



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. APPLICATION NO. 370 OF 2017

**IN THE MATTER OF AN APPLICATION BY DR. SHEM ODONGO OCHUODHO FOR
ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES
1,2,3,10,19,20,21,22,23,27,32,36,38,47,48,50 OF THE CONSTITUTION OF KENYA AND**

IN THE MATTER OF SENATORIAL ELECTIONS FOR HOMA BAY COUNTY AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT

AND ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLICAPPLICANT

VERSUS

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

MICHAEL KOSGEI

(RETURNING OFFICER HOMA BAY COUNTY).....2ND RESPONDENT

AND

SHEM ODONGO OCHUODHO.....EX PARTE APPLICANT

JUDGMENT

Introduction

1. The general elections in Kenya are constitutionally scheduled for 8 August 2017. They include elections to the Senate. The elections are regulated by the Constitution and the Elections Act, No.24 of 2011 ('the Act'). The elections are to be managed by the Independent Electoral & Boundaries Commission ('the Commission') established in accordance with Article 88 of the Constitution and the

Independent Electoral and Boundaries Commission Act, No. 9 of 2011.

2. In pursuance of its mandate and in accordance with the Act and the regulations made thereunder, the Commission compiled a time-table which regulates, *inter alia*, the submission of certain documents and necessary payments to the Commission by specified dates and times. Compliance with the time-lines would secure an independent candidate or a candidate nominated by his political party the right to participate, as a candidate in the elections pursuant to Article 38(3)(c) of the Constitution. The Commission caused the time-table for the elections to be published in the Kenya Gazette on 17 March 2017. Of relevance to the instant application is Gazette Notice No. 2695 intitled *Parliamentary Election For Members of the Senate*.

3. The Ex Parte Applicant (the Applicant) who is a citizen of Kenya, was and still is desirous of contesting the Senatorial Election for the County of Homa Bay.

Narrative

4. It is common cause that the Commission set the cut-off date and time for the submission of nomination papers of intention to contest the senatorial elections and the deposit of necessary payments at 1600hrs on 29th May 2017.

5. The gazette notice of 17 March 2017 was specific. The candidates were to avail their documents between the hours of eight o'clock in the morning and one o'clock in the afternoon, and then between the hours of two o'clock and four o'clock in the afternoon at the place designated by the Commission. The designated place was Homa Bay town.

6. On 28 May 2017, intending to comply with the time-table but still in Nairobi some odd hundreds of kilometres away, the Applicant dispatched his representative with his documents. He also gave his representative the cash to effect payment of the prescribed fees.

7. The Applicant's representative appeared before the 2nd Respondent on the afternoon of 29 May. He was ready to present the documentation. All was well, but not the payment. The Respondents required a bankers draft in the Commission's name. Not cash. Not any other medium of payment. Upon being so informed, the representative informed his principal. The Applicant then anxiously spent time on the phone still trying to urge the 2nd Respondent to accept an alternative mode of payment. The 2nd Respondent flatly declined. Frantically, the Applicant through his representative sought to obtain a banker's draft from the local banks but was not successful and had to then take a 20 minute ride to try and get the draft from elsewhere. When finally the cheque was available, time was also up. The cut-off time had struck and the Applicant was locked out.

8. Undaunted, the Applicant waited to make his case to the Commission's dispute resolution committee and ultimately did so on or about 1 June 2017.

9. Before the Commission, the Applicant complained that he had been unfairly treated and unfairly denied the chance to be on the ballot as a senatorial aspirant. He complained that he had been misled that he would present his nomination papers after the 29th of May. He complained that he had been misled that he could deposit the prescribed fees by cash or banker's draft. He complained that the 2nd Respondent gave him the false hope by assuring his representative that though late he could present his nomination papers and deposit the secured bankers draft the next morning at 0700 hours, only for the Respondents to turn around. The Applicant swore an affidavit to like effect. His affidavit also contained a lot of information as availed to him by the representative.

10. The Commission heard the Applicant and dismissed the Complaint. The Commission was clear that the Applicant was non compliant and had also presented his documentation after the cut off time. The dismissal verdict prompted the Applicant to launch the instant application.

Arguments in court

11. Dr John Khaminwa urged the Applicant's case before me.

12. Appreciating that the Applicant had been time barred, counsel heaped the blame on the Respondents whom he asserted had assured the Applicant that payment could be made in cash only to turn around at the last minute. Counsel submitted that the Applicant did all it could to secure the banker's draft in time but only succeeded after the time had lapsed.

13. Referring to the 2nd edition of Michael Supperstone's treatise "*Judicial Review*" at page 7, Dr Khaminwa submitted that where there were timelines and time limits the courts and thus other decision makers were duty bound to be flexible. Counsel also referred to the 10th edition of the treatise *Administrative Law* by Wade & Forsyth at pages 420-1 for the proposition that there was always need for flexibility and preservation by decision makers. It was counsel's contention that in failing to extend time, the Respondents had acted in an irrational and unreasonable manner and contrary to the Applicant's legitimate expectation. According to Dr Khaminwa, time should never be an obstacle at all.

