



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW**

**MISCELLANEOUS APPLICATION NO. 273 OF 2017 (J.R)**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF ARTICLE 137 (1) (d) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 33 OF THE ELECTIONS ACT, NO.24 OF 2011 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE UNFAIR TREATMENT OF PETER SOLOMON GICHIRA BY THE IEBC IN HIS CANDIDATURE FOR THE PRESIDENCY.**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**AND**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (IEBC).....RESPONDENT**

**EX PARTE: PETER SOLOMON GICHIRA**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 2<sup>nd</sup> June, 2017 the *ex parte* applicant herein **Peter Solomon Gichira**, seeks the following orders:

- 1) **THAT** this Honourable Court be pleased to issue an Order of Certiorari bringing into the High Court for purposes of quashing the Respondent's decision made on 27<sup>th</sup> May, 2017 to the effect that it would not allow the Exparte Applicant to submit his list of signatures and other documents required for nomination as a Presidential Candidate in the August 8<sup>th</sup> 2017 General Elections under Article 137(1)(d) of the Constitution on account of been time barred.
- 2) **THAT** this Honourable Court be pleased to issue an Order of Mandamus compelling the Respondent to acknowledge receipt and accept the submitted signatures of the persons who have nominated the Ex-Parte Applicant as well as his other Documents for nomination as a Presidential Candidate in the August 8<sup>th</sup> 2017 General Elections.
- 3) **THAT** the Honourable court be pleased to grant such other orders or writs as may be fair and just in the circumstances
- 4) **That** the costs of this application be borne by the Respondent.

## Applicant's Case

2. According to the applicant, he is a Kenyan and a presidential aspirant as an independent candidate. He however laments that he has encountered hurdle after hurdle in his quest to become the chief executive of this country, the latest being the decision made by the Respondent to reject the list of nomination signatures he submitted on 26<sup>th</sup> May, 2017. He added that the Respondent has even laid false and fabricated criminal charges against him in Criminal Case Number 967 of 2017 at the Chief Magistrate's Court. In addition, the Registrar of Political Parties had rejected his symbol, which led to him filing Appeal No. 2 of 2017 against the Registrar's decision at the Political Parties Disputes Tribunal which appeal was allowed on 6<sup>th</sup> May, 2017, and consequently the said symbol was recommended. It was averred that the said Tribunal compelled the Registrar of Political Parties to approve the ex-parte's applicant's symbol, paving the way for the next stage of his candidature.

3. However, on 17<sup>th</sup> May, 2017, the Respondent through its Twitter account announced that it would only receive signatures in a Microsoft Excel format and that the same should be for voters/supporters not affiliated to any political party. On the same medium and on the same day, the Respondent also announced that the signatures would be submitted between 18<sup>th</sup> and 22<sup>nd</sup> May, 2017.

4. According to the ex parte applicant, he submitted a list of signatures of his supporters to the Respondent through one of its officers, a **Mr. Abdi**, on 19<sup>th</sup> May, 2017, but they were rejected because they were neither in Excel nor were they from persons who were not affiliated to any political party. Aggrieved by the decision the ex parte applicant filed Constitutional Petition Number 234 of 2017 on 20<sup>th</sup> May, 2017 which was heard and by a judgement delivered on Friday, 26<sup>th</sup> May, 2017 the High Court declared section 29 of the **Elections Act** and the requirement to submit signatures in Excel format unconstitutional and consequently null and void. In the same judgement the Court barred the Respondent from rejecting the Ex-Parte Applicant's list of signatures on the basis of section 29 of the Elections Act and/or the requirement for Excel. It was averred that the Ex Parte Applicant immediately served the Orders upon the Respondent and resubmitted a list of his nomination signatures on the same day, but they were rejected on 27<sup>th</sup> May, 2017 on the grounds that he had submitted outside the set timelines though the decision was not even reduced into writing.

5. It was deposed that the Respondent falsely accused the Ex-Parte Applicant of *inter alia* malicious damage of property, leading to his immediate arrest and detention at the Central Police Station on 27<sup>th</sup> and 28<sup>th</sup> May, 2017. According to the applicant, the Respondent completely refused to hear his pleas and his lawyers, and proceeded with the two day exercise of presentation of nomination papers by eight presidential aspirants at the KICC on 28<sup>th</sup> and 29<sup>th</sup> May, 2017 in his absence. To the applicant, his arrest and detention were designed to lock him out of the exercise.

6. It was further deposed that the Respondent has not advanced any reasons to justify locking the applicant out of the Presidential race in the next general elections since the applicant did submit a list of 2,000 supporters from at least 24 counties as required to the Respondent's offices at Anniversary Towers on Friday the 19<sup>th</sup> day of May 2017. He disclosed that **Mr. Abdidahir Maalim Abdi** is the officer named **Abdi** that is mentioned in his Statutory Statement who perused his list of supporters and, on noticing that they were not in the prescribed format and that some of the supporters were members of political parties, he turned the applicant away for non-compliance. It was then that upon obtaining legal advice, the applicant filed Constitutional Petition No. 234 of 2017 on 20<sup>th</sup> May, 2017.

7. It was therefore the applicant's case that the Respondent's officers colluded to lie to the Court that the applicant did not appear at their offices to present his papers on 19<sup>th</sup> May, 2017. He asserted that the Respondent has not produced any documents to show that he did not present his papers on 19<sup>th</sup> May 2017. The Chairperson, he deposed claims to have been there but does not produce a register of the candidates who presented their papers on the material day, and neither does **Mr. Abdidahir Maalim Abdi** hence there is no way to show who presented their list of supporters between 18<sup>th</sup> and 22<sup>nd</sup> May 2017. To the applicant, the Chairperson and **Mr. Abdidahir Maalim Abdi** are clearly reading from different scripts. This is so because at Paragraph 6 of his Replying Affidavit, the Chairperson states that only ten (10) aspiring presidential candidates presented their list of supporters for verification between 18<sup>th</sup> and 22<sup>nd</sup> May 2017 while **Mr. Abdidahir Maalim Abdi** at paragraph 6 of his Replying Affidavit states that during the same period he received documents from nine (9) aspirants for verification, a proof that one name was clearly omitted, a clear and blatant show of error of fact, malice and bad faith.

