



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ELECTION PETITION APPEAL NO. 380 OF 2017**

**IN THE MATTER OF**  
**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC)**

**DISPUTE RESOLUTION COMMITTEE DECISION OF 7<sup>TH</sup> JUNE, 2017**

**IN THE MATTER OF: THE CONSTITUTION, 2010**

**IN THE MATTER OF: ADMINISTRATIVE ACT, 2015**

**IN THE MATTER OF: THE ARTICLE 47 OF THE CONSTITUTION: ON FAIR  
ADMINISTRATIVE ACTION**

**IN THE MATTER OF: BREACH OF RULES OF NATURAL JUSTICE AND PROCEDURE**

**AND**

**IN THE MATTER OF: THE INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION DISPUTE RESOLUTION COMMITTEE'S FAILURE TO OVERTURN THE  
DECISION OF THE COUNTY RETURNING OFFICER, NYERI, OVER OFFICER'S REFUSAL  
TO CLEAR THE APPLICANT AS A CANDIDATE FOR THE ELECTIVE POST OF SENATOR-  
NYERI COUNTY IN THE COMMITTEE'S DECISION OF 7<sup>TH</sup> JUNE, 2017**

**EUNICE WANGARI KIRAGU.....APPLICANT**

**-V E R S U S-**

**THE COUNTY RETURNING OFFICER.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1) Eunice Wangari Kiragu, the exparte Applicant herein, took out the motion dated 28<sup>th</sup> June 2017 in which she sought for the following orders:

1. *THAT an order of certiorari removing to this honourable court and quashing eh Respondent's decision of refusal to clear the Applicant as a candidate for the senate seat, Nyeri County in the Republic of Kenya.*

**2. THAT an order of mandamus directing the Respondent to accept her papers and clear her to vie as a candidate for the Nyeri senate seat.**

2) The motion is accompanied by a statement of fact and is verified by the affidavit of the Applicant. When served, the County returning Officer Nyeri, County and Independent Electorate Boundaries Commission, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively, filed grounds of opposition to resist the motion. When the motion came up for interpartes hearing, the exparte Applicant was the only who attended court. This court proceeded to grant leave to the exparte Applicant to argue the motion exparte upon being satisfied that the Respondent was served.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the verifying affidavit plus the statement of facts and the Respondent's grounds of opposition. I have also considered both the oral and written submissions. The history behind this motion appears to be short and straightforward. It appears that on or about 26<sup>th</sup> May 2017, the exparte Applicant submitted a statutory declaration form together with her papers to the Respondent's County Returning Officer (CRO), Nyeri County, to seek for clearance for nomination as a candidate for the senate seat on 8<sup>th</sup> August 2017 General Elections in Kenya. The following were documents presented by the Applicant to the Respondents County Returning Officer:

*i. A Statutory Declaration that she is a Kenyan Citizen and a holder of ID No.2238973*

*ii. Statutory Declaration papers of nominations Parliamentary & County Election under Rule 41*

*iii. An abstract from the Police records*

*iv. A Copy of National Identity Card both sides*

*v. Official letter from the National Registration Bureau confirming that the applicant is legal holder of National ID Card no. 22389736 together with official specimen of her finger prints.*

4) Upon receipt of the aforesaid documents on 29.5.2017, the Respondent's County Returning Officer refused to clear the Applicant on the basis that the Applicant had failed to present her identification documents namely the ID or a passport. The Applicant being aggrieved filed a complaint before the 2<sup>nd</sup> Respondent's Dispute Resolution Committee. The IEBC Dispute Resolution Committee heard and dismissed the Applicant's complaint on the basis that she had failed to present the requisite documentation together with the nomination papers. The committee also stated that the Returning Officer had power to invalidate nomination papers which have been presented without the requisite documents. Being dissatisfied with the 2<sup>nd</sup> Respondent's decision, the Applicant filed these proceedings.

5) It is the Applicant's submission that the Respondent's County Returning Officer made a decision without according her a right of hearing. It is further argued that had the County Returning Officer, given her a hearing, he would have found that she had presented authentic documents confirming that she is a Kenyan citizen. The Applicant further pointed out that the County Returning Officer's decision occasioned a miscarriage of justice and that the same was made in bad faith. The Applicant also argued that the County Returning Officer and the Dispute Resolution committee acted unreasonably by rejecting her complaint.

