



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 8 OF 2017

IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION

AND

IN THE MATTER OF ARTICLES 38(2), 47, 48 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE

JUDICIAL REVIEW PROCEEDINGS AGAINST THE RESPONDENTS

BETWEEN

FREDRICK ISIKA KALUMBO.....APPLICANT

AND

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

ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

**RULING**

1. By a Notice of Motion dated 14 June 2017 and filed a day later under urgency, the applicant herein seeks the following orders:

- 1. THAT the Application herewith be certified as urgent and heard ex parte in the first instance.*
- 2. THAT the applicant be exempted from filing the Notice to the Registrar owing to the urgency of the matter*
- 3. THAT the Honorable Court do grant leave to the applicant to apply for the order of mandamus herein to quash the 1<sup>st</sup> Respondent's decision of 8 June 2017 dismissing the applicant's appeal.*
- 4. The said grant of leave do operate as a stay of the decision of the 1<sup>st</sup> Respondent.*
- 5. That the applicant be allowed to campaign pending the determination of this application.*

## 6. *The costs be in the cause.*

3. The application is supported by the statutory statement filed together with the Motion and the applicant's affidavit sworn on 14 May, 2014.
4. The Application is further based on the grounds that the 1<sup>st</sup> Respondent, denied the applicant the chance to be heard and further that the applicant's democratic rights are under threat of being violated.
5. In his affidavit the applicant has given a narrative leading to the point of dismissal of the applicant's appeal by the 1<sup>st</sup> Respondent.
6. I will briefly reprise the story.
7. The applicant is a Kenyan citizen interested in participating in the forth coming general elections as a candidate. The elections are scheduled for 8 August 2017. The applicant has been intent in vying for the position of Member of the Senate, Kitui County, as an independent candidate. Following the 1<sup>st</sup> Respondent publication of a nominations' timetable, the applicant on 28<sup>th</sup> and 29<sup>th</sup> days of May attempted to present his nomination documents to the 1<sup>st</sup> Respondent's duly appointed Returning Officer. The documentation was declined. A reason was advanced to the applicant. Dissatisfied the applicant moved to the 1<sup>st</sup> Respondent's dispute resolution committee and lodged a complaint. The applicant's complaint was however dismissed on 8 June 2017 for want of prosecution. There was nobody to prosecute the applicant's complaint. The applicant himself was absent. The applicant explains his absence by stating that he was in Mwingi Town where he resides and though he received a call from the 1<sup>st</sup> Respondent notifying him of the slated hearing the time was too short. Mwingi town is supposedly some tens and tens of kilometers from Nairobi. The applicant needed four hours to get to Nairobi yet he had been called only at 2pm. The applicant says he showed up before the 1<sup>st</sup> Respondent's dispute resolution committee on 9 June 2017 only to be told that the complaint had been dismissed due to his absence.
8. It is the Applicant's contention that the decision was in bad taste and he should have been heard. The applicant further contends that the decision was contrary to the known tenets of natural justice.
9. Counsel , Mr. Olando who appeared for the applicant ex parte urged me to grant leave as there was a prima facie case shown by the mere fact that the applicant had been denied the chance of being heard. Counsel stated that there was need to protect the applicant's constitutional rights and ensure that the applicant participated in the elections.
10. I have considered the submissions. I have also read through the application as well as all the supporting documents.
11. I must foremost point out that the rationale for the requirement that leave be sought and obtained, before filing applications for judicial review, is to exclude frivolous or vexatious applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred: see **Bosire, Mbogholi-Msagha & Oguk, JJ in Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993.**
12. Leave should ordinarily thus be granted, if on the material available the court considers, without conducting a mini trial, that there is an arguable case. Leave stage effectively assists in the screening out of hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant : see **Republic v Land Disputes Tribunal Court Central Division and Another ex p Nzioka [2006] 1 EA 321** and also **Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996.** See also **Meixner & Another v Attorney General [2005] 2 KLR 189** where the Court of Appeal held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

13. The circumstances which guide the grant of leave to apply for judicial review remedies were well enumerated in **Mirugi Kariuki v Attorney General [1990-1994] EA 156; [1992] KLR 8** as follows:

***“If he [the Applicant] fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers...”***

13. In **R v Communications Commission of Kenya & 2 Others ex p East Africa Televisions Network Ltd [2001] KLR 82**, the Court of Appeal was of the view that leave should be granted if, on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave.

14. It is clear that the grant of leave is not a formality. The applicant has to show the court that he has a prima facie arguable case and that he moved the court with expedition.

15. Returning to the instant application, there is no doubt that both under the Constitution and the Fair Administrative Action Act No 4 of 2015, every person has a right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. This includes the right to an opportunity to be heard and to make representations in that regard. Where such right is not observed by any person exercising administrative action or executing quasi-judicial duties, the party adversely affected by any decision made will be entitled to the court’s intervention by way of judicial review.

16. The applicant’s nomination documents were declined by the 1<sup>st</sup> Respondent. It meant the applicant would not participate in the general elections as a candidate. The decision adversely affected the applicant. Undaunted the applicant appealed to the 1<sup>st</sup> Respondent’s disputes resolution committee. His appeal was dismissed without a hearing. The record reveals that there was a no show on the part of the applicant. The applicant was effectively locked out of the contest.

17. Prima facie the applicant has only shown that the decision by the 1<sup>st</sup> Respondent affected him adversely. It is however not clear that the decision by the 1<sup>st</sup> Respondent ought to be faulted. The main complaint by the applicant is that he was not heard. The law does not however state that a person must be heard. The prescription is for a party to be given the chance or opportunity to be heard, whether the party takes the opportunity or not is another question. That is the basic requirement of procedural fairness. When however opportunity has been availed for one to present his case but he does not take it then he should not be heard to complain that he was not heard. It may not be presumed that there was a denial of hearing.

18. In the instant case, the applicant admits that the 1<sup>st</sup> Respondent contacted him and informed him of the hearing date and time. He was invited to be present. He did not however avail himself as he states that he was only contacted some two hours to the hearing time and he could not have made it even if he had tried to. There is however no evidence or material to support this contention. There is no telling when exactly the applicant was contacted by the 1<sup>st</sup> Respondent.

19. It is not enough to simply state that the applicant was dismissed unheard. A tribunal or any administrative body has inherent powers to dismiss a case or complaint when the complainant without good reason fails to show up and urge his case once he has been notified. It is also not enough to state that the applicant was contacted so late in the day to enable him present his case. One must do more and that is exactly why a party is expected at the leave stage to file a relatively exhaustive Statement besides the supporting or verifying affidavit complete with annexes.

20. The burden was on the applicant to avail the relevant material to establish a prima facie case. He however failed to discharge the burden.

21. Taking the foregoing into consideration, it is my view and I so find and hold that the Applicant has not established a prima facie case which warrants the grant of leave. Accordingly, leave is denied.

22. I dismiss the Motion dated 14 June 2017 but make no order as to costs.

**Dated ,signed and delivered at Nairobi this 16<sup>th</sup> day of June 2017**

**J. L. ONGUTO**

**JUDGE**