



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**  
**JUDICIAL REVIEW MISC. APPLICATION NO. 473 OF 2017**

**LESIT, J**

**IN THE MATTER OF AN APPLICATION BY HON. T. J. KAJWANG FOR LEAVE TO APPLY  
FOR PREROGATIVE ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION  
ELECTORAL CODE OF CONDUCT ENFORCEMENT COMMITTEE**

**AND**

**IN THE MATTER OF ARTICLES 22, 27, 38, 47, 48, 50, 88 AND 157 OF THE CONSTITUTION  
OF KENYA, 2010, PARAGRAPH 6(a), (b) AND (C) OF 2<sup>ND</sup> SCHEDULE OF THE ELECTIONS  
ACT, 2011**

**AND**

**IN THE MATTER OF PROCEEDINGS BEFORE THE INDEPENDENT ELECTORAL &  
BOUNDARIES COMMISSION ELECTORAL CODE OF CONDUCT ENFORCEMENT  
COMMITTEE IN IEBC/ECCC/43/2017**

**AND**

**IN THE MATTER OF**

**HON. T. J. KAJWANG.....APPLICANT**

**AND**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....RESPONDENT**

**RULING**

1. The Applicant Hon. T. J. Kajwang has filed a Chamber Summons under Certificate of Urgency dated 31<sup>st</sup> July, 2017. It has been brought under **Sections 1A, 1B and 3A** of the **Civil Procedure Act** and

**Order 53 Rule 1 of the Civil Procedure Rules.**

2. The application seeks five orders as follows:

**(1) That this application be and is hereby certified as urgent and the same to be heard ex parte in the first instance.**

**(2) That leave be granted to the Applicant to apply for prerogative Order of Certiorari to remove and deliver to the Honourable Court for quashing all proceedings before the Independent Electoral and Boundaries Commission Electoral Code of Conduct Enforcement Committee being IEBC/ECCC/43/2017; Hon. Elizabeth Ongoro versus Hon. T. J. Kajwang including but not limited to Charge Sheet dated 25<sup>th</sup> July 2017, Summons dated 25<sup>th</sup> July 2017, Statement of Complaint dated 16<sup>th</sup> July 2017 and all consequential orders and/or judgmentemanating therefrom.**

**(3) That leave be granted to the Applicant to apply for prerogative Order of Prohibition to prohibit the Independent Electoral and Boundaries Commission Electoral Code of Conduct Enforcement Committee from conducting all proceedings in IEBC/ECCC/43/2017; Hon. Elizabeth Ongoro versus Hon. T. J. Kajwang including but not limited to Charge Sheet dated 25<sup>th</sup> July 2017, Summons dated 25<sup>th</sup> July 2017, Statement of Complaint dated 16<sup>th</sup> July 2017 and all consequential orders and/or judgment emanating therefrom.**

**(4) That leave be granted to operate as a stay of all proceedings before the Independent Electoral and Boundaries Commission Electoral Code of Conduct Enforcement Committee in IEBC/ECCC/43/2017; Hon. Elizabeth Ongoro versus Hon. T. J. Kajwang including but not limited to Charge Sheet dated 25<sup>th</sup> July 2017, Summons dated 25<sup>th</sup> July, Statement of Complaint dated 16<sup>th</sup> July 2017 and all consequential orders and/or judgment emanating therefrom pending hearing and determination of the motion for Judicial Review.**

**(5) That costs of this application be provided for.**

3. The application is premised on 11 grounds on the face of the application. I need not repeat those grounds here as they are ably set out under the application. The application is supported by a statement, Affidavit verifying facts and a Supporting Affidavit sworn by the Applicant.

4. When the Applicant's advocate appeared to argue the Certificate of Urgency, the Respondent had been served. Both Counsels came before court on 2<sup>nd</sup> August 2017. The court ordered that the Respondent do file its response for hearing of the Chamber Summons application the following day, which was done.

5. The Respondent filed a replying affidavit sworn by Crispine Owiye, the Secretary to the Respondent's Electoral Code of Conduct Enforcement Committee. The Respondent also filed a list of authorities.

6. The Applicant contends that the Respondent has instituted and conducted proceedings against the Applicant in his absence. He contends that he was not served with any charge. That summons to appear before the Respondent was through SMS on the evening of the day the matter was heard. He contends that his rights under **Articles 47, 50 and 157(6)** of the **Constitution** have been infringed.