14. Mr R. Amollo, who also appeared for the Applicant alongside Dr Khaminwa, added that a quick look at the Applicant's Further Affidavit of 23 June 2017, revealed how the Applicant had desperately sought to comply and also convince the 2nd Respondent to accept the payment. Counsel pointed out that it was important to take note of the very short notice the Applicant was given on Sunday the 28 May to avail himself before the 2nd Respondent the next day.

15. According to Mr Amollo, the Commission had acted irrationally in dismissing the complaint before it and failing to extend time for the Applicant to present his nomination papers. Counsel referred the court to the case of **R v National Water Conservation & Pipeline Corporation & 11 Others [2015]eKLR** where the English decision of **Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 K. B 223** was quoted with approval for the proposition that an irrational decision was one which was 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.

16. Mr V. Obondi attorned for the Respondents.

17. Mr. Obondi insisted that the Respondents had no alternative but to apply the Constitution and the law and that, in the instant case, in declining to extend time the Respondents were simply applying the provisions of the Act.

18. According to Mr Obondi, Regulation 29 of the Elections (General) Regulations was very specific that the prescribed fees was to be paid by banker's draft. Regulation 43(g) on the other hand prescribed the need to comply with the time lines or be locked out. Counsel submitted that the Applicant was aware of the requirements as well as the timelines but simply refused or neglected to comply and now only had himself to blame and not the Respondents who had simply applied the law.

19. Mr Obondi further submitted that the Commission's action in failing to extend the time for the Applicant was neither ultra vires nor irrational and the evidence before the Commission could not have led to a different decision.

Analysis and Determination

20. The urgent application as launched by the Applicant effectively seeks an edict to force the Respondents to accept the Applicant's nomination papers out of time and thereafter to treat the Applicant like all the other parties who fully complied with the rules. The Applicant seeks to have the Commission's decision reviewed and set aside through judicial review remedies. It is the conduct of the Respondents, in rejecting the Applicant's nomination papers, that was copiously attacked by the Applicant. According to counsel for the Respondent, however, the Applicant's misfortune of being barred

from participating in the polls was self invited.

21. There is no controversy that a time table had been established and that the requirements were statute-set. There is further no controversy that the Applicant was aware of the time table as well as the requirements. There was a gazette notice and a pre-nomination day meeting was convened and the Applicant was represented.

22. The evidence before the Commission was also that the 2nd Respondent had convened a pre-nomination day meeting and all the nominees were briefed and a checklist given to them. The Applicant must be taken to have been aware of the nomination requirements as well as the time-lines.

23. In these respects, it is relevant to make reference to the gazette notice which set the time lines. The same gazette notice also drew the candidates' and their representatives' attention to the requirements under the Election (General) Regulations ("the Regulations") which sets out the nomination requirements as well as the necessity to comply with the time lines lest one is disqualified. Gazette Notice No 2696 urged the candidates and their representatives to take note of Part VI of the Regulations and within this Part is inscribed Regulation 29. Regulation 29 reads as follows:

29. An application for nomination for candidature at a Senate election shall be accompanied by a non-refundable nomination fee, in banker's draft, of—

a. twenty-five thousand shillings for a candidate who is a youth, woman or person with disability; and

b. fifty thousand shillings for any other candidate. [emphasis added]

24. Pellucidly, the Applicant knew about the requirement that payment could only be through a banker's draft. The contention that the applicant was misled by the 2nd Respondent does not appear to hold much sway. Indeed, in their telephonic tete-a-tete, the 2nd Respondent reminded the Applicant about the deadline. The 2nd Respondent also appeared firm that no other mode of payment was acceptable. There was no indication that the 2nd Respondent had previously indicated otherwise. The Applicant did not also so suggest in the conversation, giving credence to the inference that the 2nd Respondent did not urge any candidate to show up with cash. Absent any independent evidence to the contrary it must be taken that the Applicant always knew that the payment was by banker's draft.

25. Focus should thus be on the question whether that the Respondents made a rash, irrational and unreasonable decision when they failed to extend time and ultimately dismissed the Applicant's complaint that it was unfair not to extend time.

26. Dealing with a similar issue as to electoral timetables and timelines, this court in **Harun Mwadali Mwaeni v Independent Electoral & Boundaries Commission & Another** [2017]eKLR, stated as follows

[37] The IEBC as well as the Elections Act (see ss. 13-19,31-35 & 74) imposes timelines, timetables and deadlines within which certain things must be done to enable the IEBC to properly prepare the election. The IEBC is constitutionally bound to deliver free and fair elections. The citizenry expects nothing short of this: see Articles 38(2) and 81(e) of the Constitution. If timelines or time-tables and deadlines are not adhered to it may be impossible to conduct orderly elections.

[38] The purpose consequently of timelines, timetables and cut-off dates/times whether imposed by the IEBC or by law, is to facilitate the smooth running of the election process. It allows for orderly elections. It allows for all parties to prepare for the elections. The IEBC is able to announce the contesting political parties and the candidates. The IEBC is also able to prepare and distribute ballots. The planning and preparation is rather infinite but may only be achieved

with success if there are time-lines.

