



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**JUDICIAL REVIEW DIVISION**

**MISC. APPLICATION NO. 429 OF 2017**

**IN THE MATTER OF AN APPLICATION**

**FOR LEAVE TO APPLY FOR PROHIBITION, MANDAMUS AND CERTIORARI**

**AND**

**IN THE MATTER OF NOMINATION OF CANDIDATES TO CONTEST FOR MEMBER OF  
COUNTY ASSEMBLY FOR MANGA WARD, KITUTU MASABA CONSTITUENCY**

**AND**

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

**AND**

**IN THE MATTER OF THE ELECTIONS ACT NO. 24 OF 2011  
AND ELECTIONS (GENERAL) REGULATIONS, 2012 (AS AMENDED)**

**AND**

**IN THE MATTER OF THE POLITICAL PARTIES ACT, NO...**

**BETWEEN**

**BERNARD KIAGE MOGENI.....APPLICANT**

**AND**

**INDEPENDENT ELECTORAL  
AND BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**RETURNING OFFICER, KITUTU  
MASABA CONSTITUENCY.....2<sup>ND</sup> RESPONDENT**

## RULING

[1] The Notice of Motion dated **2 July 2017** was filed herein on **4 July 2017** by the Applicant, **Bernard Kiage Mogeni**, pursuant to **Sections 8 and 9** of the **Law Reform Act, Chapter 26** of the **Laws of Kenya** and **Order 53 Rule 1(2), 3 and 4** of the **Civil Procedure Rules, 2010** for orders that:

[a] Spent

[b] An Order of judicial review in the nature of **Certiorari** be issued to remove into the High Court and to quash the rejection of the Applicant's Nomination Paper by the 2<sup>nd</sup> Respondent, and to quash the subsequent Decision of the Dispute Resolution Committee constituted by the 1<sup>st</sup> Respondent in **Complaint No. 341** of **2017** rendered on **9 June 2017**;

[c] An Order of Judicial Review in the nature of **Prohibition**, be issued to prohibit the 1<sup>st</sup> Respondent from publishing in the Kenya Gazette the names of persons approved and nominated to contest as candidates in the **August 8, 2017** General Election for Member of County Assembly, Manga Ward pending further orders of the Court;

[d] An Order of Judicial Review in the nature of **Mandamus** be issued to compel the 2<sup>nd</sup> Respondent in liaison with the 1<sup>st</sup> Respondent, and in consultation with the Office of the Registrar of Political Parties to receive, appraise, review and/or reconsider the Applicant's Nomination Paper (Form 18) in line with the 1<sup>st</sup> Respondent's own circular dated **30 May, 2017** and particulars of the Applicant uploaded onto the 1<sup>st</sup> Respondent's Candidate Registration Management System (CRMS) and a Certificate under **Rule 51(2)** of the **Elections (General) Regulations, 2012**, and do issue to the Applicant, secondary upon nomination of the Applicant; and that his name be gazetted as an Independent Candidate for the election of Member of County Assembly, Manga Ward, in the national elections scheduled for **August 8, 2017**;

[e] The Applicant be at liberty to apply for any or all further, necessary and/or consequential orders as may be expedient in the circumstances;

[f] Costs of and incidental to the application be provided for.

[2] The application is supported by the grounds set out therein and the facts deposed to in the annexed affidavit of the Applicant, sworn on **16 June 2017**. The Applicant's case is that for purposes of nomination as an Independent Candidate for Member of County Assembly elections, Manga Ward, his position as a voter was verified after which he submitted his symbol pursuant to **Section 32** of the **Elections Act, No. 24** of **2011** for approval by the Office of the Registrar of Political Parties and was approved and issued with a Clearance Certificate and a Symbols Certificate, which were thereafter uploaded in the CRMS. He thereafter complied with the legal requirements and rules prescribed by the 1<sup>st</sup> Respondent for the nomination of Independent Candidates.

