



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW MISC. APPLICATION NO. 354 OF 2017**

**IN THE MATTER OF AN APPLICATION BY WILSON ONGELE OCHOLLA FOR ORDERS  
OF CERTIORARI, MANDAMUS AND**

**PROHIBITION**

**AND**

**IN THE MATTER OF OF THE CONSTITUTION OF KENYA AND**

**IN THE MATTER OF THE ELECTIONS ACT NO. 24 OF 2011 AND**

**IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION ACT NO. 9 OF 2011**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**ORANGE DEMOCRATIC MOVEMENT.....1<sup>ST</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT'S NATIONAL**

**ELECTIONS BOARD.....2<sup>ND</sup> RESPONDENT**

**ABEL OSUMBA ATITO.....3<sup>RD</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES**

**COMMISSION.....4<sup>TH</sup> RESPONDENT**

**AND**

**WILSON ONGELE OCHOLLA.....EX PARTE APPLICANT**

**JUDGMENT**

1. This application for judicial review revolves around the decision of the Independent Electoral and Boundaries Commission Dispute Resolution Committee rendered on 9 June 2017. The ex parte applicant challenges the decision and has sought an array of orders following the leave which was granted to the ex parte applicant on 22 June 2017.

2. The parties have all been duly and appropriately described in the various decisions of the Political Parties Disputes Tribunal (the PPDT) as well as in the decision of this court rendered on 24 May 2017 by Seron J. For practical reasons, I will not thus describe the parties. For a better understanding of this judgment, I am however constrained to reprise the facts and litigation history.

3. The Applicant and the 3<sup>rd</sup> Respondent contested the 1<sup>st</sup> Respondent's nominations for the position of candidate member of County Assembly Utalii Ward Nairobi County. That was on or about 30 April 2017. The 3<sup>rd</sup> Respondent was apparently declared the winner but the Applicant was not persuaded. He appealed to the 1<sup>st</sup> Respondent's intra party dispute resolution team, the County Appeals Tribunal (CAT). The CAT directed a withdrawal of the 3<sup>rd</sup> Respondent's nomination certificate but as the decision was yet to be delivered the 1<sup>st</sup> Respondent granted and issued the Applicant with the Certificate of nomination. The 3<sup>rd</sup> Respondent then moved to the PPDT which made a determination in favour of the Applicant, only for the 3<sup>rd</sup> Respondent to appeal to this court. In Election Petition Appeal No 43 of 2017, Hon Seron J deemed it fit that the matter be revisited de novo by the PPDT. The learned judge, on 24 May 2017 directed that a different panel of the PPDT be reconstituted to hear the dispute and indeed it did. On 31 May 2017, the PPDT spoke and delivered a decision which effectively nullified the nomination certificate which had been issued to the 3<sup>rd</sup> Respondent. The PPDT decreed thus:

***“1. The nomination certificate currently issued to the 3<sup>rd</sup> Respondent be be and is hereby declared null and void.***

***2. That the 1<sup>st</sup> Respondent will forthwith proceed in accordance with its Constitution, election and nomination rules to nominate its candidate for member of County Assembly Utalii Ward Ruaraka Constituency.***

***3. That we make no order as to costs”***

4. As it were, it would appear that as the PPDT was rendering itself, the 4<sup>th</sup> Respondent (the IEBC) was clearing the 3<sup>rd</sup> Respondent to the contested position. The IEBC then had in its possession a letter from the 1<sup>st</sup> Respondent indicating the 3<sup>rd</sup> Respondent as the nominee for the contested position and was latter to be seized with a nomination certificate dated 31 May 2017 issued in favour of the 3<sup>rd</sup> Respondent by the 1<sup>st</sup> Respondent. The IEBC certified the 3<sup>rd</sup> Respondent and the Applicant contested that certification by lodging a complaint before the IEBC Dispute Resolution Committee. This latter committee rendered itself on 9 June 2017 and affirmed its decision to have the 3<sup>rd</sup> Respondent as the nominated candidate of the 1<sup>st</sup> Respondent for the position of candidate, member of County assembly Utalii Ward, Ruaraka Constituency Nairobi County.

5. The Applicant then moved this court seeking orders to restrain the IEBC from proceeding, determining and enforcing the decision to have the 3<sup>rd</sup> Respondent as the 1<sup>st</sup> Respondent's nominee.

