



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APP. NO. 422 OF 2017

IN THE MATTER OF AN APPLICATION TO APPLY FOR JUDICIAL REVIEW ORDERS FOR IN THE NATURE CERTIORARI, PROHIBITION, AND MANDAMUS

AND

IN THE MATTER OF A DISPUTE RESOLUTION COMMITTEE OF THE IEBC COMPLAINT NO. 69 FO 2017

AND

IN THE MATTER OF ARTICLE 88(4)(e) OF THE CONSTITUTION OF KENYA, ARTICLE 38(1)(b), 2(a) AND 3(c) OF THE CONSTITUTION OF KENYA RELATING TO POLITICAL RIGHTS AND SECTION 74 OF THE ELECTIONS ACT

BETWEEN

BONIFACE KIARIE GITAGIAAPPLICANT

AND

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....RESPONDENT

RULING

1. By a Notice of Motion dated 7th July, 2017 and filed on 10th July, 2017, the Applicant herein seeks for orders of court:

- (i) To quash the decision of the Independent Electoral and Boundaries Commission (IEBC) Dispute Resolution Committee (DRC) given on 7th June 2017 in Complaint No. 69 of 2017.
- (ii) To stop the publication of names of candidates vying for senatorial position in Trans Nzoia County on 8th August, 2017 in the Nation Elections unless the Applicant’s name is included.
- (iii) That by itself, its agents, servants, officers and/otherwise be compelled to receive the Applicant’s nomination papers and to publish his name as a dully nominated candidate for Trans Nzoia County.

2. A summary of the grounds of the application is that the Respondent denied the Applicant the

opportunity to exercise his constitutional rights of vying for a political seat namely the Senate, for Trans-Nzoia County when he was constitutionally qualified to do so. Further that his fundamental rights to fair hearing were violated.

3. There is no supporting affidavit to the Notice of Motion. In the verifying affidavit filed together with the chamber summons seeking leave to commence these Judicial Review proceedings however, the Applicant states that he is a Kenyan citizen interested in participating in the forth coming general elections as a senatorial candidate for Trans Nzoia County, on Maendeleo Chap Chap Party ticket. That he presented himself before the IEBC in time on 29th May, 2017 with all his documents as required, but he was shut out and told he was out of time because he had come after 4 p.m. on 29th May 2017.

4. Mr. Njiru learned Counsel appearing for the Applicant, argued that the decision of the IEBC denied the Applicant his fundamental rights under **Article 38** of the **Constitution** which entitles that every citizen to a free and fair election.

5. Counsel argued that there is nothing in the IEBC Rules on the time lines to be observed and the court cannot make a decision that the printing of the ballots is over, since this appears to be a secret known only to the IEBC. He contended that the fact that gazette ment had already been done cannot bar the Applicant from being included by special gazette ment.

6. Counsel urged that this was a specific case of misbehavior by the IEBC through its Returning Officer, to deny the Applicant a chance to exercise his political rights and the people of Trans Nzoia a chance to elect a senator of their choice, and should not be allowed.

7. In response, learned counsel Mr. Mwangela for the Respondent relied on the Replying affidavit of Douglas K. Bargorett, a Legal Officer with the Respondent and submitted that this matter had been brought to court too late in the day. Further that the Respondent cannot be blamed for the Applicant's own misadventure in seeking the wrong remedy in the first instance and wasting time when he approached the court by way of appeal.

8. Counsel urged that from the evidence of the Returning Officer and the Applicant himself, the Applicant did not attend the pre-nomination meeting held on 28th March 2017 during which all candidates were briefed on the regulations of IEBC for the nominations. That by the gazette Notice of 16th March 2017 senatorial candidates were required to present their nomination papers on 28th and 29th May 2017 and the Applicant presented himself on the 29th May 2017 but submitted a list of the 30 names of his supporters without the names of a proposer and a seconder.

9. Counsel stated that the proposer and seconder signed the form the following day on 30th May 2017, backdating it to 29th May 2017 and that the Applicant was therefore time barred as time expired at 4.p.m. on 29th May, 2017. Counsel argued that the reason the Applicant did not disclose before this court or the DRC who the candidate is, whom he alleges was indulged by the Returning Officer causing the delay to attend to the Applicant until time ran out is because there was no such candidate.

10. Lastly, Counsel contended that the IEBC has stated publicly that printing of ballot papers, other than for the Presidential candidates is virtually done and a reversal of that process to include the Applicant would cause a constitutional crisis, since the election dates have already been set on 8th August 2017 and would also cost the tax payer a lot of money.