8. It was contended by the applicant that he could not possibly have gone to Court before firstly submitting his list of supporters since he was not aware of the requirements of 17<sup>th</sup> May 2017 until he presented his list and was turned away which rejection on 19<sup>th</sup> May 2017 informed and was the reason for his decision to file Constitutional Petition No. 234 of 2017 on 20<sup>th</sup> May, 2017.

9. The applicant denied the allegation that he was of unsound mind and therefore unfit to vie for the Presidency and averred that he has never been convicted of any criminal offence or found to be of unsound mind.

10. It was disclosed that on 29<sup>th</sup> May 2017, the applicant's advocate, acting on his instructions, went to the Respondent's offices to collect the letter that had allegedly communicated the decision to reject his list of supporters on account of being time barred but was informed that the letter had been recalled by the Chairperson and later shred. The applicant therefore contended that the Respondent's actions amount to an infringement on his right to information since the Respondent has deliberately withheld the letter from the Court and to date, he still does not know the specific grounds the Respondent relied on in rejecting his papers on 27<sup>th</sup> May 2017. While the Respondent has communicated to him through email and other modes before, this time round they chose to completely keep him in the dark.

11. It was further disclosed that **Mr. Moses Kipkemoi Kipkogei** also informed the applicant's advocate that the Respondent had expected him to present himself at KICC on 28<sup>th</sup> and 29<sup>th</sup> May 2017, like **Ms. Nazlin Umar** did, for purposes of being cleared but this was never communicated to him. Instead, he was arrested on 27<sup>th</sup> May 2017 and was locked in custody till the afternoon of 29<sup>th</sup> May, 2017.

12. According to the applicant, at Paragraph 8 of his Replying Affidavit, **Mr. Moses Kipkemoi Kipkogei** claims that the Respondent was in the process of confirming whether the applicant's signatures would meet the Constitutional requirement of a list of 2000 supporters'

signatures who must be registered voters in at least 24 counties. However, this was after a decision had been reached, by the very same Respondent, to reject the very same signatures. It was noted that whereas the Chairperson annexed a copy of an extract of the register of attendance at the venue for registration of candidates, being the KICC, he curiously did not annex that of 18<sup>th</sup> – 22<sup>nd</sup> May 2017 at its offices. In any event, the applicant could not present his grievances at KICC because he was being held at the Central Police Station hence there was no way he could meet the Chairperson at KICC like he expected him to.

13. It was therefore the applicant's case that it was becoming increasingly clear that the Respondent is hell-bent on frustrating him out of the presidential race. It was noted that whereas the Chairperson says 18 candidates expressed interest to participate in the said nominations, and goes on to list ten candidates who were rejected for non-compliance, the applicant's name does not appear therein. However, the Chairperson, in the Respondent's own Interim Report of 20<sup>th</sup> May, 2017 at Page 3, acknowledges that the applicant was a proposed independent presidential candidate. He also revealed that the Respondent, on the evening of 22<sup>nd</sup> May 2017, extended to him through email an Invitation to a Pre-Nomination meeting for presidential candidates that he attended on 23<sup>rd</sup> May 2017, a confirmation that as at 22<sup>nd</sup> May 2017 they had the applicant as one of the candidates.

14. It was clarified by the applicant that he wrote the letter annexed as 'PSG-3' on 26<sup>th</sup> May 2017 to resubmit his CD after the High Court ruled in his favour earlier that day and that the purpose of the letter was purely to lay the basis of the resubmission. The applicant while the Chairperson correctly states that neither the applicant nor his authorized representative presented his nomination papers at the KICC on 28<sup>th</sup> and 29<sup>th</sup> May 2017 hence the reason for not making a determination or communicating any decision to him, the Chairperson, shot himself in the foot for two reasons. Firstly, the Respondent did indeed make a decision that was communicated orally to the applicant and contained in the letter that was mysteriously recalled by the Chairperson and shred as confirmed by **Mr. Moses Kipkemoi Kipkogei** in his affidavit sworn on 6<sup>th</sup> June 2017 that the Chairperson had authored a letter to the applicant which they have failed to disclose till now. Secondly, the applicant could not present himself at the KICC because he was systematically, at the instigation of the Respondent, being held at Central Police Station at the time. In any event, the Respondent had released a list of the candidates who were required at that venue and a timetable for the exercise which list and the timetable were in the public domain, and the applicant's name was not on them.

15. The Chairperson was accused by the applicant of exhibiting conduct unbecoming of a person of his stature by being hell-bent on destroying evidence that might implicate him and the Commission. He claims that no decision was made yet there was a letter that was recalled by himself and shred for unknown reasons. His own officer has confirmed the existence of the letter, which to date has not been produced before this court despite the Orders of the Court. The absence of this letter just goes to show how unfair and flawed the Respondent's process to verify and clear me for the presidential elections has been.

16. The applicant's case was that he was not accorded any chance to address the Respondent before and after it arrived at the decision to reject the signatures of his supporters after the court order of 26<sup>th</sup> May 2017, neither were any reasons communicated to him for the rejection.

17. It was submitted on behalf of the applicant that the decision taken by the Respondent on 27<sup>th</sup> May 2017 to reject his signatures had the effect of denying him the right to be a candidate for public office as provided under Article 38(3)(c) of the constitution. The Respondent, as the sole body tasked with conducting elections in Kenya, was well aware of the implications of its decision, and there is no justifiable reason it did not treat the Applicant fairly. Pursuant to Article 24(3) of the Constitution, it is incumbent upon the Respondent to demonstrate to this Court that the requirements of the said Article have been met but it did not do so. To the applicant the Respondent put unreasonable restrictions on the Applicant in his quest to vie for the presidency.

