



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
JR NO. 397 OF 2017
IN THE MATTER OF INDEPENDENT CANDIDATE FOR
GOVERNOR, TAITA TAVETA COUNTY
JARED NZANO APPLICANT
VERSUS
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSIONRESPONDENT
RULING

The applicant herein has moved the court by way of Notice of Motion dated the 7th July, 2017 seeking the following orders:-

- (i) An order of certiorari to remove into the High Court and quash the decision of the IEBC Dispute Resolution Committee made and signed by the respondent's CEO on 22nd June, 2017.**
- (ii) An order of mandamus to remove into the High Court and compel the IEBC the Respondent to expeditiously issue a Clearance Certificate to the Exparte applicant to vie as a Governor as an independent candidate, Taita Taveta County in the forthcoming General Elections.**
- (iii) Any other or further relief that this Honourable Court may deem fit to and just grant.**

The application is brought under Order 53 Rule 3 (1) (2) and (3) of the Civil Procedure Rules, sections 8 and 9 of the Law Reform Act, sections 3(1) 7 (1) (2) 8, 9, and 11 of the Fair Administrative Actions Act no 4 of 2015.

The same is premised on the grounds set out on the body of the application and it's supported by the annexed statement by the applicant Jared Nzano.

In summary, the applicant is an independent candidate aspiring for the seat of Governor Taita Taveta County. He avers that he was scheduled to present his documents on the 2nd day of June 2016 and on the said date, he got there on time but his running mate did not make it on time until 16.32 hours due to what

he terms as unavoidable circumstances.

That the returning officer declined to accept his papers stating that his running mate did not appear and that a cheque of Kshs. 50,000/= was not presented to the respondent as required. He avers that the said cheque was in the custody of his running mate who failed to make it on time. That he was at the county nomination center until 17.06 hours on the 2/6/2017 when his running mate appeared and on his arrival, they pleaded with the returning officer to accept his papers but he declined to accept the same.

He depones that his running mate could not make it to the nomination centre on time as he has a very serious heart condition and had to seek medical attention that took him until 5th June, 2017 when the applicant was able to file a complaint with the respondent requesting that he be allowed to present his papers out of time but the same was rejected on the 22nd June, 2017.

He urges the court to sympathize with his circumstances and grant him an order compelling the respondent to clear him to run for Governor of Taita Taveta County so that he can enjoy his democratic rights as provided for in the constitution of Kenya 2010.

The respondent has opposed the application vide a relying affidavit sworn by Festus Muriithi Mucheke sworn on the 14th July, 2017. The deponent is the returning officer for Taita Taveta County.

The summary of the facts as captured in the said affidavit are that, the applicant appeared before him on the 2nd June, 2017 at the County Nomination Centre to present his papers as an independent candidate. That the applicant appeared at the centre at 4.00 O'clock and earlier on, he had consulted him on the requirements needed for a candidate who held a degree from outside Kenya and he had advised him that it was mandatory for him to obtain a letter of university recognition from the Commission of University Education.

That by 4.30pm the applicant had not received the said letter and he also did not have the bankers cheque of Kshs. 50,000/= payable to the respondent. He instead had cash which the respondent declined to accept as it was not acceptable. In addition, his running mate was not present and did not turn up at all and it's a requirement by the respondent that the running mate of a candidate be physically present at the nomination centre with the candidate, for the clearance to be done. That due to the above reasons, the returning officer (deponent) declined to clear the applicant as he had failed to meet the statutory requirements. He further averred that though the applicant reached him on phone the following day requesting him to assist him, he could not be able to do so as the timelines were strict and had already been set.

He contended that in declining to accept the nomination papers presented to him by the applicant, he duly complied with the provisions of the law as set out in the Gazette notice no. 2692 published by the Chairman of the Respondent on the 17th March, 2017 that provided the deadline for presentation of nomination papers for candidates vying for Gubernatorial position as 1st and 2nd June, 2017 between eight O'clock to one O'clock and between 2 O'clock to 4 O'clock in the afternoon.