7. The second complaint by the Applicant is that the Respondent has acted without jurisdiction first by usurping the powers of the Director of Public Prosecutions to institute and prosecute election offences under **Article 157(6)** of the **Constitution**. The Applicant argues that the substance of the matter heard by the Respondent was in the nature of election offences which can only be prosecuted by the DPP, and under **Section 23** of the **Elections offences Act**, can only be heard by Special Courts.

8. The Applicant contends that he has since seen the charge instituted against him which is annexed to the pleadings. He contends that the Respondent entertained allegations of offences purportedly committed by

the Applicant and or his supporters in the period before the Applicant became a candidate for the elections for the position of Member of National Assembly for Ruaraka Constituency. That therefore the powers of the Respondent to enforce the **Code of Conduct** under the **Second Schedule** of the **Elections Act** had not kicked in during part of the period the alleged offences or breaches were committed, and secondly, during the same period the Applicant was not a candidate and therefore the Applicant was not within the jurisdiction of the Respondent and its Committee.

9. The Applicant contends that the Respondent has finalized the hearing having heard the complainant and her witnesses. He contends that summoning him to appear before the Respondent's Committee after the hearing has been concluded infringes and continues to infringe on his rights.

10. The Applicant contends that the entire process is *ultra vires*, that he stands to suffer irreparably. He contends that sanctions the Respondent has power to impose are draconian and far reaching. He therefore seeks to be granted leave to file judicial review proceedings as sought.

11. The Respondent has opposed this application and relies on the replying affidavit sworn by Mr. Owiye, together with the list of authorities.

12. The Respondent's contention is that the Applicant's application is incompetent having cited the wrong provisions of law and misinterpreted the law. It is the Respondent's contention that it has acted within the law and within its jurisdiction under the **Elections Act, 2<sup>nd</sup> Schedule** of the **Act** and received a complaint lodged by one Senator Elizabeth Ongoro against the Application on breach of **paragraphs 6(a) (b) and (c) of the Electoral Code of Conduct**.

13. The Respondent contends that the Respondent's Committee issued summons to the Applicant which he has failed to heed and has taken no steps to appear before the Committee despite being aware of the proceedings before the Committee.

14. The Respondent contends that the Applicant has not been shut out from participating in the proceedings but the Applicant has decided not to subject himself to the Committee despite signing the electoral code of conduct.

15. The Respondent admits that proceedings before the Committee have since commenced by the complainant, but contends that since judgment has not been rendered this application is pre-mature.

16. The Respondent contends that it has not usurped the powers of the DPP, which powers are limited to offences brought under the **Elections Offences Act** and not those in the instant case which have been brought under the **Second Schedule** of the **Elections Act**.

17. I have considered the application, the statement of facts, affidavits from both sides and submissions by both counsels to the parties in this case.

18. At this interlocutory stage of the proceedings, the court must satisfy itself of three principle factors. One that the Applicant has a prima facie case with arguable grounds and that the application meets the technical form prescribed in law; two that the Applicant has the *locus standi* to institutes and maintain the application; and three, that the application is not time barred.

19. The Respondent has urged that the judicial review proceedings are of last resort for purposes of quashing any unprocedural process. The Respondent argues that the Applicant has not shown that the process under scrutiny in this application was unlawful or that there was procedural impropriety.

20. The Applicant on the other hand urged that he has demonstrated that there was procedural impropriety, arbitrariness and unfairness in the entire process and Respondent's actions, and therefore, the Applicant is entitled to apply for leave to institute judicial review proceedings for the prerogative orders of certiorari and prohibition, and for the orders to operate as a stay.

21. The writ of Prohibition looks into the future and deals not only with acts but also omissions, and the same can be applied for at any time so long as the acts or omissions sought to be restrained persist.

22. The Applicant seeks prohibition order to prohibit the Respondent's Committee from conducting all proceedings in IEBC/ECCC/43/2017 **Hon. Ongoro vs. Hon. Kajwang** including but not limited to the charge sheet dated 25<sup>th</sup> July 2017, summons dated 25<sup>th</sup> July 2017, statement of complaint dated 16<sup>th</sup> July 2017 and all consequential orders and/or judgment emanating therefrom. There is no dispute that the proceedings proceeded and that judgment was due on 31<sup>st</sup> July, 2017 and is still being awaited. At the same time the Respondent purports in this proceedings that it is still awaiting the Applicant to present himself before it before passing judgment. I find that what the Applicant seeks to prohibit still persists, and the jurisdiction is thus invoked.