18. It was submitted that the decision was never communicated to the Applicant as provided under Article 47 and the applicant relied on **Republic vs. Commission on Administrative Justice & Another Ex Parte Samson Kegengo Ongeru [2015] eKLR**. According to the applicant, the Respondent was under a Constitutional obligation to ensure that its decision to reject the Applicant's list of supporters met the requirement of fairness and relied on **R vs. Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531, 560-G**.

19. According to the applicant, for the hearing to be said to be fair, the Applicant ought to have been called to address the Respondent before such an adverse decision was reached. He should have been given a reasonable opportunity to put forward his facts and arguments in justification of his resubmission of his signatures on 26<sup>th</sup> May 2017.

20. The Court was therefore urged to find that the process conducted by the Respondent in regard to the Applicant's candidature was so procedurally flawed that it does not meet the Constitutional threshold set out under Article 47 and reliance was placed on **Halsbury's Laws of England**, 5<sup>th</sup> Edition. Vol. 61 page 545 at Paragraph 640. The Court was further urged to rely on and to associate itself with the findings of the **Lenaola, J** in **Garissa County Government vs. National Land Commission 3 Others [2016] eKLR** where he held that an action or decision can only be deemed reasonable if it is undertaken or reached following a process that is well reasoned and logical, so that even if a reasonable person would disagree with the action taken or decision reached, the person would still deem the process leading thereto as coherent and sensible. What this then means is that the process leading up to a decision must be procedurally sound for the action to be deemed reasonable. In this case, the process was procedurally flawed for failure to satisfy Article 47 of the Constitution. The Applicant was not afforded an opportunity to be heard before and after the decision was made unilaterally. The decision itself was not communicated to him in writing. The reasons for the decision remain unknown. It therefore follows that the decision taken by the Respondent was unreasonable.

21. It was submitted that the Respondent's locking out the Applicant on account of a timeline when he had successfully challenged the Respondent's requirements also demonstrates unreasonableness. The Respondent was ably represented in **Constitutional Petition No. 234 of 2017**, and it is a show of bad faith and malice to bar the Applicant while well aware that there were proceedings in Court.

22. The applicant argued that pursuant to section 6(4) of the **Fair Administrative Action Act**, if the administrator fails to furnish the Applicant with reasons for the decision complained of, the decision shall be presumed to have been made without any good reasons.

23. Based on the decision in **Garissa County Government vs. National Land Commission 3 Others** (supra) it was submitted that written

reasons should be given, as a matter of right, to anyone against whom an administrative action has been taken.

24. To the applicant, the decision taken by the Respondent to reject the Applicant's list of supporters was not procedurally fair. It needs to be quashed because it violates the principles of natural justice. Such a decision must be declared to be no decision.

#### **Respondents' Case.**

25. On behalf of the Respondent, four sets of affidavits were filed.

26. According to the Commission's Chairperson, **Wanyonyi Wafula Chebukati**, on 17<sup>th</sup> March, 2017 the Respondent published Gazette Notice Number 2692 in the Kenya Gazette notifying all aspirants intending to participate in the General Elections as presidential candidates of the various timelines to be met in order to be cleared as presidential candidates in the General Elections on 8<sup>th</sup> August 2017. In accordance with the stipulated timelines, the Respondent issued a public notification on 17<sup>th</sup> May, 2017 informing the presidential aspirants and general public that all presidential candidates were to submit their list of 2,000 supporters from at least 24 counties as required in Article 137(1) (d) of the Constitution to the Commission in print and excel formats between 18<sup>th</sup> -22<sup>nd</sup> May 2017. It was the Chairperson's view that the Respondent's notification was premised on the provisions of section 33 (b) of the **Elections Act, 2011** which allows the Respondent to call for the nomination papers in prescribed form and Regulation 18 of the **Election (General) Regulations 2012** which requires the same to be in form 12 accompanied by an A4 sheets of paper print and an electronic form which IEBC prescribed as the excel format.

27. It was deposed that the Applicant being aggrieved by this requirement moved to court by way of Constitutional Petition Number 234 of 2017 to challenge section 29 of the **Elections Act** and the requirement for submission of the list in the manner set out in the notice dated 17<sup>th</sup> May, 2017 and judgment was issued in favour of the Applicant on 26<sup>th</sup> May 2017.

28. According to the Chairperson, the Respondent received the submissions of list of supporters by aspiring Presidential Candidates between the 18<sup>th</sup> and 22<sup>nd</sup> May 2017, at its offices in Anniversary Towers, 6<sup>th</sup> Floor University Way and at the lapse of the period allowed for receiving the nomination lists, the Respondent closed the submission process to pave way for the receiving of nomination papers from all presidential candidates which was scheduled on Sunday, 28<sup>th</sup> May, 2017 and Monday, 29<sup>th</sup> May, 2017. According to him, the nomination papers were to be delivered by the candidates, to the Chairperson of the Independent Electoral and Boundaries Commission, as the Returning Officer for the presidential election, 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 and four o'clock in the afternoon at Kenyatta International Convention Centre, being the place designated by the Respondent.