6) In response to the Applicant's motion, the Respondent filed grounds of opposition to oppose the same. The Respondents did not deem it fit to file an affidavit to controvert the Applicant's averments. The main ground put forward by the Respondent to oppose the motion is to the effect that the orders prayed for have been overtaken by events since the timeline set for the Respondent to receive nomination papers of candidates has already lapsed and that the ballot papers have already been printed. The Respondents have further argued that the timelines cannot allow for the inclusion of the Applicant in the ballot paper. This court was consequently urged to dismiss the motion.

7) Having considered the rival arguments, it is clear in my mind that the facts presented by the Applicant are not contested. It is not in dispute that the exparte Applicant presented to the Respondent's County Returning Officer the following documents:

- i. A Statutory Declaration that she is a Kenyan Citizen and a holder of ID No.2238973*
- ii. Statutory Declaration papers of nominations Parliamentary & County Election under Rule 41*
- iii. An abstract from the Police records*
- iv. A Copy of National Identity Card both sides*
- v. Official letter from the National Registration Bureau confirming that the applicant is legal holder of National ID Card no. 22389736 together with official specimen of her finger prints.*

8) It is also not in dispute that the 2<sup>nd</sup> Respondent's County Returning Officer merely rejected the Applicant's application for nomination as a senatorial candidate for Nyeri County after hearing her but without critically considering the validity of the documents she presented. It is further not in dispute that the 2<sup>nd</sup> Respondent's Dispute Resolution Committee heard the Applicant's complaint and dismissed it on the basis that the Respondent's County Returning Officer had the right to invalidate the Applicant's documents. It is also not in dispute that the Applicant did not present to the Respondent's County Returning Officer her original I.D because the same got lost.

9) The question is whether or not the Applicant was given a right of hearing by the Respondent's County Returning Officer before refusing to clear her as a senatorial candidate for Nyeri County? I have carefully considered the material placed before this court and I am convinced that the Applicant was given a right of hearing by the Respondent's County Returning Officer. There is no doubt that the exparte Applicant was also given a hearing before the Respondent's Dispute Resolution Committee.

10) Having determined the issue touching on the right of hearing, I now turn my attention to the question as to whether or not the decision was unreasonable. Both the 2<sup>nd</sup> Respondents' County returning Officer and the Dispute Resolution Committee came to the conclusion that the exparte Applicant had failed to present the requisite documentation together with the nomination papers. The main document which was missing in the Applicant's list of documents is the original identity card. The Applicant has averred that she lost the same. She in fact supplied a copy of her Identity Card plus the police abstract form and an affidavit. Under the relevant provision, the Applicant was required to present the original and a copy of the identity card. Of course there was an explanation as to why the original ID Card could to be presented. With respect, I agree with the submissions of the Applicant that on the face of the explanation given by the Applicant and the presentation of a police abstract form and a statutory declaration in form of an affidavit, it cannot be said that the Applicant had failed to present the requisite documents. The Applicant had presented a copy of her identity card together with the supporting documents. The County returning Officer and the Dispute Resolution Committee did not comment on the validity or otherwise of the aforesaid documents. In my humble view the 2<sup>nd</sup> Respondent's County Retuning Officer and its Dispute Resolution Committee acted unreasonably hence their decision to refuse to clear the Applicant is amenable to be quashed. The Respondent is therefore entitled to prayer 1 of the motion dated 28.6.2017.

11) This court has also been asked to issue an order of mandamus to compel the Respondent to accept the Applicant's nomination papers as a senatorial candidate for the Nyeri County. The Respondent has beseeched this court not go grant the order because the time it was required to receive nomination papers has lapsed and that ballot papers have been printed. Mr. Maosa learned advocate for the Applicant appreciated the fact that the Applicant's prayer for an order for mandamus has been overtaken by events since the ballot papers have been printed and that the time to receive nomination papers has lapsed. With respect, I agree with the arguments of both sides that the Applicant's prayer for an order of mandamus has been overtaken by events. The time the Respondent was required to receive nomination papers has lapsed.

12) It is not in dispute, and, it is also in public domain that the ballot papers have already been printed hence it is not possible to have the name of the Applicant included in the ballot.

13) In the end, and, though I find merit in the Applicant's application for an order for certiorari, I will however apply the doctrine of proportionality to dismiss the motion in public interest. Consequently the motion is dismissed with no order as to costs.

Dated, Signed and Delivered in open court this 1<sup>st</sup> day of August, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent