REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCELLANEOUS CIVIL APPLICATION NO. 2 OF 2017

REPUBLIC…………………………..............…….........……………..………..APPLICANT

VERSUS

SAMWEL LEPATI SEKI……………………….........................……..1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION…2ND RESPONDENT

***EX PARTE:* JAMES KARIMI KARUBIU**

JUDGMENT

By a motion dated 19th June, 2017, and filed in court on 28th of June 2017, the *ex parte* applicant (herein 'the applicant') sought for judicial review order of certiorari to quash the decision of the 1st respondent disqualifying him from presenting his nomination documents for the elective position of Senator of Kirinyaga County during the general elections of 8th August, 2017; he also sought for the same order to issue to remove into this court, for the purpose of being quashed, a decision of the 2nd responder's tribunal dated 9th of June 2017 apparently upholding the 1st respondent's decision declining to nominate and issue a clear certificate to the complainant to contest for the position of senator in the elections. Apart from the prayers for the orders of certiorari, the applicant also sought for an order for prohibition against the 2nd respondent prohibiting it from implementing the decision of the 1st respondent refusing to clear the applicant to contest for the particular senatorial seat in the forthcoming general elections. Finally, the applicant sought for an order of mandamus to issue to compel the 2nd respondent to accept the applicant's nomination papers and gazette his name as an independent candidate for Kirinyaga County senatorial seat in the general elections, which as noted, will be held on 8th August, 2017.

The motion was filed under **order 53 rule 3** of the Civil Procedure Rules 2010 sections 8 and 9 of the Law Reform Act, cap. 26 of the Laws of Kenya and was supported by the affidavit sworn by applicant himself on 19th June, 2017. As usual in such suits, it was also supported by a statement of facts that was initially filed with the summons seeking leave to file the substantive motion for the judicial review orders aforestated.

I understand the applicant to say in these documents that he is a registered voter in Kirinyaga County Central constituency and that he was duly cleared by the registrar of political parties to run as an independent candidate for the Kirinyaga County senatorial seat.

On 22nd May, 2017, the 1st respondent invited all the aspirants in the County, including the applicant, for what he described in his phone text message to them, as a pre-nomination meeting. The meeting was convened on 23rd May, 2017 and its agenda, according to the 1st respondent's phone message, was to

clarify the nomination requirements which included the collection of nomination papers and the schedule for nomination.

In that meeting, all the candidates were given the requisite nomination papers to fill and return them to the 1st respondent on a such date and time that each one of them was allocated. The applicant was scheduled to present his papers at St Michael Primary School in Kerugoya, on 30th May, 2017 at 11 AM. However, on 28th May, 2017 he received a message from the 1st respondent asking him to confirm the presentation of his papers between 11 AM and 12 PM on that particular day. The applicant called back and informed him that he was scheduled to submit his papers on 30th May, 2017 and not on 28th of May, 2017.

According to the applicant, an argument ensued between him and the 1st respondent in the course of their telephone conversation over the appropriate date for presentation of the applicant's nomination papers despite the fact that the 1st respondent admitted that 30th May, 2017 was the right date that the applicant had been allocated for this exercise. The 1st respondent directed the applicant to present his papers on 29th May, 2017 between 3 and 4 PM.

In view of this development, the applicant had to cancel his other pre-arranged business commitments and present his papers on 29th May, 2017 as directed by the 1st respondent. He arrived at the presentation venue at 3:45 PM but as he tried to access it, he was stopped by a police officer who informed him that he was under strict instructions from the 1st respondent to bar him from entering the premises. He managed to get to the 1st respondent on phone and requested him to allow him (the applicant) to present his nomination papers. The 1st respondent could not hear of his plea because, according to him, the applicant was out of time and he ought to have considered himself as disqualified.

Being aggrieved, the applicant proceeded to Nairobi on the same day to seek audience with the 2nd respondent. He managed to talk to the Chief Executive Officer of the 2nd respondent who advised him to put his complaint in writing for consideration. He acted accordingly and on the following day, the 30th May, 2017, he received a positive communication from the chairman of the 2nd respondent asking him to present his nomination papers on or before 31st May 2017 at 4 PM. The 1st respondent confirmed having received a similar communication but he directed the applicant to present his papers at 2 PM on the material date.