He further avers that from the applicant's letter dated 5th June, 2017 marked as annexure JNM6 he confirms that he was unsuccessful and was turned away due to non compliance. That the applicant having had sufficient time to prepare, has himself to blame for his misfortunes. It is also averred that the applicant's application is time barred as he did not move to court expeditiously in that he moved to court on the 29/6/2017 when he was granted leave to apply for Judicial Review, and even then, he did not file the substantive motion until the 30/6/2017, which was too late in the day.

He contended that the candidates have since been gazetted and the application has been overtaken by events. The printing of ballot papers other than the presidential has been done and a reversal of that process to include the applicant would cause a constitutional crisis owing to the already set date of 8th August, 2017 for General Elections.

It was averred that the application is defective, frivolous, vexatious and laced with material non disclosure and that it contravenes the provisions of order 53 Rule 3 (1) (2) and (3) of the Civil Procedure Act and therefore its an abuse of the legal process.

The court has given due consideration to the application, the affidavits and the submissions by the parties in support of their respective positions. Counsel for respondents has submitted that the application is fatally defective as the applicant did not comply with the provisions of order 53 Rule 3 (1) (2) and (3) of the Civil Procedure Act in that the applicant did not annex a verifying affidavit to the substantive notice of motion. With regard to this contention, the court notes that the applicant had annexed a supporting affidavit to the Exparte chamber summons vide which he sought leave to file the notice of motion. Having filed the same, the court hereby excuses the failure to annex a verifying affidavit to the notice of motion application. The supporting affidavit in this case serves the same purpose with a verifying affidavit and in view of Article 159 (2) of the constitution, it is a technicality that can be excused and I hereby excuse the same.

On the merits of the application, it is not disputed that the applicant was at the county nomination office just before 4pm and at the time, his running mate had not arrived. It is also not denied that the applicant did not have a letter from the Commission of Higher Education and a cheque of Kshs. 50,000/= as required. Time was of essence and the applicant having attended pre-nomination meetings knew what was required of him to be cleared by the respondent to run for the Gubernatorial seat. Though the applicant avers that his running mate was unwell, and such was not able to make it to the nomination centre on time, the court has keenly perused the medical reports annexed to the supporting affidavit and I note that one of them marked JNM4 is dated 22/10/2015 while the other is dated 5/6/2017. There is no evidence that the applicant's running mate was attended to by a medical doctor or in any clinic/hospital on the 2/6/2017 when he was required to be at the nomination centre. Even after the said date, it took him another three days before he sought medical intervention. It is therefore most probably that the applicant is not telling the truth that his running mate was unwell and he could not make it to the nomination centre on time and this court is not persuaded by that reason. I agree with the respondent's submission that the applicant was unsuccessful due to non compliance as he had not met all the requirements.

Secondly, it is noted that the applicant vide a letter dated 22/6/2017, was notified of the fact that he had not met the qualifications as specified in the law. The letter was a response to his dated 5th June, 2017. It took him a whole seven (7) days to move to court to challenge the decision by the respondent and even after leave was granted on 30/6/2017, he filed the application herein seven (7) days down the line.

As an aspirant for Gubernatorial seat and having attended the pre-nomination meetings with the respondent during which they were briefed on the requirements and the timelines, he ought to have moved with haste in filing his chamber summons and the Notice of Motion. In the circumstances of this case, he is guilty of unreasonable delay considering the timelines and the fact that only 2 weeks are remaining to the General Elections. The court takes Judicial notice of the fact that the ballot papers have been printed and that save for those of the presidential candidates, the rest are already herein in the country. The court has to consider the individual political rights such as for the applicant herein and the larger interest of the public not to have the political process disrupted. I wish to borrow from the wisdom of Justice Onguto in Misc. Application number 402/2017 wherein he stated;

“I must point out that the closer the court contests are to the election, the greater the risk of disrupting of the elections. Yet it is clear that elections should not unnecessarily be disrupted. On the other hand, political rights are always central to a democratic society and their protection is an important constitutional purpose. Certainly, these two interest may at times point in opposite direction”.

In view of the foregoing, I find that the application dated 7th July, 2017 has no merits and the same is dismissed with no orders as to costs.

DATED, DELIVERED and SIGNED at Nairobi this 31st day of July, 2017.

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L. NJUGUNA

JUDGE

In the presence of:

..... For the applicant

.....for the Respondent