[3] The Applicant further averred that, at the pre-nomination meeting, he informed the 2<sup>nd</sup> Respondent that he did not have the Clearance and Symbol Certificates issued to him by the Officer of the Registrar of Political Parties as the same, alongside other personal effects, had been stolen; but the 2<sup>nd</sup> Respondent insisted that he could not accept the nomination application form without the supporting documents, including the certificates. He made efforts to have the documents replaced by the 1<sup>st</sup> Respondent and the Office of the Registrar of Political Parties but was not successful. In addition, he had the theft reported to the Police and was issued with an abstract.

[4] Accordingly, on **30 May 2017**, the 1<sup>st</sup> Respondent published the Applicant's name among the names of independent candidates who had been approved to contest in the national elections and uploaded his particulars onto its CRMS, thereby certifying him qualified for nomination. The Applicant however averred that, on **31 May 2017** when he presented his nomination application form for clearance but

encountered challenges on account of the missing original documents. He thereafter lodged a Complaint with the 1<sup>st</sup> Respondent's Dispute Resolution Committee but the rejection of his nomination application by the 2<sup>nd</sup> Respondent was upheld.

[5] It was the contention of the Applicant that the decision of the 1<sup>st</sup> Respondent's Dispute Resolution Committee and the 2<sup>nd</sup> Respondent, insisting on physical presentation of copies of the Clearance and Symbol Certificates was absurd and unreasonable, noting that the documents had been reported lost and a police abstract issued and presented to the 2<sup>nd</sup> Respondent; the loss of the said documents was not premeditated; the ORPP, through its County Officer, **Mr. Moses Oyugi Nyakundi**, independently confirmed to the 2<sup>nd</sup> Respondent that the ORPP had issued to the Applicant the Certificates; electronic copies of the said documents had already been uploaded in the 1<sup>st</sup> Respondent's CRMS which the 2<sup>nd</sup> Respondent had access to. The Applicant therefore contended that he has been gravely prejudiced and risks being locked out of the forthcoming general elections; hence the prayers sought herein.

[6] The Respondents opposed the application, relying on the Replying Affidavit sworn by **Douglas Bargorett**. Their position was that there are laws and guidelines which all prospective candidates were obliged to comply with to qualify for clearance to vie for the position of Member of County Assembly; and that the Applicant failed to comply with those requirements. Consequently, his nomination was invalidated pursuant to **Regulation 43(2)(a) of the Elections (General) Regulations, 2012**. It was further the averment of the Respondents that the Applicant was granted a fair hearing by both the 2<sup>nd</sup> Respondent, and thereafter the 1<sup>st</sup> Respondent's Dispute Resolution Committee; and that in any event, the application has been overtaken by events since the candidates for the **August 8, 2017** General Elections have since been gazetted vide **Gazette Notice No. 84 of 27 June 2017**, and the printing of the ballot papers commenced.

[9] Having carefully considered the application and the affidavits filed herein, a preliminary point that pops up therefrom is the failure by the Applicant to comply with the mandatory provisions of **Order 53 Rule 1 of the Civil Procedure Rules**. That provision is explicit 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."**

[10] No such leave has, thus far been granted to the Applicant to file the Notice of Motion dated **2 July 2017**. Accordingly, no Statutory Statement has been filed, setting out the name and description of the Applicant, the relief sought and the grounds on which the relief sought is based. Similarly, no Verifying Affidavit has been filed herein verifying the facts relied on by the Applicant; and although on the face of it, the Notice of Motion shows that it was filed pursuant to leave that was granted on **29 June 2017**, there is no evidence on the record as to the granting of such leave, noting that the application itself was filed on **4 July 2017**.

[11] It is now trite that an application for judicial review would be incompetent without such leave having been obtained for that purpose beforehand. The rationale for this being that Applicant for leave to commence an application for Judicial Review must first satisfy the Court that he has an arguable case. In **Republic vs. County Council of Kwale & Another, Ex parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** for instance, the Court observed that:

**"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The**

requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busybodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in-depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".

[10] In the premises, it is manifest that the Notice of Motion dated 2 July 2017 is incompetent and is for striking out; and it is so ordered. Considering that the Applicant had already paid the nomination fee of Kshs. 5000/- I would direct each party to bear own costs of the application.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF JULY 2017**

**OLGA SEWE**

**JUDGE**