When he arrived at the venue, he was unable to access it because, once again, a police officer stopped him. He again had to call the 1st respondent who in turn directed the police officer to allow the 1st applicant to access the venue as long as he was not accompanied with anybody else including his proposer and seconder. Once at the venue, he commenced the clearance process; when he finally reached the 1st respondent's desk, which apparently was the final clearance point, an argument between him and the 1st respondent arose once more. It would appear from their conversation that the 1st respondent was not amused that the applicant had to seek the intervention of the head office to have him clear the applicant.

At the end of it all the 1st respondent asked the applicant to retype the names of the 2000 signatories, supporting the applicant's candidacy, and return the following day which was the 1st June, 2017 at 3.30 PM. He returned on that day but the police officer manning the gate told him that he had instructions to ask him to come back the following day. When he went back to the venue on 2nd June, 2017, the 1st respondent told him that he was out of time and was therefore disqualified.

The applicant then appealed to the 2nd respondent's Dispute Resolution Committee. There, he was informed that his Appeal would be heard on 8th June, 2017; however, nobody called him to prosecute his appeal despite having had to wait at the Committee's offices for this opportunity. Instead of hearing him, the Committee dismissed the applicant's appeal and he only came to learn of this dismissal when his name was called out at 3PM, apparently on the same day, and was informed accordingly. The applicant's

gripe with the Committee's decision is that there were no proceedings conducted prior to the making of the decision. And even then, the Committee was mainly made up of members of the 2nd respondent who, by that very fact, could not be seen to be adjudicating on a complaint lodged against their own decision.

Only the 2nd respondent filed grounds of objection to the applicant's application. The 1st respondent did not respond at all; as matter of fact, he appears not to have been represented although when the motion came up for hearing, Ms Olao, counsel for the 2nd respondent, intimated that she also represented him.

In its grounds of objection, the 2nd respondent contended that the petition was misconceived, frivolous, vexatious, incompetent and an abuse of the due process of the court; it was also contended on its behalf that the application did not meet the threshold of granting the orders of judicial review of certiorari and mandamus under **order 53 rule (1)** of the **Civil Procedure Rules.** According to the 2nd respondent, judicial review is only concerned with the decision-making process and not with the decision itself and therefore this court cannot be asked to sit on appeal of the merits of the decision of the Independent Electoral and Boundaries Commission Dispute Resolution Committee. It also alleged that the applicant was in breach of the **Electoral (General) Regulations 2012** and failed to meet the prescribed requirements for nomination. Further, the 2nd respondent's Dispute Resolution Committee dismissed the applicant's complaint on the basis of the evidence before it and upon careful consideration of the **Elections Act, 2011** and the relevant regulations thereunder, in particular the **Elections (General) Regulations 2012**. Finally, the applicant has not demonstrated that the decision of the Committee complained of is tainted with illegality, irrationality or procedural impropriety.

This matter was initially initiated in the High Court at Nairobi but was transferred to the High Court at Nyeri on the order of Odunga, J. made on 19th June, 2017. It first came up for hearing before me on 22nd June 2017 but the hearing couldn't proceed because there was no appearance for the respondent; counsel for the applicant was said to have mechanical difficulties with his car and so he could neither attend court in time or at all. On 12th July, 2017 when this application came up for hearing again before my sister Mshila, J. it couldn't take off apparently because the applicant's counsel asked for an alternative date before court No. 1.

Be that as it may, parties eventually appeared before me on 24th July, 2017 when directions were taken to the effect that application proceeds by way of written submissions. The submissions had been filed prior to this date and owing to the urgency of the matter I reserved my judgment for delivery on 28th July, 2017, four days after the directions had been taken.

The applicant filed fairly lengthy submissions but which I have, nevertheless, had occasion to consider alongside the 2nd respondent's despite the limited time on my hands. The applicant's narrative is generally this: the disqualification of the applicant's candidature for the senatorial seat of Kirinyaga county in the forthcoming general elections was as a result of a bungled nomination process instigated by the 1st respondent. Since the 1st respondent is himself the author of the confusion that yielded to the purported disqualification, his errors, whether of omission or commission, should not be visited upon the applicant. To this extent, the 2nd respondent is faulted for effectively upholding the 1st respondent's decision disqualifying the applicant when it dismissed the latter's complaint. In summary, it is against this background that the applicant has approached this court for judicial review orders of certiorari, prohibition and mandamus.