29. It was his case that the process starting with the receipt of list of supporters by the Respondent as per the constitutional and statutory requirements was part of a series of connected and continuous events leading up to the General Elections to be held on 8<sup>th</sup> August 2017 and more specifically the start of the political campaign period between the 28<sup>th</sup> May 2017 and 5<sup>th</sup> August 2017 which had to be strictly complied with. He disclosed that as the Returning Officer for the Presidential Election, he was present at the Respondent's offices on the 19<sup>th</sup> May 2017 overseeing the receipt of nomination lists from all aspiring presidential candidates as scheduled and was aware that only ten (10) aspiring presidential candidates presented their list of supporters for verification during the said period between 18<sup>th</sup> -22<sup>nd</sup> May 2017. He was also aware that 18 candidates expressed interest to participate in nominations for presidential elections out of which the following ten (10) candidates were rejected for non-compliance as listed below:

- a) Musungu Amram Inaymbuku;
- b) Juma Justus Zachaos Onyango;
- c) Musyoka Stephen Kalonzo;
- d) Michael Nyangwachi Orenge;
- e) Muthiora Eluid Karaiara;
- f) Stephen Owoko Oganga;
- g) Peter Osotsi;
- h) Nazlin Umar Rajput;
- i) David Munga Mwadenda; and
- j) Erastus Nyamera Masira.

30. However, eight (8) aspiring presidential candidates were cleared as follows:

- a) Dida Mohamed Abduba;
- b) Kenyatta Uhuru;

- c) Odinga Raila Amolo;
- d) Ekuru Aukot;
- e) Khwa Jirongo Shakhhalaga;
- f) Joseph William Nthiga Nyaga;
- g) Japheteh Kavinga Kaluyu; and
- h) Michael Wanaina Waweru.

31. It was the Chairperson's case that in conducting the entire exercise he gave audience to all aspiring candidates who sought to present their papers as well as those making enquiries, seeking exemptions or presenting grievances such as **Ms. Nazlin Umar Rajput** and all these were documented. However, the Applicant did not present his documents to him for clearance within the period referred to above. He asserted that a candidate could only be cleared to contest for Presidential Office upon the presentation of nomination papers with the following details to the Returning Officer:

- a. the candidate's name as it appears in the voter register;
- b. the voter registration number of each of the subscribers thereto;
- c. be signed by the candidate, and by a proposer and seconder who shall be voters registered in the respective electoral areas but who shall not be members of any political party;
- d. the respective electoral area and voters number of the proposer and the seconder; and
- e. be delivered to the returning officer personally by the candidate himself or herself or by a person authorized in that behalf by the candidate on the day set for the nomination of that election.

32. It was averred that in performing the said role, a Returning Officer is required to hold nomination papers invalid where:

- a. the particulars of the candidate or supporters contained in the nomination paper are not as required by the Act or Regulations in respect of that elective post;
- b. the nomination paper is not subscribed as required by these Regulations in respect of that elective post;
- c. the candidate is not qualified to be, or is disqualified by law from being nominated or elected to the elective post for which nomination is sought;
- d. that so many of the supporters as would reduce the number of qualified supporters to less than the required number of supporters are not qualified to be supporters;
- e. the candidate was not nominated by a political party under section 13 of the Act;
- f. the candidate's name is not on the list submitted by the political party under section 35 of the Act;
- g. the nomination paper is presented after the prescribed period has lapsed;
- h. the nomination paper was not accompanied by the prescribed fee;
- i. the person stands nominated as a candidate in another electoral area; or
- j. the candidate is disqualified under any other written law.

33. It was therefore averred that based on the mandatory requirements set out above there is no way that the Respondent would have cleared the Applicant without the Applicant presenting any documents for his clearance in the first place. It was therefore his position that all aspiring presidential candidates had a fair opportunity to present documents according to requirements set out in law.

34. He however asserted that despite the clear timelines set out above, the Applicant presented to the Respondent his nomination documents on the 27<sup>th</sup> May, 2017 and was informed that the documents could not be received as they were submitted out of time and it would not have been possible for the necessary verifications and checks for compliance to be finalized. It was his case that the Respondent does not have the option or discretion of accepting submissions made out of time such as the Applicants as the Respondent has a duty to apply the set timelines uniformly and to reject documents or submissions made out of time. His justification was that the need for parties to observe the timelines set for candidates to make their submissions or deliver documents is intended to ensure that the Respondent is able to meet its obligation of ensuring that the elections are conducted using a defined and predictable timetable. To him therefore the Applicant has only himself to blame for failing to exercise reasonable diligence in ensuring compliance with the timelines gazetted by the Respondent over two months before the relevant date and the Respondent cannot be faulted for the Applicant's own failure to meet the set deadlines. In the circumstances, the Court was urged not to allow the Applicant to benefit from his indolence and non-compliance with the law since the effect of the application as presented by the Applicant is in the circumstances an attempt to circumvent and bypass constitutional and statutory requirements as well as clearly stipulated timelines.

35. Accordingly, the reliefs sought by the Applicant are entirely unmerited and offend the spirit of the law to the extent that they seek to circumvent clear-cut safeguards on the qualifications and requirements for persons aspiring to participate as candidates for the highest office of the land. It was therefore his position that it is undesirable for the application to be allowed as this will set the stage for a plethora of similar applications in relation to various elective positions and therefore result in the Respondent being shackled with litigation that will impair the delivery of its mandate which is an issue of widespread public importance.

36. The deponent further deposed that as the Returning Officer for the Presidential Election, he was present at the Respondent's offices on 18<sup>th</sup> May 2017 to 22<sup>nd</sup> May 2017 overseeing the receipt and verification of the nomination lists from all aspiring presidential candidates and from the list of the Applicants who presented their documents on the said dates and in particular on 19<sup>th</sup> May 2017, he did not receive any application from the ex-parte Applicant as alleged or on any other date between the 18<sup>th</sup> and 22<sup>nd</sup> March 2017. He reiterated that during the said period the Respondent received documents from only 10 presidential aspirants eight (8) of whom were successful and cleared to present their nomination papers on 28<sup>th</sup> -29<sup>th</sup> May 2017. He emphasized that he did not receive the ex-parte Applicant's submission of the list of supporter's signatures on the 19<sup>th</sup> May 2017 or any other date during the said period.

