



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. ELECTION PETITION APPLICATION NO. 414 OF 2017

JAMES NJOROGE KAHURA.....APPLICANT

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT

RETURNING OFFICER, RUIRU CONSTITUENCY.....2ND RESPONDENT

RULING

By a Notice of Motion dated the 10th July, 2017, the applicant James Njoroge Kahura seeks the following orders: -

- (1)** THAT this application be certified urgent and be heard exparte in the first instance for reasons of urgency as set out in the certificate of urgency.
- (2)** THAT pending the hearing and determination of this Application, the Court do compel the 1st Respondent to include the name of the Applicant as an Independent Candidate contesting as a member of the National Assembly, Ruiru Constituency in the forthcoming august 8th 2017 General Elections.
- (3)** THAT pending the hearing and determination of this application, the court do direct that as a measure of protection in the Interim, that the 1st Respondent to include the name of the applicant in the Candidate's list published in the Kenya Gazette.
- (4)** THAT the honourable court be pleased to grant such other or further reliefs as it may deem fit in the circumstances
- (5)** That costs of this application be provided for:-

The application is brought under Article 165 (6) and 7 of the constitution and order 53 Rule 1 of the Civil Procedure Rules. It is premised on the grounds set out on the body of the same and on the annexed supporting affidavit sworn by the applicant on the 10th July, 2017.

The applicant's case is that he is an Independent Candidate Aspiring for the member of National Assembly Ruiru Constituency. That when he appeared before the 2nd respondent for clearance and presentation of his papers, the 2nd respondent declined to clear him on ground that he did not have the

required number of supporters.

He avers that he had with him, among other requirements, a list of supporters within Ruiru Constituency which had 1500 registered voters way above the mandatory 1000 required. That his insistence that he had more than enough supporters in his flask disk fell on deaf ears as the 2nd respondent refused to verify his list. He proceeded to file a complaint with the first respondent's dispute Resolution Committee on the 6/6/2017 which was received but since then, the first Respondent has never communicated with him and all his efforts to have the complaint heard have been in vain. He avers that unless the first respondent is compelled to include his name in the list of candidates for Ruiru Constituency for the county Elections, he will never get a fair hearing.

He contended that the entire process by the 2nd respondent was accentuated with ulterior political considerations in a manner that violates the provisions of law and defeats the principles of the constitution of Kenya and the right to fair administrative action.

The application is opposed vide a replying affidavit sworn by Douglas K. Bargorett who is the legal officer employed by the first respondent.

The application is opposed on the basis that, first, it is bad in law for non compliance with the rules of procedure and form for instituting a claim under Article 165 (6) and 7 of the constitution, part 111 of the fair Administrative Actions Act, 2015 and order 53(1) of the Civil Procedure Rules 2010 which deal with Judicial Review applications.

He further avers that the application is vexatious and a waste of Judicial time as the applicant does not seek any permanent orders to be determined in the substantive hearing of the application but only seeks to be granted interim orders to be granted before the hearing. That in any event, the prayers sought in the application are not capable of being granted as this honourable court cannot make orders relating to independent exercise of discretion by the first respondent and hence the court has no powers to order the first respondent to clear the applicant as a nominee for member of Ruiru Constituency.

He contended that the names of candidates for the seat of member of National Assembly, Ruiru Constituency for the Elections of 8/8/2017 have already been published in the Kenya Gazettee on the 27th June, 2017 vide legal Notice no 6253 of 2017. The court was invited to take judicial notice of the fact that the first respondent is now at a very advanced stage of preparing the process leading to the conduct of the general Elections to be held on the 8/8/2017 which process entails printing of Ballot papers which has already been done and other logistical matters at immense public expenditure and to grant the orders sought herein will lead to a reversal of that process and occasion a constitutional crisis considering that the elections are less than one month away.

Parties made oral submissions that greatly mirrors the averments contained in their respective affidavits but in addition, it was submitted that the respondents infringed on the applicants right to legitimate expectation and to support this contention, the case of **R vs Nairobi City Council & Another exparte Wainaina Kigathi Mungai (2014) eKLR** was relied on. The court was told that the applicant expected the respondents to go through the documents that he presented to them. That the applicant is stranded and will be locked out of the polls if the respondents refuse to clear him and accept his documents. It was argued that failure to consider a legitimate expectation is a failure to consider a relevant consideration and it will call for the courts intervention as Justice Nyamu held in the **R vs. Nairobi City Council case (supra)**.

On his part, counsel for the respondents submitted that the application is defective as the applicant did not seek leave as required under order 53 of the Civil Procedure Act. That the remedy of Judicial Review is discretionary and asked the court to take judicial notice of the fact that the ballot papers have already been printed and have already been brought to the country. He also submitted that the applicant has conceded in his documents that there was a deficit of 390 names out of the 1000 required, after the list of 1000 he submitted to the respondents was verified.

In a quick rejoinder, counsel for the applicant contended that, it was not in dispute that the applicant was not heard on his complaint which shows that the respondents breached the rules of natural justice. On whether the application is defective or not, it was his contention that the application is not a Judicial Review Application. He averred that article 23(1) of the constitution makes provision for filing application whenever a right or fundamental freedom has been threatened and that Article 24 of the constitution is not specific that time can limit a right that a party has, under the constitution.

The court has carefully considered the application, the affidavits and the submissions made by the learned counsels. Counsel for the respondents has raised a very fundamental issue and has argued that the application is fatally defective as it does not comply with the legal principles in that the same being a Judicial Review Application, the applicant ought to have sought the leave of the court before filing the substantive application. In reply to this, counsel for the applicants has submitted that the application is not a Judicial Review and hence not subject to the principles governing Judicial Review applications.

A casual glance at the application reveals that the same is brought under article 165 (6) and (7) of the constitution, order 53 Rule 1 of the Civil Procedure Act and in his submissions, counsel for the applicant relied on the provisions of fair administrative Act No. 4 of 2016 in support of the principle of legitimate expectation.

Article 165 (6) provides as follows;

“The High Court has supervisory jurisdiction over the subordinate courts and over any person or authority exercising Judicial or quasi judicial function but not over a superior court”.

While Article 165 (7) provides;

“For purposes of clause (6) the High Court may call the record of any proceedings before subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice”.

Under the fair administrative Action Act, an administrative action includes;

- (1) The power, the functions and duties exercised by authorities or quasi judicial tribunals; or ;
- (2) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

The Act under section 87 (7) (1) provides that;

“Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to;

- (a) A court in accordance with section 8 and the procedure is provided for under section 9 which is by way of Judicial Review to the High court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22 (3) of the constitution.

The applicant herein chose to come to the High Court under order 53 Rule 1 of the Civil Procedure Rules and his application states as much.

Order 53 (1) (1) is very specific on the issue of leave and it provides;

“No application for an order of mandamus, prohibition or Certiorari shall be made unless leave therefore has been granted in accordance with this rule. No such leave was sought. Though the application is also expressed to be brought under Article 165 (6) and (7) of the constitution, the procedural law is the Civil Procedure Act which provides for the procedure in filing an application for Judicial Review.

In view of the foregoing, I concur with the counsel for the respondent that the application is fatally defective and the same is hereby struck out with costs to the respondent.

Dated, signed and delivered at Nairobi this 31st day of July, 2017.

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L. NJUGUNA

JUDGE

In the presence of

.....*For the Applicant*

..... *for the 1st Respondent.*

..... *for the 2nd Respondent.*