



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**JUDICIAL REVIEW DIVISION**  
**JR MISC. APPLI. NO. 351 OF 2017**

**IN THE MATTER OF MEMBER OF PARLIAMENT,**  
**EMBAKASI NORTH, NAIROBI COUNTY**

**FRANICS CHEGE WACHIRA ..... PETITIONERS**

**VERSUS**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ..... RESPONDENT**

**AND**

**RETURNING OFFICER NAKURU EAST CONSTITUENCY..... INTERESTED PARTY**

**JUDGMENT**

1. The exparte applicant is an aspirant for the position of Member of County Assembly for Biashara Ward Nakuru County as an Independent Candidate and in his quest for the said position presented his papers to the interested party who allegedly rejected the said papers.

2. Upon the rejection of the said papers he moved the court by way of appeal in Election Nomination Appeals No. 12 of 2017 Nairobi and Justice Lesiit rightly found that the exparte applicant should have been heard by the IEBC Dispute Resolution Committee by virtue of Article 88 (4) of the Constitution and Section 74 of the Elections Act and since there was no provision either in constitution or statutes on matters of appeal from the IEBC Dispute Resolution committee and that such jurisdiction does not exist and struck out the appeal as being incompetent.

3. The above legal setback did not deter the exparte applicant in his set objective to be on the ballot paper. He therefore filed the present cause under certificate of urgency dated 19<sup>th</sup> June, 2017 in which he sought the following orders:-

**1) THAT the application be heard exparte in the first instance.**

**2) THAT leave be granted to the applicant to commence Judicial Review proceedings for an order of certiorari to quash the decision dated 8<sup>th</sup> June, 2017.**

**3) THAT leave be granted to the Applicant to commence judicial review proceedings for an order of mandamus compelling the IEBC to clear the Applicant to vie for the position of Member of County Assembly for Biashara ward Nakuru County as an independent candidate.**

**4) Leave granted to operate as stay barring the IEBC from publishing the names of candidates until the substantive motion is heard and determined.**

4. The application was supported by his annexed affidavit in which he deponed that he traveled all the way to Nairobi to perform task 9 and 5 on the Respondent's check list upon which he was advised by the office of the Registrar of Political Parties Nairobi that it was the work of the returning officer to verify that the applicant and his first two supporters were not members of any political party and therefore managed to beat the deadline and presented his papers before the Returning Officer at 3.45 p.m. on 31<sup>st</sup> May, 2017 but was not cleared on the basis that he had no original clearance letter and that his supporters number 1 and 2 were not conveniently verified as not registered under any political party.

5. It was deponed that he reported to the IEBC Returning Officer on 1<sup>st</sup> June, 2017 but the forms were rejected and marked time barred having diligently performed his part of the process and was frustrated by the returning officer which amounted to harassing and infringement of his constitutional right to vie for the seat of Member of County Assembly Biashara Ward Nakuru.

6. This application was certified urgent and fixed for hearing of substantive orders on 28/6/2017 at which when the matter was called out and in the absence of the Applicant the same was dismissed for non-attendance which application was reinstated for hearing on merit upon an application dated 30/6/2017.

7. In response to the said application the Respondent filed a replying affidavit sworn by one SALOME OYUGI Manager Political Parties in which it was deponed that the applicant had not followed the correct procedure in filing the application here under Order 53 Rule 1(2) of the Civil Procedure Rules 2010 and that the reason for rejection of the Applicant's papers was that the same was late in submitting the same which was confirmed by the exparte applicant and that there was no justification for the court to bar the Respondent for publishing or printing the names of candidates.

### **SUBMISSIONS**

8. This application was heard by way of oral submissions and on behalf of the Applicant it was submitted that the interested party violated principles of Article 10(2) of the Constitution of Kenya 2010 in declining to admit the applicant as a candidate having put the burden on the same to perform the duties which they were supposed to do and therefore being unfair and discriminatory to the applicant. It was submitted that failure to include the statement of claim was not fatal to the application herein.

9. On behalf of the respondent it was submitted that the application herein was defective since there was no statement of claim upon which the court would have granted the order sought. It was submitted that the application papers were rejected on the ground of lateness as per the timelines set by the 1<sup>st</sup> Respondent.

### **ANALYSIS AND DETERMINATION**

10. In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and law before it, would have made such decisions. Such decision is usually in defiance of logic and acceptable moral standard, procedural impropriety is when there is a failure to act fairly on the part of the decisions making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of

natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercise jurisdiction to make a decision. See **REPUBLIC v DIRECTOR OF PUBLIC PROSECUTION exparte VICTORY WELDING WORKS LTD** High Court of Nairobi Misc. Civil Application No. 249 of 2012 (2013) eKLR.