6. At the beginning of the hearing of this application, counsel for the applicant clarified that the decision being impugned was the decision of the IEBC Committee and not any other decision. Of course, that was the correct approach. A decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents including the decision of 31 May 2017 to award a direct nomination certificate to the 3<sup>rd</sup> Respondent could not be challenged through an application for judicial review to this court. Such a decision must be challenged through the PPDT under ss. 40 and 41 of the Political Parties Act. Likewise, a decision of the PPDT can only be challenged before this court by way of an appeal: see s. 41(2) of the Political Parties Act.

7. In argument, Mr. Akusala referred to the statutory statement as well as the Verifying Affidavit. Mr. Akusala contended that the IEBC Committee had acted illegally and in total disregard of the law as well as of the Constitution as the IEBC was bound to ensure that the electoral process was free, fair and transparent as prescribed under Articles 38 and 88 of the Constitution. Additionally, Mr. Akusala stated that the Applicant had legitimately expected that the IEBC would observe the fact that the dispute was still before the PPDT prior to admitting and clearing the 3<sup>rd</sup> Respondent through the nomination process on 31 May 2017.

8. I must add that the Applicant's case also contained an array of allegations argued by Mr Akusala. Counsel pointed out that the IEBC had acted ultra vires. Counsel also pointed out that the IEBC had taken into account an irrelevant consideration when it relied simply on the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Finally, counsel pointed out that the Respondents were unreasonable acted in bad faith and were procedurally unfair besides failing to observe the rules of natural justice.

9. Mr. Ochich for the 3<sup>rd</sup> Respondent argued that the application was res judicata as all issues raised had been determined by Sergon J on 24 May 2017. Mr Ochich also submitted that there was no proven illegality. Finally, Mr Ochich urged that this court has no jurisdiction as the Applicant should have sought to fault the 1<sup>st</sup> and 2<sup>nd</sup> Respondents before the PPDT for issuing a direct nomination to the 3<sup>rd</sup> Respondent. Counsel concluded by stating that all the parties had been given their day before the IEBC Dispute Resolution Committee and all evidence considered.

10. On her part, Ms. Kwambuha , counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that she had seen no fault on what the IEBC had done. According to counsel, the 1<sup>st</sup> Respondent due to the nearly expiring timelines complied with the orders of the PPDT and duly nominated a candidate in accordance with its Constitution and Rules. Counsel stated that the 1<sup>st</sup> Respondent had immediately the PPDT rendered itself on 31 May 2017, convened its National Executive Council(NEC) and directed the NEB to issue the 3<sup>rd</sup> Respondent with a certificate of direct nomination which it did pursuant to Rule 3.3 of the 1<sup>st</sup> Respondent's Elections and Nomination Rules. Counsel stated that the 1<sup>st</sup> Respondent took this root due to the nomination time-lines laid by the IEBC.

11. I have considered the application as well as the arguments by counsel. A few issues may be isolated. First, is the court seized with the requisite jurisdiction. Secondly, is the dispute res judicata. Thirdly, has the applicant established his case to the required standard?

12. On the issue of res judicata, Mr Ochich appeared to have abandoned the same mid-stream his submissions upon the court's consistent prodding. There is simply no issue preclusion and no final determination. Res judicata presumes that a dispute between the same parties or parties litigating through them has been finally determined by a court of competent jurisdiction. While the court presided over by Sergon J was very well seized and competent in Election Petition Appeal No. 43 of 2017, the court did not make a final finding. Indeed, the court decided that the matter be heard de novo by the PPDT. It made no final determination of the dispute. It would even have been res judicata had the Applicant or the 3<sup>rd</sup> Respondent appealed against the decision of the PPDT of 31 May 2017. Likewise, the court's decision of 24 May 2017 (Sergon J) could not be deemed res judicata as the complaint before the court then, which complaint was not determined with finality, was never against the IEBC. I do not find any semblance of the principle of res judicata to be fetched on or to this case.

13. On the issue of jurisdiction, I am clear in my mind that this court pursuant to Article 165(6) of the Constitution has the inherent powers to review the decisions of the IEBC Dispute Resolution Committee. As read together with both Order 53 of the Civil Procedure Rules as well as the Fair Administrative Action Act 2015. I am certain that this court is properly seized with the requisite judicial review powers and authority given that the impugned decision as admitted by counsel for the Applicant is the IEBC decision of 9 June 2017 and not any other.

14. It brings me to the issue as to whether there is merit for this court to review judicially the decision of

the IEBC Dispute Resolution Committee of 9 June 2017. I will handle this issue in a wholesome manner.