11. Counsel asserted that the orders sought being discretionary, the Applicant had disintitiled himself to the grant thereof having sat on his laurels since 7th June 2017 when the decision he seeks to quash was issued. He urged the court to deny the orders sought since and the Respondent had carried out the process transparently and in accordance with the law and the rights of the Applicant have not been violated.

12. I have considered the submissions before me and note that the Applicant does not seem to have

moved the court expeditiously in the circumstances of this case. The impugned decision was rendered on 7th June 2017 and this application is dated 7th July 2017. The delay in the circumstances was unreasonable in a process ruled by structures of time. The Applicant admits that due to wrong advise he initially approached the High Court by way of appeal instead of Judicial Review. Clearly the IEBC should not have to pay for the Applicant's own misadventure.

13. At play in this matter are the individual political rights of the Applicant against the larger interest of the public not to have the political process disrupted. I am reminded of the observations of Onguto J in **Misc. Application No. 402 of 2017**, where he stated that:

“I must point out that the closer the court contests are to the election, the greater the risk of disruption to the elections. Yet it is clear that elections should not unnecessarily be disrupted. On the other hand, political rights are always central to a democratic society and their protection is an important constitutional purpose. Certainly, these two interests may at times point in opposite direction.”

14. In each case, the court has to consider the nature and extent of the rights asserted by Applicant in light of any potential disruption to an election. In the case before me the Applicant has abandoned the prayer for prohibition because it has been overtaken by events, the gazette notice having been already published.

15. On the eligibility of the Applicant to be granted the Judicial Review orders of Certiorari to remove into this court and quash the decision of the DRC, I had regard to the decision of the Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996**, which stated that;

“...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

16. In this case I note that the Applicant was given a hearing by the DRC in Complaint No. 69 of 2017. The DRC gave a written and reasoned decision on 7th June 2017 and stated that:

“The Committee has considered the pleadings filed and the testimony of both the Complainant and the Returning Officer and finds that the Complainant was time barred, and that he had not met the statutory requirements for nomination as at 29th May, 2017, the last day for presentation of nomination papers.”

17. It is not in dispute that the Applicant presented himself on the 29th June, 2017 which was the last day to present his papers, or that he did not present a proposer and seconder with his list of supporters. Contrary to what is posited by Mr. Njiru that there is nothing in the IEBC rules on time lines, the electoral process is a technical process governed by strict rules of procedure and time lines provided by **Chapter 7 of the Constitution, the Independent Electoral and Boundaries Commission 2011, the Elections Act 2011 and the Political Parties Act 2011.**

18. By gazette Notice of 16th March 2017 senatorial candidates were required to present their nomination papers on 28th and 29th May 2017 between the hours of 8.00 a.m. to 1.00 p.m. and 2.00p.m. to 4.00 p.m. each day. If the Applicant presented himself on the 29th May 2017 with documents that were incomplete leaving himself no room for correction of any errors, he cannot blame the IEBC for failing to accommodate him on the 30th June 2017 when he returned to present his proposer and seconder.

19. As Majanja J observed in **Francis Gitau Parsimei & 2 Others -vs- The National Alliance Party & 4 Others, Petition No. 356 and 359 of 2012:**

“On the other hand, it must be clear that political rights are exercised through a political process involving many actors; the citizens and institutions. This is the process provided for

under the provisions of Chapter Seven of the Constitution titled, “Representation of the People.” These provisions are operationalized by the Independent Electoral and Boundaries Commission Act, 2011, the Elections Act, 2011 and the Political Parties Act, 2011. Individual political rights and the electoral process cannot be divorced from one another but must go hand in hand. It is therefore proper that political rights are realized within a structured process that takes into account the larger interests of the society and the need for a free and fair election which is enhanced by a self-contained dispute resolution mechanism underpinned by the Constitution itself and statutes enacted to give effect to its provisions.”

20. The grant of judicial review orders of certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought, to satisfy itself that there is reasonable basis to justify the orders sought.

21. I have analyzed all the material before me and considered the rival arguments advanced together with the authorities referred to by Mr. Mwongela. The Applicant is the author of his own misfortune and has failed to show that in arriving at its decision the Respondent abrogated any provisions of the Constitution, or any statute, or any rules made thereunder, or that it had breached the rules of natural justice.

In the premise the Notice of Motion dated 7th July, 2017 is dismissed with no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 14th DAY OF July, 2017.

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L. A. ACHODE

JUDGE

In the presence offor the Applicant

In the presence offor the Respondent