37. He averred that under rule 43(4) of the *Elections (general) Regulations 2012*, where a nomination paper is declared to be invalid for want of compliance with the prescribed regulations, the returning officer is obligated to record that decision and the reasons thereof on the nomination paper, append his signature on the same and return the invalid nomination paper to the candidate or its presenter. Therefore had the ex-parte Applicant submitted his documents on 19<sup>th</sup> May 2017, and the same were found to be invalid as alleged, at the very least the ex parte Applicant ought to produce before this Court the nomination paper presented and endorsed by the Respondent's returning officer rejecting the documents which the applicant has not done. The totality of the above is that the ex parte Applicant has not tendered any evidence to show that he appeared before the Respondent on the 19<sup>th</sup> of May 2017.

38. According to the deponent, on the afternoon of 26<sup>th</sup> May 2017, the ex parte Applicant submitted a list of 57,382 names and signatures of his supporter's for verification together with a High Court Judgment which had been rendered on the same day. This letter was duly received and stamped by the Respondent on the same day. Similarly, had the Applicant submitted his papers on 19<sup>th</sup> May 2017 as alleged, the same procedure would have been applied and the documents would have been stamped and received by the Respondent regardless of whether it was accepted or not. However, by time the ex parte Applicant presented his list of supporters to the Respondent on 26<sup>th</sup> May 2017, the period for receipt of the signatures of presidential aspirant's list of supporter's had lapsed on 22<sup>nd</sup> May 2017.

39. It was the deponent's case that the Judgment rendered by this Court on 26<sup>th</sup> May 2017 did not direct the Respondent to extend the period for receipt of list of supporters beyond the set period of 18<sup>th</sup> to 22<sup>nd</sup> May 2017 and in the circumstances, the ex-parte Applicant's submission was clearly out of time. He asserted that in the said judgment of 26<sup>th</sup> May 2017, the Court declined to issue a blanket order directing the Respondent to acknowledge receipt and accept the submitted signatures of the persons who had nominated the Petitioner as a Presidential candidate in the August 8<sup>th</sup> 2017 General Election.

40. The deponent reiterated that by a gazette notice dated 17<sup>th</sup> March 2017, the Respondent notified members of the public that all aspiring presidential candidates were required to present their nomination papers to the chairperson returning officer for the Presidential election on the 28<sup>th</sup> and 29<sup>th</sup> May 2017 at a place to be designated by the Respondent, being the Kenyatta International Conference Centre. However, neither the ex-parte Applicant nor his authorized representative presented his nomination papers to the Chairman of the Respondent on the 28<sup>th</sup> and 29<sup>th</sup> of May 2017 as required under the provisions of rule 39(e) of the *Elections (general) Regulations 2012*. In the circumstances, in the absence of the ex-parte Applicant's nomination papers, the Respondent could not make any determination nor communicate any decision to the ex-parte Applicant. As such, the application herein lacks merit.

41. To the deponent, the allegation by the ex-parte Applicant that the Respondent engineered his arrest and detention to prevent him from presenting his papers is false and has not been substantiated. The Applicant was in any event by law allowed to appoint a representative to present his nomination papers in his stead. Accordingly, there was no malice or ill will on the part of the Respondent towards the ex-parte Applicant.

42. There was also another affidavit sworn by **Moses Kipkemoi Kipkogei**, an Advocate of the High Court of Kenya currently employed by the Commission as a Manager in the Office of the Chief Executive Officer/ Commission Secretary.

43. According to him, on 27<sup>th</sup> May, 2017 he was in the Office handling his usual assignments when he was requested by the Secretary to the Chairperson to help her deal with a difficult client who had declined to accept to receive a letter authored by the Chairperson for him. He then requested the Secretary to invite the individual to his Office which she did and the client introduced himself as **Peter Solomon Gichira**, the Applicant herein, and proceeded to narrate his difficulties in collecting the letter in question. The Applicant was, at the time, accompanied by his lawyer. According to the deponent, the Applicant informed him that he had successfully challenged the provisions of

section 29 of the **Elections Act**, which had obligated all independent candidates for the presidential elections to obtain at least 2000 supporters' signatures from a majority of the Counties, who should not be members of a political party. The Applicant indicated that he had also succeeded in challenging the Commission's directive that the envisaged signatures be submitted in excel format. The Applicant further informed him that following the Court decision, he had on 26<sup>th</sup> May, 2017 submitted the requisite signatures and an electronic version of the same. On further inquiry from the deponent's colleagues, the deponent was informed by **Abdihahir Maalim Abdi** that he had submitted scanned copies in PDF format.

44. It was deposed that the Applicant indicated that the Commission should now schedule him to appear before the Chairperson of the Commission for registration as an independent presidential candidate for the forthcoming General Election. However, the deponent informed him that the Commission was in the process of confirming whether his signatures would meet the Constitutional requirement of a list of 2000 supporters' signatures, who must be registered voters, in at least 24 counties. He therefore gave the Applicant audience to air his grievances and patiently explained to him the legal process he still needed to undergo before he could be cleared to vie as an independent presidential candidate. Notwithstanding that, the Applicant went berserk accusing everyone of blocking his aspiration to change this country from the front and ultimately stated that two things were going to happen: that he either gets cleared to vie for the presidency there and then or that someone would die. When asked whom he intended to kill, the applicant said he would commit suicide within the building rather than kill other persons. It was deposed that all efforts to reason with and calm down the Applicant were futile and shortly thereafter, the Applicant walked out of the office into the Secretary's office and a few minutes later, he heard shouts of panic and calls for help coming from the Secretary's office.

45. It was deposed by the deponent that upon rushing to the Secretary's office he found the Applicant being pulled back from the office window and then restrained by the office assistants and the Secretary and he was informed that the Applicant had attempted to commit suicide by jumping off the Secretary's Office window, which is located on the 6<sup>th</sup> Floor of the building. In the process, the Applicant had also damaged property in the Secretary's office. The Applicant was shortly thereafter arrested, hand cuffed by the security officers and subsequently booked at the Central Police Station and was eventually released on Monday, 29<sup>th</sup> May, 2017 at around 2:00 p.m. having been charged and released on Bond.