On the other hand, the 2nd respondent's position is that the applicant does not deserve any of the orders of judicial review because he is effectively appealing against the merits of the decision by Independent Electoral and Boundaries Commission Dispute Resolution Committee. The decision, according to the 2nd respondent, was reached when the applicant was found to have flouted the **Elections (General) Regulations 2012** and, in any event, the applicant's complaint to the Committee was dismissed based on the evidence before the Committee and after careful consideration of the applicable law which, in this case, is the **Elections Act, 2011** and the regulations made thereunder, in particular, the **Elections (General) Regulations 2012**.

It is apparent therefore that the contest between the parties revolves around the general question on the instances when orders for judicial review are available to an applicant. Narrowed down to the present application, the primary question is whether these orders are available to the applicant. To answer this question, it is necessary to remind ourselves what judicial review is all about.

Judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties. (see **Halsbury's Laws of England/JUDICIAL REVIEW (VOLUME 61 (2010) 5TH EDITION)/4 par. 602).** In short**,** judicial review provides the means by which judicial control of administrative action is exercised. **(see Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at 408).**

As correctly submitted by counsel for the 2nd respondent, judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but with ensuring that the bodies exercising public functions observe the substantive principles of public law and that the decision-making process itself is lawful. (See **Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141 at 154, [1982] 1 WLR 1155 at 1173**). In the foregoing decision, Lord Brightman said at pages 155 and 1174 that *'judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.'* When hearing an appeal, on the other hand, the court is concerned with the merits of the decision under appeal.

Halsbury's Laws of England (supra) sheds more light on the nature and extent of the remedy of judicial review; it is stated at paragraph 4 thereof that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected: it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question, and unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power (see the **Chief Constable of the North Wales Police v Evans(supra)** at page 143). That is so whether or not there is a right of appeal against the decision on the merits. The duty of the court is to confine itself to the question of legality. Its concern is with whether a decision-making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice (or the duty to act fairly), reached a decision which no reasonable tribunal could have reached or abused its powers.

It is further noted that the grounds upon which administrative action is subject to control by judicial review have been conveniently classified as threefold. The first ground is 'illegality': the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second is 'irrationality', namely Wednesbury unreasonableness **(Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223, [1947] 2 All ER 680).** The third is 'procedural impropriety'. What procedure will satisfy the public law requirement of procedural propriety depends upon the subject matter of the decision, the executive functions of the decision-maker (if the decision is not that of an administrative tribunal) and the particular circumstances in which the decision came to be made. **(Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at 411)**. It has also been held that even where facts are 'jurisdictional', the court's investigation of them is of a supervisory character and not by way of appeal **(Khawaja v Secretary of State for the Home Department [1984] AC 74 at 105)**.

This, in summary, is the law on judicial review and it is the prism through which the applicant's application ought to be viewed.

To begin with, it is worth noting that the facts upon which the applicant's application is based are not in dispute since none of the respondents filed any replying affidavit to respond to them. It follows that in the absence of any contrary evidence, the facts as deposed by the applicant are presumed to be true. It is on this understanding that I will proceed.

As noted earlier, one of the grounds upon which the 2nd respondent opposed the applicant's suit is that the applicant is basically seeking to have the decision of the Independent Electoral and Boundaries

Commission Dispute Resolution Committee substituted with the decision of this court; in other words, the applicant is accused of challenging the merits of the Committee's decision, an issue that this honourable court cannot venture into under the guise of judicial review.

For the record, the applicant has impugned two decisions the first of which is the decision of the 1st respondent disqualifying the applicant as an independent candidate for the senatorial seat in Kirinyaga County; the second decision is that of the Dispute Resolution Committee dismissing the applicant's complaint against the 1st respondent's decision to disqualify him.

My understanding of the applicant's case is that the processes leading to these decisions were flawed and for that very reason, those decisions cannot be allowed to stand. If it is true, as the applicant suggests, that the respondents' decisions are predicated on anomalous processes, characteristic of any of the grounds for judicial review, then I agree with him that the resultant decisions fall squarely within the scope of administrative acts that are subject to scrutiny by this court by way of judicial review. What I mean is that if it is proved to the satisfaction of this court, that there was an element of illegality, irrationality or procedural impropriety in the processes that eventually culminated in the impugned decisions, then those decisions are unsustainable not necessarily for want of merit but because the means through which they evolved is tainted, one way or the other.

There is no doubt that the 2nd respondent is a public body and by its very nature, it is bound by the substantive principles of public law in exercise of its public functions. For this reason and because of its quasi-judicial functions, it must, as matter of law, ensure that its decision-making process is lawful. The High Court will intervene, in exercise of its supervisory jurisdiction, where it fails in any of these tasks.

