



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION NOMINATION APPEAL NO. 9 OF 2017

JOHN ROBERT OUKO

JOHN WEKESA WALIARO

MUKINGANYI WALTER TRENK

MARY MWARANIA NDEGWA.....APPLICANTS

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....RESPONDENT

R U L I N G

1. Before me there are four applications brought by way of Notice of Motion dated 13th June 2017 under **Sections 3(1), 7(1), (2), 8, 9 and 11** of the **Fair Administrative Act 2015** as if it is a single application by the Applicants **John Robert Ouko, John Wekesa Waliaro, Mukinganyi Walter Trenk** and **Mary Mwarania Ndegwa**. The consolidation of this application was not sanctioned by the court neither was it brought to the attention to of the court before the hearing and would have been in itself a ground for striking out the applications for misjoinder. I have however proceeded to consider the applicaitons.

2. The substantive prayers they seek are that this Court be pleased to order a stay of the decision conveyed by the Independent Elections and Boundaries Commission (hereinafter the IEBC) in dismissing their complaints. That an order of mandamus do issue to remove into this court and compel the IEBC to issue clearance certificates to the Applicants within one day, for Members of County Assembly, Senator and Women Representative respectively, to vie in the 2017 General Elections.

3. When the application came up for hearing on 19th June, 2017, each Applicant presented their case.

4. **Mr. Mukinginyi Walter Trenk** submitted that he was cleared by the Orange Democratic Party (ODM) to vie for the Nairobi Senatorial Seat. That on 29th May 2017, while on his way to return his nomination papers, his car was broken into and documents, including a bankers cheque were stolen. He informed the Returning Officer about the incident, who told him to present his papers before 5.pm. that day. That he had all the documents save for the bankers cheque.

5. **Mr. Mukinginyi** argued that despite his explanation the Returning Officer rejected his documents for unavailability of the Bankers cheque. He complained that his appeal to the IEBC, was dismissed for want of prosecution despite the fact that his affidavit was in the file. Further that other people in similar circumstances were cleared on appeal.

6. **Mr. John Robert Ouko** submitted that he is an independent aspirant for Member of County Assembly (MCA) in Biashara Ward, Nakuru. That he arrived at the Clearance Centre on 31st May 2017 at 7. p.m. to find that there were 60 names before him waiting to return their forms. He left and when returned at 8 p.m. to submit his nomination papers he was not allowed in by the Returning Officer. He explained that he received the nomination papers on 30th May, 2017 instead of 13th May, 2017 as he should have. That the IEBC confirmed to him on 27th May 2017 that his name was in the list of aspirants.

7. **Mr. John Wekesa Waliaro** submitted that he is an aspirant for Member of County Assembly (MCA) in Marama West Ward, Butere Constituency. That the IEBC station at Butere refused to clear him on grounds that he returned his nomination papers 2nd June 2017 instead of 31st May, 2017. He explained that he had fallen ill while Nairobi on to pick his campaign material on 28th May, 2017. He was diagnosed with malaria and put on bed rest with heavy medication up to 31st May, 2017 when he travelled back to Butere.

8. **Mr. Wekesa** further argued that although later the office of the IEBC at Butere received and stamped his documents, they turned him away for reasons that he was time barred. He argued that it is not the Returning Officer who refused to accept his papers but the IEBC Tribunal who did not assess his grounds. He asserted that it was wrong for the Tribunal to victimize him and state that he was the author of his own misfortune on account of illness and urged the court to order the IEBC to allow him to exercise his constitutional rights.

9. **M/s. Mary Mwarania Ndegwa** submitted that she is a Women Representative aspirant for Nakuru County. That she was not cleared by the Returning Officer on grounds that she was late. She stated that she was assigned to be cleared at 9.00 a.m on 30th May, 2017 but her two supporters came late at noon because their employers could not release them. That she returned the following day with all her documents as directed but she was still not cleared. She argued that other people with similar issues were given a chance to bring whatever they were missing the next day. She urged the court to give her another chance.

10. Looking at these applications they have nothing in common expect political ambitions of the Applicants. They should not have been brought in one application. From the reliefs sought however, the four applications are in the nature of Judicial Review even if they have not been identified as such. In Judicial Review proceedings the court is not concerned with the nature of the decision that is impugned but is concerned primarily with the propriety of the process that led up to that decision.

11. A summary of their cases is that Mr. Mukinginyi Walter Trenk submitted documents without the requisite bankers cheque while Mr. John Robert Ouko, Mary Mwarania Ndegwa and John Wekesa Waliaro were late in the submission of their documents.

12. I am aware that Judicial Review has since expanded to include abuse of power and bad faith as stated in **R vs Commissioner for Co-operatives ex-parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd (1999) 1 EA 245** at page 249 where the Court of Appeal held that:

“It is axiomatic that statutory powers could only be exercised validly if they are exercised reasonably. No statute ever allows anyone on whom it confers a power to exercise such power arbitrarily, capriciously or in bad faith.”

13. With the above in mind I have considered the submissions of each Applicant in all four applications and find that the Applicants have not demonstrated that there was any procedural impropriety, or a failure to observe the rules of natural justice on the part of the IEBC in the process of arriving at the decisions against each of them. They have not demonstrated that the decision of the IEBC was actuated by ulterior motive, or malice or bad faith or that the Respondent acted irrationally in arriving at their decisions to bar them. The IEBC acted with the accordance with the law and each Applicant was given a hearing.

14. Reasons wherefore each of the four applications is found to have no merit and is struck out

accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 21st DAY OF June, 2017.

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L. A. ACHODE

JUDGE

In the presence offor the Applicants