REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW NO. 438 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTION 84 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT NO. 9 OF 2011

AND

IN THE MATTER THE ELECTIONS ACT, 2016

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS 2012

THE ELECTIONS (PARTY PRIMARIES AND PARTY LISTS) REGULATIONS, 2017

BETWEEN

AND

ANTHONY MWAU WAMBUA.....APPLICANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....RESPONDENT

RULING

[1] The Applicant, **Anthony Mwau Wambua**, moved the Court under Certificate of Urgency, vide his Chamber Summons application dated **7 July 2017,** pursuant to **Rules 20** and **21** of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual, High Court Practice and Procedure Rules, 2006, seeking the following orders:

[a] Spent

[b] That in view of the urgency of the matter, the Court be pleased to make ex parte interim orders in the first instance, compelling the Respondent to clear the Applicant pending the hearing and determination of the application *inter partes*;

[c] That the Court be pleased to make any other orders and directions deemed appropriate;

[d] That the costs of the application be in the cause.

[2] The application was premised on the grounds that the Applicant was given direct nomination by the Orange Democratic Movement Party and duly issued with a Nomination Certificate, after which he complied with all requirements and submitted his documents to the Respondent for clearance; but was informed that he did not qualify to be cleared to vie for the position of Member of the National Assembly for Mwala Constituency. In support of that ground, the Applicant relied on his own affidavit sworn on **7 July 2017**, to which he annexed copies of the Nomination Certificate and the supporting nomination papers, together with a copy of the letter dated **1 June 2017**, by which his name was submitted by his Party. The Applicant also exhibited a transcript of short message text communication exchanged between him and the concerned officials of the Orange Democratic Party in respect of his nomination.

[3] Along with the Chamber Summons, the Applicant filed a Statement pursuant to **Order 53 Rule 1(2)** of the **Civil Procedure Rules** setting out the grounds upon which relief is sought herein. That Statement is, in effect, a reiteration of the matters deponed to in the Supporting Affidavit. The purport thereof is that the Applicant on **1 June 2017** at 12.00 noon, was called by the Respondent's Returning Officer and instructed to report to their Mwala Constituency office with purposes of clearance; and that this was notwithstanding that the Applicant had earlier been given an appointment for **2 June 2017**. It was further the contention of the Applicant that he complied and submitted all the documents that were required and returned the following day to finalize the process; only to be told, at around 3.45 p.m. that his name was not in the system.

[4] The Applicant further averred that he immediately contacted the Chairperson of his party's Election Board, **Ms. Judith Pareno**, through short text message, asking her to contact the Respondent and have the matter addressed before 4.00 p.m. and that it was then that the Applicant was informed that the party had written a letter dated **1 June 2017** and requested for his name along with others to be included in the Respondent's system. He obtained a copy of that letter on and has exhibited it as an annexure herein.

[5] It was further stated by the Applicant that in spite of having been duly nominated by his party, the Respondent declined to clear him as being qualified to vie as a candidate in the forthcoming General Elections, on the grounds that:

[a] His nomination papers were submitted late;

[b] His particulars were not uploaded by his party in the Respondent's system;

[c] There was no proof of gazettement of the Applicant; and

[d] He had not paid the required nomination fee.

[6] According to the Applicant, the Respondent's decision was made without justification and was made in disregard of the principles of natural justice, and therefore is in contravention of the Constitution of Kenya and the relevant provisions of the law. In the premises, it was the Applicant's prayer that an order be issued directing the Respondent to clear him as a candidate duly qualified to vie for the elective position of Member of the National Assembly, Mwala Constituency.

[7] The Respondent opposed the application and relied on the Replying Affidavit sworn by **Douglas K. Bargorett** on **12 July 2017**. The Respondent averred that the application is incompetent in that leave has not been obtained to apply for orders for judicial review prior to its filing as required by **Order 53 Rule 1,** Civil Procedure Rules. The Respondent further took issue with the form of the application contending

that in judicial review proceedings, the applicant is the Republic and not the person aggrieved by the impugned decision; and therefore that the application is procedurally incompetent and ought to be struck out with costs.

[8] It was the contention of the Respondent that it complied fully with the provisions of the Constitution of Kenya, the Independent Electoral and Boundaries Commission Act, No. 9 of 2011, the Elections (General) Regulations, 2012 and the Elections (Party Primaries and Party Lists) Regulations, 2017 by publishing **Gazette Notice No. 2692** of **17 March 2017,** giving prospective candidates guidelines and timelines on presentation of nomination papers for clearance.

[9] The Respondent further averred that under **Regulation 27** of the Elections (Party Primaries and Party Lists) Regulations, party nomination disputes must first be referred to the respective party's Dispute Resolution Committee for resolution; and therefore that the instant application is misconceived and bad in law, as the Court does not have jurisdiction to hear and entertain the same. Finally, it was the contention of the Respondent that the orders sought in the application are not capable of being granted as the Court has no powers to direct the Respondent to clear the Applicant as a nominee for Mwala Constituency as prayed, that being the preserve of the Applicant's party, which party is not a party to these proceedings.

[10] I have given due consideration to the Applicant's application, the affidavits filed and the submission made herein by the parties. There can be no doubt that although reference was made in the Chamber Summons and the Statement filed herein to this being a Petition brought under **Rules 20** and **21** of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual, High Court Practice and Procedure Rules, 2006, there is no doubt that the approach has been made by way of Judicial Review. This is manifest in the heading of the Applicant's Chamber Summons and the accompanying documents.

[11] In the premises, **Order 53 Rule 1** of the Civil Procedure Rules stipulates that:

> **"(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.**
>
> **(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on."**

[7] The aforesaid provision is couched in peremptory terms; and therefore, it was imperative for the Applicant to comply therewith by filing, an application for leave to apply for judicial review; and, in addition to the Statutory Statement, file a separate affidavit verifying the facts relied on by him. This the Applicant did not do. Accordingly, I would take the view, as I do, that the application is incompetent, for the reason that the Rules of Procedure are the handmaidens of justice and are therefore in place for a valid reason. In this connection, I would accordingly adopt the words of **Kiage JA** in the case of **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR, namely**:

> **"...that Article 159 of the Constitution and the Oxygen Principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost effective manner…were [n]ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice…it is in the even-handed and dispassionate application of rules that Courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity."**

[9] More importantly, looking at the prayers set out in the Chamber Summons, it is plain that prayers 1 and 2 thereof are spent. In prayer 2, the Applicant sought an *ex parte* interim order, compelling the

Respondent to clear him pending the hearing and determination of the application. That was not done, as to grant the said prayer would have been to dispose of the entire application *ex parte*. Additionally, it is now trite that where a constitutional mandate has been granted to a particular body or organ, judicial restraint would be apt; which is what the Court of Appeal had to say in **Shaban Mohamud Hassan and 2 Others vs The Attorney General and Others Nairobi Civil Appeal No. 281 of 2012, namely:**

> **"...the courts in discharging their judicial function must always bear in mind the supremacy of the Constitution and to respect the manner it has distributed functions to various state organs and independent bodies. The function of the High Court is to see that lawful authority vested in these organs and bodies is not abuse by unfair treatment. They cannot step outside the bounds of authority prescribed to them by the Constitution or statute because the supremacy of the Constitution is protected by the authority of an independent Judiciary, which acts as the interpreter of the Constitution and all other legislation."**

[10] In the light of the foregoing reasons, it is my finding that the Applicant's application is untenable. The same is hereby dismissed with an order that each party bears own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY 2017

OLGA SEWE

JUDGE