.

13. In this case, it is clear that the reason why the applicant's papers were rejected was because he did not have the requisite number of supporters to support his nomination. According to him, he was informed of this mishap at 3.15 pm which he corrected and returned to the venue at 4.26pm by which time the Returning Officer was nowhere to be seen and it was not until 5.00pm that he managed to trace her on phone when the sad news was transmitted to him that he was time barred.

14. Regulation 50(4) of the *Elections (General) Regulations* provide as hereunder:

***A returning officer may extend the hours of nomination at the electoral area where nomination has been interrupted and shall, where nomination started late, extend the hours of nomination by the amount of time which was lost in so starting late.***

15. Therefore a Returning Officer is only entitled to extend the hours of nomination in cases where the process has been interrupted or where the process started late. In other words the discretion is exercisable in circumstances beyond the control of the candidate(s). It however does not apply where the issue is failure by a candidate to adhere to the rules and regulations for nomination.

16. Since no other provision that permits the extension of time beyond 4.00pm has been cited to me, it cannot be successfully argued that a legitimate expectation was created in favour of the applicant that the time would be extended. According to Gazette Notice 2697 of 17<sup>th</sup> March, 2017:

***The days for nomination of political parties candidates and independent candidates for the Senate will be on Sunday, 28<sup>th</sup> May 28, and Monday, 29<sup>th</sup> May 3, 2017 and nomination papers shall be delivered by the candidates to the respective Returning Officers between the hours of eight o'clock in the morning and one 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.***

17. In this case it is not contended that the nomination process started late or that the process was interrupted. To the contrary the failure by the applicant to present his papers within the prescribed timelines was due to the anomaly in the eligibility of his supporters. I agree with the opinion of the Supreme Court of India in **Arikala Narasa Reddy vs/ Venkata Ram Reddy Reddygari & Another Civil Appeal Nos. 5710-5711 of 2012** that:

**“It is a settled legal proposition that the statutory requirements relating to election law have to be strictly adhered to for the reason that an election dispute is a statutory proceeding unknown to the common law and thus, the doctrine of equity, etc. does not apply in such dispute. All the technicalities prescribed/mandated in election law have been provided to safeguard the purity of the election process and courts have a duty to enforce the same with all rigours and not to minimize their operation. A right to be elected is neither a fundamental right nor a common law right, though it may be very fundamental to a democratic set-up of governance. Therefore, answer to every question raised in election dispute is to be solved within the four corners of the statute.”**

18. In this case the applicant does not contend that the 2<sup>nd</sup> Respondent extended the time for him past 4.00pm. Rather, his contention is that he was permitted by the 2<sup>nd</sup> Respondent to top up the deficiency occasioned by the ineligibility of some of his supporters. In my view, even if this position was correct, that permission does not necessarily amount to extension of time past the gazetted time more so when it is not stated what the period of the extension was. A contrary finding would mean that such a candidate would even be permitted to scout for the top up for an indefinite period a situation which would render the timelines prescribed under the electoral law superfluous. As was held by the Court of Appeal in **Ferdinand Waititu vs. Independent Electoral and Boundaries Commission, (IEBC) & Others, Civil Appeal No. 137 of 2013:**

***“These timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any Court for whatever reason. It is indeed the tyranny of time, if we may call it so. That means a trial Court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously...”***

19. In other words to grant the orders sought herein would lead to an absurd situation.

20. In these circumstances it is my view that legitimate expectation cannot be successfully invoked since

it is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate “in the sense of an expectation which will be protected by law”. See **R vs. Department for Education and Employment, ex p Begbie [2000] 1 WLR 1115, 1125C-D**. In other words the doctrine of legitimate expectation based on considerations of fairness, even where benefit claimed not procedural, should not be invoked to confer an unmerited or improper benefit. See **R vs. Gaming Board of Great Britain, ex p Kingsley [1996] COD 178 at 241**.

21. As was held in **Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited HCMISC. Civil Application No. 359 of 2012**:

**“...the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a particular manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law.”**

. 22. This Court exercising its judicial review jurisdiction does not normally interfere with the exercise of discretion unless it is shown that (1) there is an abuse of discretion; or (2) the decision-maker exercises discretion for an improper purpose; or (3) the decision-maker is in breach of the duty to act fairly; or (4) the decision-maker has failed to exercise statutory discretion reasonably; or (5) the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; or (6) the decision-maker fetters the discretion given; or (7) or the decision-maker fails to exercise discretion; or (8) the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323**.

23. In this case there is no material placed before me on the basis of which I can find that the 1<sup>st</sup> Respondent’s Dispute Resolution Committee’s decision fell under the aforesaid categories.

24. In the premises I find no justification to interfere with the decision of the said Committee.

25. Consequently, the Motion dated 15<sup>th</sup> June, 2017 fails and is dismissed but due to non-compliance with directions of the Court with respect to submission of soft-copies of the filed documents there will be no order as to costs.

26. It is so ordered.

**Dated at Nairobi this 28<sup>th</sup> day of June, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Abuor for the applicant***

***Mr Muchoki for the Respondent***

**CA Mwangi**