11. The above position has been reinstated by the Supreme Court of India in **STATE OF MADHYA PRADESH v M.V. VYAVASAYA & CO.** AIR 1997 SC 993:-

*“It has been repeatedly held by this court that the power of the High Court under Article 226 of the Constitution is not akin to appellate power. While exercising this power, the court does not go into the merits of the decisions taken by the authorities concerned but only to ensure that the decision is arrived at in accordance with the principles of natural justice whenever applicable. Further where there are disputed questions of fact, the High Court does not normally go into or adjudicate upon the disputed questions of fact.”* Emphasis added

12. It must be pointed out that the decision challenged by the Applicant before this court by way of Judicial Review is not the decision of the interested party in rejecting the applicant’s papers but that of the 1<sup>st</sup> Respondent Dispute Resolutions committee in Complaint No. 186 of 2017 in declining to allow the applicant to submit his nomination papers out of time and in which the committee had this to say:-

*“According to gazette Notice No. 2697 dated 16<sup>th</sup> March, 2017, the days for the nomination of political parties candidates and independent candidates for the County Assemblies was on Sunday, May 28, 2017 and Wednesday, May 31, 2017. Further, the candidates were required to deliver their nomination papers to the respective Returning Officers between the hours of eight o’clock in the morning and one o’clock in the afternoon and between the hours of two o’clock in the afternoon at the place designated by the Commission.*

*Further, this Committee reiterates the provisions of Regulation 43(2)(g) of the Elections (General) Regulations, 2012 to the effect that the Returning Officer shall hold a nomination paper invalid in the nomination papers is presented after the prescribed period has lapsed.*

*In view of the admission by the complainant himself in his supporting affidavit that he was time barred and considering the above mentioned Gazette Notice and the law the only order that commends itself is a dismissal of the Complaint.”*

13. In this matter it is not disputed that the 1<sup>st</sup> Respondent Dispute Resolution Committee had jurisdictions conferred to it by Section 74 of the Elections Act No. 24 of 2011 pursuant to the provision of Article 88(4) (e) of the Constitution of Kenya 2010 and that the exparte applicant presented his complaint to the said bodies who accorded the same a hearing thereby complying with the Rules of Natural Justice since the same received a just and fair treatment. It is therefore not open to this court to go into the merit of the decision itself since under review the court has no power to substitute the decision unlike when the court is dealing with powers of Judicial Review of Constitutional and Statutory provisions which is not the case with the present application even though the applicant submitted that it was based upon Article 10(2) of the Constitution of Kenya, 2010.

14. In the **Court of Appeal CA. No. 224 of 2017 INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION v THE NATIONAL SUPER ALLIANCE (NASA) & 6 OTHERS** the Court had this to say on the issue of Judicial Review application against the Constitution Judicial Review

*“92. In our considered view presently, Judicial Review in Kenya has constitutional underpinning in Articles 22 and 23 as read with Article 47 of the Constitution and as operationalized through the provisions of the Fair Administrative Action Act. The common Law Judicial Review is now embodied and ensconced into constitutional and statutory judicial review order O53 of the civil procedure Act and Rules is a procedure for applying for remedies under*

***common law and Law Reform Act. These common law remedies are now part of the constitutional remedies that the High Court can grant under Articles 23(3) (c) and (f) of the Constitution, the fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems of judicial review. A party is at liberty to choose the common law Order 53 or constitution and statutory review procedure. It is not fatal to adopt either or both.”***

15. In the present case it is clear that the applicant chose the common law **Order 53** and must therefore be bound by its provisions including filing statement of claim. Since it is clear that the applicant was accorded hearing and the matter was properly determined on the basis that the applicant failed to meet the timelines set by the Respondents in presentation of his papers which he has admitted in his evidence in support, I am unable to see any merit on the application herein since the purpose of Judicial Review is to ensure that an individual receives fair treatment and that the process in reaching the decision has been observed correctly.

16. Whereas the applicant and his supporters had legitimate expectation to participate in the election and for his nomination papers to be accepted, he was equally under a legal duty to present his nomination papers correctly and within the timelines set out either under statute or regulation issued thereon which he failed to comply with.

17. By reason of the matters stated herein above, I find no merit in the application herein noting that the applicant has failed to make out a case for grant of the orders sought and hereby dismiss his application herein.

18. Since election matters are of a public nature each party shall bear its own costs.

DATED, DELIVERED and SIGNED at Nairobi this 25<sup>th</sup> day of **July**, 2017.

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**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Faraji for the Applicant*

*No appearance for the Respondent*

*Tabitha court clerk*