46. It was therefore the deponent's opinion based on the Applicant's behaviour, conduct and demeanour on the material day that the Applicant could be of unsound mind warranting proper inquisition as to whether he is not disqualified to vie for the office of President under Article 99(2)(e) as read together with the provisions of Article 137 (1) (b). To him, the Applicant's actions were an attempt to try and manipulate or blackmail the Commission in its performance of its constitutional and statutory mandate. He however asserted that the Commission could not allow the Applicant's manipulation to prevail as the Commission is required to comply with the law and ensure that all intending candidates are treated equally and go through due process within the stipulated timelines.

47. It was submitted on behalf of the Commission that Regulation 18 of the **Elections (General) Regulations, 2012** obligates prospective candidates in a general election to submit, at least five (5) days to the day fixed for nomination a list containing *inter alia* the names, Identity card or passport numbers and signatures of at least 2000 registered voters from each of a majority of the Counties to the Commission in both A4 sheets of paper and in electronic format. It was submitted that the said regulation does not require the Respondent to make a determination immediately and notify the prospective candidate as to whether the requisite threshold has been met. That decision is made under Regulation 43 of the **Elections (General) Regulations** when the Returning Officer has to make a determination as to whether the nomination paper is invalid under sub-regulation (2) thereof. It is the Respondent's submission that the Applicant is misguided in demanding a decision to have been made before the gazetted nomination dates and which decision is not contemplated in law.

48. According to the Respondent, it is common ground that whereas the parties desirous of contesting as presidential candidates appeared before the Returning Officer on 28<sup>th</sup> and 29<sup>th</sup> May, 2017, neither the Applicant nor his representative presented themselves at the venue of the nominations for a determination as to the validity of his nomination papers to be made. By virtue of Regulation 43 of the **Elections (General) Regulations, 2012** the determination of the issue of compliance and candidacy of the various applicants could only have been made at the point of submission of the nomination papers to the Returning Officer on either of those two dates, 27<sup>th</sup> or 28<sup>th</sup> May, 2017. It was submitted that Rule 43 (4) of the **Elections (General) Regulations 2012**, provides that, where a nomination paper is declared to be invalid for want of compliance with the prescribed regulations, the returning officer is obligated to record that decision and the reasons thereof on the nomination paper, append his signature on the same and return the invalid nomination paper to the candidate or its presenter. It was the Respondent's submission that on the facts of the present case this stage was not reached due to the failure by the Applicant to present himself to the Returning Officer and therefore that no decision could have been made in the manner envisaged by Rule 43(4).

49. To the Respondent, it is entrusted with the exclusive constitutional mandate of *inter alia* conducting or supervising referenda and elections to various elective bodies and offices established by the Constitution of Kenya. This mandate includes overseeing nomination of presidential candidates in compliance with Constitutional and statutory requirements.

50. It was reiterated that on 17<sup>th</sup> March, 2017 the Respondent published Gazette Notice Number 2692 in the Kenya Gazette notifying all aspirants intending to participate in the General Elections as presidential candidates of the various timelines to be met in order to be cleared as presidential candidates in the General Elections on 8<sup>th</sup> August 2017. In accordance with the stipulated timelines, the Respondent issued a public notification on 17<sup>th</sup> May, 2017 informing the presidential aspirants and general public that ALL presidential candidates were to submit their list of 2,000 supporters from at least 24 counties as required in Article 137(1)(d) of the Constitution to the Commission in print and excel formats between 18<sup>th</sup> -22<sup>nd</sup> May 2017. The Respondent however did not receive any application from the *Ex-Parte* Applicant as alleged or on any other date between the 18<sup>th</sup> and 22<sup>nd</sup> May 2017 and therefor that none could have been acted upon.

51. On 28<sup>th</sup> and 29<sup>th</sup> the Respondent received nomination papers from various aspirants as detailed in the affidavit of **Wafula Wanyonyi Chebukati**. As confirmed by the attendance registrar annexed to the Affidavit, these included aspirants that were seeking clarifications and none of the aspirants was denied audience with the Returning Officer. Neither the ex-parte Applicant nor his authorized representative presented his nomination papers to the Chairman of the Respondent on the 28<sup>th</sup> and 29<sup>th</sup> of May 2017 as required under the provisions of rule 39(e) of the **Elections (general) Regulations 2012**. In the circumstances, in the absence of the ex-parte Applicant's nomination papers, the

Respondent could not make any determination nor communicate any decision to the ex-parte Applicant.

52. It was submitted that the Respondent acted in strict compliance with the law in insisting on observance of or compliance with the stipulated timelines and that no evidence has been tendered of the Respondent's refusal to perform its duty as to warrant an order of mandamus being issued as sought by the Applicant.

53. In support of its submissions the Commission relied on Ferdinand Ndung'u Waititu vs. Independent Electoral & Boundaries Commission, IEBC & 8 Others (2014) eKLR, Kimani Wanyoike v Electoral Commission & Another [1995] eKLR, Republic vs. Nairobi City County & another exparte Wainaina Kigathi Mungai [2014] eKLR, Nairobi Judicial Review Misc. Case No. 356 of 2013, and Republic vs. Judicial Service Commission Exparte Pareno [2004] 1 KLR 203-209, Republic vs. Kiambu County Government & 4 others Exparte Samuel Thinguri Waruath & 2 others [2015] eKLR, Nairobi Judicial Review Misc. App. No. 355 of 2014 and concluded that all aspiring presidential candidates had a fair opportunity to present documents according to requirements set out in law and that the *Ex-Parte* Applicant was the author of his own misfortune by failing to comply with the stipulated timelines, of which the Respondent cannot faulted. By insisting on compliance with the stipulated timelines the Respondent was merely acting in pursuance of its constitutional and statutory mandate and in the circumstances urged the court to dismiss the application with costs.