15. Foremost, I must state that this court has respect for all judicial and quasi-judicial bodies enjoined to make decision. If anything, any decision maker is respected and revered by this court. Fault must be established and clearly so before this court intervenes. The fault may be established by showing that there was clear and procedural impropriety or unfairness through the non-observance of the rules of natural justice. Fault may also be established by showing the clear grounds upon which judicial review may be pegged. Ordinarily referred to as the three Is ( "3 Is"). That is to say; irrationality, illegality and impropriety. To these may be added the concepts of unreasonableness, ultra vires or abuse of power , legitimate expectation and general unfairness through bad faith and malice.

16. With regard to procedural impropriety also commonly referred to as " the need for procedural fairness", I am unable to identify any procedural impropriety inherent or rife in the proceedings before the IEBC Committee either before during or after 9 June 2017. The Applicant did not also point to any procedural unfairness and indeed conceded, like the Respondents, that all the parties were heard. The statutory statement makes reference to the fact that the IEBC violated the principle of *nemo iudex in causa* , but the Applicant failed to or neglected to refer to s.74 of the Elections Act as well as Article 88(4) of the Constitution which both enjoin the IEBC to resolve nomination disputes. What was before the IEBC was a nomination dispute with the Applicant pointing to the fact that the 3<sup>rd</sup> Respondent had not been nominated and the IEBC had the mandate to hear the parties and determine the dispute.

17. I do not find that the IEBC Dispute Resolution Committee in any way acted contrary to the rules and tenets of natural justice in entertaining and determining the dispute. The Applicant ought to be grateful to the legal fact that IEBC decisions are subject to review and further that Article 47 of the Constitution has greatly expanded the scope of judicial review to beyond mere procedural impropriety.

18. Mr Akusala made a copious reference to illegality. I however tend to agree with Mr Ochich this respect. There was no evidence tendered of IEBC having acted illegally or ultra vires ( in excess of its powers at all) when it made the decision of 9 June 2017. Questions may be asked of IEBC having accepted the nomination papers of the 3<sup>rd</sup> Respondent but certainly on 9 June 2017, the IEBC in resolving the nomination dispute did not in any way act in excess of or abuse its powers under s. 74 of the Elections Act or even illegally.

19. There are pointers to illegality in the statutory statement of the Applicant but all these relate to what the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did on 31 May 2017 and not the IEBC Dispute Resolution Committee.

20. It brings me to the question of legitimate expectation and unreasonableness or irrationality.

21. There is no doubt the Applicant legitimately expected the IEBC Dispute Resolution Committee to rationally and reasonably make a determination: see Article 47 of the Constitution.

22. An unreasonable and irrational decision has been described as one which any reasonable decision maker seized with all the facts would not venture to reach: see **Associated Pictures Provincial v Wednesbury Corp [1948]**.It is one that defeats logic.

23. In the instant case, the IEBC Committee on dispute resolution was seized of all the relevant facts. Did it consider any irrelevant fact(s) or ignore relevant fact(s) and thus ended up an unreasonable and or irrational decision?

24. Before I answer that question, I need to try and demystify the question as to whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents complied with the PPDT's orders of 31 May 2017. These orders were most definitely relevant to the IEBC decision making process of 9 June 2017.

25. The PPDT's orders of 31 May 2017 were clear that the nomination exercise be re-undertaken in accordance with the party's (1<sup>st</sup> Respondent's) Constitution and nomination regulations. The 1<sup>st</sup>

Respondent insists that it complied by invoking Rule 3.3 and granting the 3<sup>rd</sup> Respondent a direct nomination. It claims it did so after the PPDT had rendered itself on 31 May 2017. The Applicant insists this is not so. And, the facts and evidence before me appear to support the Applicant.

26. The record reveals that as of 28 May 2017 when the dispute was still very alive before the PPDT the 1<sup>st</sup> Respondent had long made a determination and forwarded to the IEBC the 3<sup>rd</sup> Respondent's name as its nominee. The 1<sup>st</sup> Respondent already had a nominee. So when it purports to have issued a direct nomination through the Party's constitution and rules to the 3<sup>rd</sup> Respondent on 31 May 2017 after the PPDT decision which both parties agree was rendered in the afternoon, albeit without any synchronized hour, the 1<sup>st</sup> Respondent needed to do more to convince this court that it complied with the PPDT's orders. It is simply inconceivable that on the same afternoon even if it was 2.30 pm, as the 1<sup>st</sup> Respondent states, the decision of the PPDT was read and quickly a NEC was convened by the 1<sup>st</sup> Respondent and the direct nomination certificate issued. I am not ready to accept that the passage of time was so utilized and a nomination certificate duly issued within the time limit and in accordance with the 1<sup>st</sup> Respondents constitution.