With this in mind, I respectfully disagree with the learned counsel for the 2nd respondent that the applicant's application is only meant to supplant the decision of the Disputes Resolution Committee with that of this honourable court.

Turning back to the applicant's affidavit, the picture painted of the 1st respondent is of a person who was bent on locking out the applicant from the senatorial contest after his initial attempt was thwarted by none other than the Chairman of the Independent Electoral and Boundaries Commission himself. My assessment of the applicant's evidence is that the seeds of discord between the applicant and the 1st respondent were sowed by the 1st respondent's unilateral decision to alter the applicant's scheduled date for presentation of his nomination papers. The altercation that ensued when the applicant complained of this change of dates seems to have characterised his subsequent interactions with the respondent.

These facts tell the full story: the applicant was initially scheduled to appear for presentation of his papers on 30thMay, 2017. Later the 1st respondent asked him to appear on 28th May, 2017 instead; and even after the appellant complained that he could not make it because he had prior engagements on the material date, the 1st respondent insisted that if he could not come on 28th May, 2017 then he had to appear on 29th May, 2017 and not on the agreed date of 30th May, 2017. And even then, after the applicant made efforts and appeared on 29th May, 2017 as directed, the 1st respondents could not even allow him at the venue. He not only employed a police officer to bar the applicant from accessing the premises but he also informed him that he should consider himself disqualified.

As noted, it is only when the chairman of the Electoral Commission intervened that the applicant was allowed to present his papers on 31st May, 2017. The decision of the chairman suggests two things; that the applicant had a valid complaint against the 1st respondent and, that there was no particular reason why the 1st respondent was effectively straining the applicant to present his nomination papers on 28th or 29th May, 2017 when he could possibly present them after his scheduled date 30th May, 2017.

The 1st respondent could not hide his displeasure when the applicant appeared before him to present his papers at the order of the Chairman of the Electoral Commission on 31st May, 2017. He questioned the

applicant's involvement of the Chairman of the Commission in his case. He then sent the applicant away on the pretext that he could not access signatories of his supporters in his computer and also because the applicant was not accompanied by his proposer and seconder yet these persons had been locked out of the venue by the officer manning the gate. When the applicant appeared again to present his papers on 2nd June, 2017 the 1st respondent declined to clear the applicant; amongst the reasons he scribbled on the applicant's nomination papers was that the applicant was not accompanied by his proposer and seconder and that his nomination papers had been filled outside the nomination deadline. This was obviously not true because the applicant had all along been with his proposer and seconder and as far as the filling of the nomination form is concerned, it is clear on its face that it was filled on 29th May, 2017. It cannot therefore be argued that it was filled outside the nomination deadline when the applicant was scheduled to return his papers on 30th May, 2017 and later on 31st May, 2017.

My assessment of the 1st respondent's conduct with respect to the applicant's endeavour for clearance to contest for the senatorial seat in Kirinyaga county is that it was laced with malice and bad faith. The altercation between him and the applicant, and the subsequent strained relationship between them appears to have influenced every decision he made with respect to the applicant's efforts for clearance to contest.

If the 1st respondent's conduct is examined in the context of the grounds upon which a court can intervene in an administrative action by a public body, I am convinced it fits the grounds of irrationality and procedural impropriety.

The disqualification of the applicant by the 1st respondent was, as noted, influenced by ulterior motives; it was in bad faith; it took into account irrelevant considerations and disregarded relevant considerations. All these flaws define what irrationality or 'Wednesbury unreasonableness' is.

The 2nd respondent on the other hand, was guilty of procedural impropriety and illegality in its decision. From what I gather, a complaint lodged before it would ordinarily be in a prescribed standard form and amongst the conditions that the complainant had to comply with, as explicitly stated on the face of that form, is that:

> ***"The complainant must, at the time of the hearing, have evidence of prior service to on the respondent."***

It is implied here that, once a complaint is filed, there follows a hearing and it is a complainant's legitimate expectation that there will be such a hearing in which he will present or prosecute his case. It is also implied that by requiring evidence of service to the respondent, it is expected, and legitimately so, that the respondent will not only answer the complainant's complaint but that the he will also appear at the hearing to put its case forward.