### **Determinations**

54. I have considered the application, the affidavit filed in support of and in opposition to the application, the submissions filed and the authorities relied on.

55. In my view the determination of this matter depends on whether the Respondent adhered to the principles of fair administrative action in the manner in treated the applicant herein.

56. Article 47 of the Constitution of Kenya provides as follows:

*(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

*(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*

57 Procedural fairness is therefore now a Constitutional requirement in administrative action and the requirement goes further than the traditional meaning of the duty to afford one an opportunity of being heard. It is now clear that even in cases where there is no express requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly. In Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR, Civil Appeal 52 of 2014, the Court of Appeal held that:

**“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”**

58. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1, at paragraphs 135 -136 where it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:

**“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”**

59. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6 where it was held:

**“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”**

60. The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given case, the court set out five factors to be considered: (1) The nature of the decision being made and the

process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker.

61. Therefore, the principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

62. The right to be afforded an opportunity of being heard must be distinguished from the necessity to have an oral hearing especially in disciplinary matters. The procedure in such matters is aptly dealt with by **Michael Fordham** in *Judicial Review Handbook*; 4<sup>th</sup> Edn. at page 1007 as follows:

**“procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case”.**

63. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009**, the Court of appeal delivered itself as follows:

**“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. *Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed.*”** [Emphasis mine].

64. In **Russel vs. Duke of Norfolk [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

**“There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but *whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case.*”** [Emphasis mine].

65. However as is stated in *Halsbury Laws of England*, 5<sup>th</sup> Edition 2010 Vol. 61 at para. 639:

**“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”**

66. What the above cases hold is that whatever form of proceedings adopted by the authority, it must meet the minimum irreducible elements of fairness.

67. It is now trite that the powers given to and exercisable by state officers and state organs are not unfettered and can only be exercised lawfully lest they are accused of abusing the same. I associate myself with the decision of **Nyamu, J** (as he then was) in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] 2 KLR 240** that:

**“it is implied that power given to authorities or persons by an Act of Parliament must be exercised fairly, and the court has the power to reach out where the exercise of that power is unfair and I further endorse Lord Scarman’s quote in *Reg vs. Secretary of State for the Environment Ex Parte Nottingham Shire Country Council [1986] AC* where he stated: “A power which is abused should be treated as a power which has not been lawfully exercised.”**

68. Abuse of power, it has been held, takes several forms, one of which is where power is exercised for collateral purpose by reneging thereon without adequate justification. In my view a power that is being exercised arbitrarily is a power that is being abused.

69. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others** (supra) the Court held that:

**“On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any**

action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose the merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance...From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism.”

70. Judicial review, it has been held, stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. See **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43**.

71. In the instant case the applicant’s case is that he submitted a list of signatures of his supporters to the Respondent through one of its officers, a **Mr. Abdi**, on 19<sup>th</sup> May, 2017, but they were rejected because they were neither in Excel nor were they from persons who were not affiliated to any political party. He averred that this **Abdi** is the same person as **Mr. Abdidahir Maalim Abdi**. This information was confirmed by **Moses Kipkemoi Kipkoge**, the Commission’s Manager in the Office of the Chief Executive Officer/ Commission Secretary who deposed that upon inquiry from his colleagues, he was informed by **Abdidahir Maalim Abdi** that the applicant had submitted scanned copies in PDF format. The date for this submission was not disclosed by the Commission. Accordingly the only evidence with respect to the date of its submission is from the applicant and that date can only be taken to have been 19<sup>th</sup> May, 2017. It follows that the position adopted by the Chairperson that the applicant did not present his papers is clearly contradicted by his own officers. It follows that if as the Chairperson averred, the Respondent received the submissions of list of supporters by aspiring Presidential Candidates between the 18<sup>th</sup> and 22<sup>nd</sup> May 2017, the applicant did submit his papers within the prescribed period.

72. That this was so was confirmed by the same **Moses Kipkoge** who deposed that on 27<sup>th</sup> May, 2017 the Commission was in the process of confirming whether the applicant’s signatures would meet the Constitutional requirement of a list of 2000 supporters’ signatures, who must be registered voters, in at least 24 counties. He therefore gave the Applicant audience to air his grievances and patiently explained to him the legal process he still needed to undergo before he could be cleared to vie as an independent presidential candidate. If I am to understand the deposition of **Moses Kipkoge** properly, by 27<sup>th</sup> May, 2017, the Commission was yet to make a determination with respect to the eligibility of the applicant’s application. This must be necessarily so because the Chairperson himself confirmed that ten (10) candidates were rejected for non-compliance and he disclosed the said names which did not include the applicant’s name.

73. The question that arises is if the applicant submitted his documents which the Commission was up to 27<sup>th</sup> May, 2017 still scrutinising, what happened to his application since according to the Chairperson, only 8 aspirants were cleared. The applicant contends that he was never informed of what happened to his application. Since there was no communication to him to appear before the Commission on 27<sup>th</sup> May, 2017, he averred that there was no way he could have known that he was to appear on that day. The Respondents have not shown any evidence that they communicated to the applicant to appear on the said day so that he could do so either in person or by his representative.

74. In this case the Respondent is not very clear in its position. Whereas the Chairperson maintained that there was no decision to be made, his officers in particular **Moses Kipkoge** deposed on oath that he was requested by the Secretary to the Chairperson to help her deal with a difficult client who had declined to accept to receive a letter authored by the Chairperson for him. It was therefore clear that there was some communication from the Chair to the applicant. The Respondent for reasons best known to them have not disclosed what this communication was all about.