27. Secondly, my view is that compliance with the PPDT's orders of 31 May 2017 would only be deemed as achieved once the Rule 18.1 of the 1<sup>st</sup> Respondent's Elections & Nomination Rules was complied with. I will say no more on this point.

28. In the instant case and with all the documentation before it, the IEBC needed to have asked itself whether the PPDT's orders had been complied with. The moment the question was raised, the IEBC had to satisfy itself that the 1<sup>st</sup> Respondent had complied with its constitution, whether it was nominating directly or through universal suffrage. In my view, it was not enough to simply receive a nomination certificate and also list of nominees and state that the 1<sup>st</sup> Respondent had spoken. Any reasonable decision maker would have sought to closely look at the documents including the PPDT's orders and make an informed decision. The PPDT did speak. The court followed. Then the PPDT spoke again. It was not appropriate and neither was it reasonable for the IEBC Committee to instead ignore all these decisions and instead settle on a letter written prior to the decision of the PPDT and a nomination certificate. To say the least, the IEBC was rather, indeed, irrational. It should have considered all the relevant factors as I have already pointed out. It did not.

29. If these factors of compliance with the PPDT's orders of 31 May 2017 had been closely considered, I am satisfied that the IEBC's decision would have been influenced otherwise to the extent that it could not have confirmed the 3<sup>rd</sup> Respondent as a duly and properly nominated candidate. The same factors likewise would not have affected the IEBC's decision to decline to accept the Applicant herein as the properly nominated candidate on behalf of the 1<sup>st</sup> Respondent.

30. I hasten to add that the IEBC Committee as a quasi-judicial body was also duty bound to take judicial notice of other judicial bodies which had dealt with the matter and especially their decisions, if relevant. The PPDT's decision of 31 May 2017 was relevant and the IEBC ought to have not only taken judicial notice of the same but also its effect on the entire nomination vis a vis the parties who were then before the IEBC committee on or about 9 June 2017.

31. I am satisfied that the Applicant has established grounds to the acceptable standard that the impugned decision cannot stand. There is cause therefore to judicially review the IEBC Committee's decision. The question would be : what are the appropriate reliefs in disposal?

32. Clearly, time is neither on the IEBC's side nor on the parties' (to these proceedings) side. That aside, justice must however be done to the parties. It is in the public interest that once parties bind themselves to rules, then they truly must be held to it. The 1<sup>st</sup> Respondent bound both the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent to its Elections and Nomination rules. The 1<sup>st</sup> Respondent also bound the Applicant to the same Rules. The Rules dictated that universal suffrage be the process of nomination in specific areas. I see no reason why in the circumstances of this matter and in light of the decision of the PPDT of 31 May 2017 which

decision still stands, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents should not comply.

33. In the circumstances, I am constrained to fashion the following orders:

***a. There shall issue an order of certiorari to remove into this court and quash the decision of the 4<sup>th</sup> Respondent dated 9 June 2017 dismissing the Applicant's complaint to the IEBC Dispute Resolution committee regarding the nomination of the 3<sup>rd</sup> Respondent as a candidate for the member of County Assembly Utalii Ward Ruaraka Constituency Nairobi County.***

***b. There shall issue an order of certiorari to remove into this court and quash the decision of the 4<sup>th</sup> Respondent to accept and affirm the nomination of the 3<sup>rd</sup> Respondent by the 1<sup>st</sup> Respondent as the duly nominated candidate by the 1<sup>st</sup> Respondent for the position of candidate member of the county assembly Utalii Ward Nairobi County***

***c. There shall issue an order of prohibition, prohibiting and restraining the 4<sup>th</sup> Respondent from gazetting the name of the 3<sup>rd</sup> Respondent as candidate for the position of member of county assembly Utalii Ward Nairobi County as a nominee of the 1<sup>st</sup> Respondent.***

***d. There shall issue an order of prohibition prohibiting and restraining the 4<sup>th</sup> Respondent from gazetting any person or name as a candidate duly nominated by the 1<sup>st</sup> Respondent to contest the position of member of county Assembly Utalii Ward Ruaraka Constituency Nairobi County until such time as the 1<sup>st</sup> Respondent would have fully and freely complied with the orders of the Political Parties Disputes Tribunal (the PPDT) of 31 May 2017 and the PPDT has certified as much.***

***e. Each party shall bear its own costs of the application.***

Dated signed and delivered this 24<sup>th</sup> day of June 2017 at Nairobi.

**J. L. ONGUTO**

**JUDGE**