23. The Applicant seeks an order of certiorari to quash the proceedings in issue and entire complaint, charges and record of proceedings. The Applicant has demonstrated that the proceedings have proceeded unprocedurally without prior notification or summons to him thus infringing the Applicant's right to natural justice and right to fair hearing, fair trial and fair administrative action. The Application has demonstrated that the Respondent may be entertaining complaints outside of the period prescribed in the **Elections Act** and **2<sup>nd</sup> Schedule** thereunder. The Applicant has demonstrated that the Respondent's powers to investigate and interrogate had not crystallized for part of the period under consideration and therefore its actions are ultra vires.

24. The Respondent has urged that it will only act on the period within the law. That argument is defeated by the proceedings before the Respondent as it framed only one charge sheet and in it the Respondent is enquiring into a number of days some of which fall outside its purview of jurisdiction.

25. I am satisfied that the Applicant has demonstrated that it has a prima facie case to apply for the judicial review as sought. The Applicant has *locus standi* to institute and maintain the proceedings sought. The application has also been brought within time.

26. In regard to whether leave sought should apply as a stay the Respondent has argued that granting stay will be encouraging impunity, allowing the Applicant to escape and will be tantamount to permitting him to continue carrying out violations of the Electoral Conduct.

27. The Respondent is anxious for nothing. Even if the Respondent committee's life comes to an end, electoral misconduct and offences will still be dealt with post the electoral period, either through the **Election Offences Act** or **Election Petitions**. The Applicant's actions can still be dealt with by other bodies even after the life of the Respondent's Committee.

28. The greater harm and what concerns this court is to allow a process tainted with procedural impropriety and which infringes on the rights to fair trial under **Article 50** and fair administrative action under **Article 47** of the **Constitution**. Constitutional infringement is by far a worse wrong than alleged breach of a **Code of Conduct**. Nothing prevented the Respondent's Committee from complying with the rules of natural justice and the constitutional rights to fair trial, fair hearing and fair administrative action. These are fundamental rights and even the mere threat to infringe them cannot be countenanced by the court.

29. I find that the Applicant has established that he has a prima facie case. I will therefore grant the following orders:

**(1) That leave be and is hereby granted to the Applicant to apply for prerogative Order of Certiorari to remove and deliver to the Honourable Court for quashing all proceedings before the Independent Electoral and Boundaries Commission Electoral Code of Conduct Enforcement Committee being IEBC/ECCC/43/2017; Hon. Elizabeth Ongoro versus Hon. T. J. Kajwang including but not limited to Charge Sheet dated 25<sup>th</sup> July 2017. Summons dated 25<sup>th</sup> July 2017, Statement of Complaint dated 16<sup>th</sup> July 2017 and all consequential orders**

and/or judgmentemanating therefrom.

(2) That leave be and is hereby granted to the Applicant to apply for prerogative Order of Prohibition to prohibit the Independent Electoral and Boundaries Commission Electoral Code of Conduct Enforcement Committee from conducting all proceedings in IEBC/ECCC/43/2017; Hon. Elizabeth Ongoro versus Hon. T. J. Kajwang including but not limited to Charge Sheet dated 25<sup>th</sup> July 2017, Summons dated 25<sup>th</sup> July 2017, Statement of Complaint dated 16<sup>th</sup> July 2017 and all consequential orders and/or judgment emanating therefrom.

(3) That leave be granted to operate as a stay of all proceedings before the Independent Electoral and Boundaries Commission Electoral Code of Conduct Enforcement Committee in IEBC/ECCC/43/2017; Hon. Elizabeth Ongoro versus Hon. T. J. Kajwang including but not limited to Charge Sheet dated 25<sup>th</sup> July 2017, Summons dated 25<sup>th</sup> July, Statement of Complaint dated 16<sup>th</sup> July 2017 and all consequential orders and/or judgment emanating therefrom pending hearing and determination of the motion for Judicial Review.

(4) That costs will be in the cause.

DATED AT NAIROBI THIS 4<sup>TH</sup> DAY OF AUGUST, 2017.

LESITT, J.

JUDGE