75. It is not in doubt that on 26<sup>th</sup> May, 2017 this Court in Constitutional Petition Number 234 of 2017 declared section 29 of the **Elections Act** which required that the independent candidates seek support only from non-party members and the requirement to submit signatures in Excel format unconstitutional and consequently null and void. In the same judgement the Court barred the Respondent from rejecting the Ex-Parte Applicant’s list of signatures on the basis of section 29 of the **Elections Act** and/or the requirement for Excel. The Respondents now contend that the Court did not extend time for the submission of the documents. However, as the officers of the Respondent confirmed that the applicant had submitted the documents in PDF format what was required of the Respondent was to peruse the submitted documents afresh in order to determine whether in light of the Court’s decision they were in conformity with the requirements and make a decision thereon. There is no evidence that such a decision was made and if it was so made there is no evidence that the same was communicated to the applicant.

76. In **Garissa County Government vs. National Land Commission & 3 others [2016] eKLR**, Lenaola, J (as he then was) juxtaposed the provisions of Article 35 vis-à-vis 47 of the Constitution and expressed himself as follows:

“I wish to remark at this juncture, that this right to written reasons differs from the right of access to information under Article 35 of the Constitution. For the latter, a request for the information one wishes to access has to be made while for the former, the decision maker is required to offer written reasons for his decision to the person against whom he makes the decision when he makes that decision and not subsequently thereto. Therefore, for the administrative action that is the subject of this suit, (the administrative action that was taken against the Interested Party), the Interested Party had the right to be given written reasons therefor... the Fair Administrative Act, 2015...provides for written reason to be given, as a matter of right, to anyone against whom an administrative decision is taken. This provision, in my view, encompasses those whose rights are not affected by any administrative decisions taken against them as well as those whose rights are affected by any

administrative decisions taken against them and therefore the jurisprudence on this subject is bound to expand accordingly. In addition to the above, written reasons would only be considered sufficient if they clearly correspond to the decision taken and are sensible in that respect.”

78. I wish to add that the Constitution requires that the reasons be in writing. According to the Commission’s Chairperson, the Applicant presented to the Respondent his nomination documents on the 27<sup>th</sup> May, 2017 and was informed that the documents could not be received as they were submitted out of time and it would not have been possible for the necessary verifications and checks for compliance to be finalized. I have already found that from the evidence of the Commission’s own officer the applicant submitted his nomination documents on 19<sup>th</sup> May, 2017. In any case the Respondent has not complied with the requirements of Article 47 of the Constitution with respect to furnishing reasons in writing.

77. It was however contended that under rule 43(4) of the *Elections (general) Regulations 2012*, where a nomination paper is declared to be invalid for want of compliance with the prescribed regulations, the returning officer is obligated to record that decision and the reasons thereof on the nomination paper, append his signature on the same and return the invalid nomination paper to the candidate or its presenter. Surely one would expect that the Commission itself would retain for its own record, counterparts of the endorsement. Here the applicant contends that no decision has been given to him. To expect him to be the one to produce the Commission’s decision is clearly irrational.

78. In my view the Commission failed to adhere to the requirements of fair administrative action as required under the Constitution.

79. The applicant seeks the following orders apart from the one for costs:

1) **THAT** this Honourable Court be pleased to issue an Order of Certiorari bringing into the High Court for purposes of quashing the Respondent’s decision made on 27<sup>th</sup> May, 2017 to the effect that it would not allow the Exparte Applicant to submit his list of signatures and other documents required for nomination as a Presidential Candidate in the August 8<sup>th</sup> 2017 General Elections under Article 137(1)(d) of the Constitution on account of been time barred.

2) **THAT** this Honourable Court be pleased to issue an Order of Mandamus compelling the Respondent to acknowledge receipt and accept the submitted signatures of the persons who have nominated the Ex-Parte Applicant as well as his other Documents for nomination as a Presidential Candidate in the August 8<sup>th</sup> 2017 General Elections.

3) **THAT** the Honourable court be pleased to grant such other orders or writs as may be fair and just in the circumstances

80. Article 23 of the Constitution provides that a court "may grant appropriate relief, including a declaration of rights" when confronted with rights violations. Under the said Article, the Applicant is entitled to 'appropriate relief' which means an effective remedy: An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Section 11 of the *Fair Administrative Action Act, 2015* provides as follows:

*(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order*

*(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;*

*(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;*

*(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;*

*(d) prohibiting the administrator from acting in a particular manner;*

*(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;*

*(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;*

*(g) prohibiting the administrator from acting in a particular manner;*

*(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;*

*(i) granting a temporary interdict or other temporary relief; or*

*(j) for the award of costs or other pecuniary compensation in appropriate cases.*

81. This Court is therefore empowered to fashion appropriate remedies. In Zacharia Okoth Obado vs. Edward Akong’o Oyugi & 2 Others [2014] eKLR the Supreme Court held that:

**“Article 3(1) of the Constitution imposes an obligation on every one, without exception, to respect, uphold and defend the Constitution. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2) (e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of the Constitution being protected and promoted. However, all statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally-guided process. What this Court would not do is to extend time beyond that decreed by the Constitution. However, a process provided for by the Constitution and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorized. For that reason, this Court would, by no means be interfering with a constitutionally-mandated process, if the order for stay is granted. This is because an order for stay will be sufficient to bring to a halt the preparation of the by-election by the IEBC as well as stop the swearing in of the Speaker.”**

82. In this case, based on the material before me I am not able to find whether the applicant satisfied all the conditions prescribed for one to vie as a President of this Country. It is however clear that the manner in which the Respondent treated him was unfair.

**Order**

83. In the premises, the order which commends itself to me and which I hereby grant is an order compelling the Respondent to receive the applicant’s documents for nomination and make a determination thereon within 36 hours of the said receipt and furnish the applicant with reasons for the its decision.

84. The costs of this application will be borne by the Respondent.

85. It is so ordered.

**Dated at Nairobi this 16<sup>th</sup> day of June, 2017**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Mr Wachira for the applicant***

***Mr Melly for the Respondent***

***CA Mwangi***