Now, there is no evidence that after the applicant lodged and served his complaint, there was any sort of response from either of the respondents. Neither is there any evidence that proceedings of whatever nature were conducted to deliberate on the applicant's complaint. More importantly, the applicant was not heard.

With all these omissions, the question that arises is the basis upon which the 2nd complainant's decision dated 9th day of June 2017 dismissing the applicant's complaint was made.

Again, it bothered me that although the complaint was against the respondents, it was the 2nd respondent's Chairman and its two other commissioners who are purported to have deliberated on the applicant's complaint. Strictly speaking, and in my humble view, it is obvious that the respondents sat on their case.

I am minded that under **section 74** of the **Elections Act, No. 24 of 2011** the Independent Electoral and Boundaries Commission is vested with power to resolve electoral disputes, including disputes relating to

and arising from nominations. I doubt, however, that the disputes the legislature had in mind were disputes in which the commission was itself a party.

Without any evidence that the Disputes Resolution Committee conducted any proceedings; without the evidence that the applicant was given a hearing; and, considering that even if the Committee deliberated on the applicant's complainant, it sat on its case, I am inclined to conclude that besides being culpable for procedural impropriety, the Committee also flouted the two basic rules of natural justice. First, that no man is to be a judge in his own cause (*nemo judex in causa sua*) and second that no man is to be condemned unheard (*audi alteram partem*).

There is also a tinge of illegality in the procedure adopted by the Committee. S**ection 3** of the **Fair Administrative Action Act, No. 4 of 2015**, subjects the 2nd respondent to the provisions of this Act. **Section 4** of that Act spells out what I would call the basic minimum requirements an administrative action, such as the one taken by the 2nd respondent, must meet in order to stand the test of legality. Due to its centrality to the question at hand, and for better understanding, it is necessary that I reproduce the entire section here; it states:

> ***4.(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) Every person has the right to be given written reasons for any administrative action that is taken against him.***
>
> ***(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision***
>
> > ***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***
> >
> > ***(b) an opportunity to be heard and to make representations in that regard;***
> >
> > ***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***
> >
> > ***(d) a statement of reasons pursuant to section 6;***
> >
> > ***(e) notice of the right to legal representation, where applicable;***
> >
> > ***(f) notice of the right to cross-examine or where applicable; or***
> >
> > ***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***
>
> ***(4) The administrator shall accord the person against whom administrative action is taken an opportunity to***
>
> > ***(a) attend proceedings, in person or in the company of an expert of his choice;***
> >
> > ***(b) be heard;***
> >
> > ***(c) cross-examine persons who give adverse evidence against him; and***
> >
> > ***(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.***
>
> ***(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or***

be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

There is no doubt that decision taken by the 2nd respondent adversely affected the applicant in so far as his constitutional rights or fundamental freedoms are concerned. It was up to the 2nd respondent to ensure, before coming to its decision, that the applicant had, as much as possible, been accorded the entitlements outlined in **section 4(3)** and **(4)** of the Act which clearly include the right to attend the proceedings in person; the right to be heard; and, the right to cross-examine any person who had adverse evidence against him. To the extent that it flouted these provisions of the law its decision smacks of illegality.

In conclusion therefore, I am persuaded that the process that culminated in the decisions to lock out the applicant from contesting for the seat of senator in the forthcoming general elections were vitiated by irrationality, procedural impropriety and illegality. This in effect means that the applicant has made out a case for orders for judicial review and therefore his motion dated 19th June, 2017 is allowed. For avoidance of doubt, I hereby make the following specific orders:

1. An order of certiorari is hereby issued; the decision of the 1st respondent that disqualified the applicant from presenting his nomination papers for the position of senator in Kirinyaga county is thus removed into this court and quashed.

2. An order of certiorari is hereby issued; the decision of the Independent Electoral and Boundaries Commission Dispute Resolution Committee dated 9th June, 2017 dismissing the applicant's complaint is removed and quashed.

3. An order of prohibition is hereby issued prohibiting the respondent from implementing the decision of the 1st respondent refusing to clear the applicant to contest as an independent candidate for the senatorial seat for Kirinyaga County.

4. An order of mandamus is hereby issued compelling the 2nd respondent to accept the applicant's nomination papers and gazette the name of the applicant as an independent candidate for the Kirinyaga Senate seat in the general elections scheduled for 8th August, 2017.

The applicant shall have the costs of this application.

It is so ordered.

Signed, dated and delivered in open court this 28th July, 2017

Ngaah Jairus

JUDGE