[39] On the other hand the citizenry and especially the voter is also timeously informed of everything he or she has to be aware of before casting his vote, including the ultimate candidates who launch campaigns before him or her.

[40] The IEBC time-lines consequently expect strict adherence and in determining whether non-compliance may be condoned, the IEBC (and the court for that matter) has to reflect on the purpose of the time-lines, which I have sought to delimit in the three preceding paragraphs.

[41] The general rule, in my view, ought to be that there should be no condonation where there is non-compliance, for the simple reason that the public would favour an orderly election which may only be achieved if there is adherence to the time-lines. Condonation may however be availed in certain circumstances.

[42] Condonation ought to be entertained as constitutional principles and values would dictate as much. Essentially, constitutional values encourage enfranchisement rather than disenfranchisement. Allowing a minimal time difference may only encourage such a value, while an inflexible approach will not. The IEBC as well as the court ought to adopt an approach which favours enfranchisement rather than disenfranchisement. The circumstances where condonation is allowed however ought to be exceptional, otherwise it may end up as a free for all and the result would be a disorganized and shambolic electoral process. Cogent evidence of sabotage or kidnapping of the candidate may serve as good examples in these respects, but an unforeseen storm lasting a day may not.

[43] Where there are established exceptional circumstances then a tolerant approach is required of both the IEBC and the court

27. I have quoted extensively from the *Harun Mwadali Mwaeni*'s case as I see no reason to depart from my earlier reasoning. I must reaffirm the position that the court and thus the Commission must be flexible when dealing with timelines. The reason is that whilst the purpose of pre-election timetables and timelines are appreciated, a cautious consideration must always be given when a party seeks condonation and thus extension where there has been no compliance for the simple reason that the court and thus the Commission must seek to assist participation in elections and not disenfranchisement. The court or the Commission would simply be promoting the Bill of Rights where it so proceeds.

28. In cautiously approaching the situation the court or the Commission looks out for exceptional situations or circumstances which led to the non-observance. This ensures that the timelines or timetables do not hinder the exercise of political rights unnecessarily. At the same time, it also ensures that electoral timelines and timetables are not altered at the whims of individuals. It further ensures that the timelines or timetables do not simply end up as marquee inefficient and useless tools intended to satisfy a statutory requirement that they be published.

29. There was indeed non compliance and delay in the instant case.

30. The reason advanced was that the banker's draft was not ready until after the time had expired. There is evidence that the banker's draft was ready well over one and a half hours after the time had expired.

31. The Commission adopted a specific approach while rejecting the Applicant's complaint on 7 June 2017. In its impugned decision of 7 June 2017, the Commission appreciated that it could extend time. It appreciated that it could condone non compliance with the timelines set. It was ready to be flexible but only upon reason. The Commission stated as much when in its decision of 7 June 2017 it, inter alia, stated that "*.....The sole issue for determination is whether the delay was excusable....*". The question was whether the Applicant could be excused and the Commission was not convinced with the reasons advanced for the delay.

32. In my view, the refusal to accept the documents and payment was not unreasonable or irrational and contrary to the aforesaid constitutional values.

33. The Applicant had always been aware of the requirements. The Applicant was also duly reminded of the requirements. Likewise, the applicant was aware of the timeline and the timetable. He knew he was to comply and in the process assist the Commission organize and deliver free fair and transparent elections.

34. The Commission did not find any good reason or exceptional circumstances for it to be flexible and extend time for the Applicant. I also find none. The inability to meet the cut off time, in my view, arose from the Applicant's rather tardy approach and failure to be vigilant and active enough in the circumstances. A last minute flurry is not good enough reason to excuse a hitherto unprepared candidate.

Conclusion and disposal

35. I find that the Commission did not make an irrational or unreasonable decision as contended by the Applicant. Any reasonable decision maker taking all the circumstances into consideration as well as the purpose of the timetable would have arrived at the same decision. The decision was not short of logic.

36. I also view it that the Commission did not act contrary to the Constitution or any law or in a manner inconsistent with the rules of natural justice and fair procedure. The electoral timetable needed to be adhered to and in the absence of exceptional circumstances, the Commission could not whimsically extend time in favour of the Applicant. The strict and inflexible application of the cut off time line and timetable as well as the requirements was neither unreasonable in the circumstances nor contrary to the legislative purpose. This is notwithstanding the fact that no prejudice would have been occasioned had the Applicant's nomination papers been received.

37. In the foregoing, the Commission's decision to refuse to accept the Applicant's documents or to extend time does not fall to be judicially reviewed.

38. The application by way of Motion dated 23rd June 2017 is hereby consequently dismissed. Each party shall bear its own costs.

Dated and signed at Nairobi this 26th day of June 2017

J.L.ONGUTO

JUDGE

Read and Delivered at Nairobi this 27th day of June 2017

G.V.O. ODUNGA

JUDGE