



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION APPLICATION NO. 399 OF 2017

ENOCK MWACHALA..... APPLICANT

V E R S U S

INDEPENDENT ELECTORATE BOUNDARIES COMMISSION...RESPONDENT

JUDGEMENT

1. The subject matter of this judgement is the motion dated 6th July 2017 taken out by Enock Mwaghalala Mbogho, the Exparte Applicant. In the aforesaid motion, the applicant sought for the following orders;

1. AN ORDER of certiorari to remove into the High Court and quash the decision of the IEBC Dispute Resolution Committee made on 27th June 2017.

2. AN ORDER of mandamus to remove into the High Court and compel the IEBC the respondent to expeditiously issue a clearance certificate to the ex parte applicant to vie as a senator as an independent candidate, Taita, Taveta County in the forth coming general elections.

3. Any other or further relief that this honourable court may deem fit and just to grant.

2. The motion is supported by the affidavit of the Independent Electoral and Boundaries Commission (I.E.B.C), the respondent. When served, I.E.B.C filed the replying affidavit of Bargoret Douglas Kipruto to oppose the same. When the motion came up for hearing, learned counsels were invited to make oral submissions.

3. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against. I have further considered the rival oral submissions plus the authorities cited. It is the submission of the applicant that the respondent dismissed his complaint vide the letter dated 27.06.2017 without according him a fair hearing or any hearing at all. The applicant further claimed that he had fulfilled all the requirements precedent to being cleared as a senatorial candidate but the respondent has intentionally blocked and refused to clear him.

4. The respondent on the other hand vehemently opposed the applicant's motion. It was argued that the applicant presented his nomination papers to the respondent's returning officer claiming to have complied with all the other statutory provisions but had not complied with Regulation 28 of the Elections Act Regulation 2012. It is pointed out that the applicant had also failed to furnish the respondent with the list of supporters in soft copy for verification 5 days prior to the date of nomination and his nomination papers were therefore declined. The respondent also argued that the applicant had presented to the Respondent's Returning Officer a cheque which was not properly drawn thus prompting the respondent's

returning officer to reject the applicant's nomination papers under Regulation 29 of the Elections (General) Regulations, 2012. The respondent further submitted that the applicant has not filed a proper complaint with the respondent and in any event the complaint would be out of time. The respondent further argued that the final list of candidates to contest for the August Election was gazetted on 27.06.2017 and any complaint not filed before then is therefore belated.

5. Having considered the rival arguments put forward, the question posed to this court to determine is whether or not there was a competent complaint and if the answer is in the affirmative whether or not the applicant was heard before his complaint was dismissed.

6. I have already set out the argument of the parties. The main ground put forward by the applicant is that his complaint was dismissed without a fair hearing or being heard at all. He also claimed that he had fulfilled all the requirements to be cleared to contest as an independent candidate for the senatorial seat in Taita/Taveta County. The respondent pointed out that the nomination papers the applicant submitted did not comply with Regulation 28 of the Elections (General) Regulations, 2012. The applicant was further accused of not supplying a soft copy of the list of his supporters for verification. The applicant does not dispute the respondent's averment that he did not tender copies of the identity cards of the voters to accompany the list of names from the county he is seeking to contest the senatorial seat. The applicant further admits that on 28.5.2017 the papers he presented to the respondent had a problem hence he was forced to come the next day i.e 29.5.2017 and that is when the respondent's returning officer declined to accept his papers because he had not rectified the anomalies earlier pointed out. The applicant has not controverted the averment in paragraph 11 of the replying affidavit of Bargoret Douglas Kipruto which was to the effect that he submitted documents on 29.5.2017 without rectifying the anomalies pointed out to him on 28.5.2017. In the circumstances, it cannot be said that the applicant was not given a right of hearing. The record shows that applicant had a discussion with the respondent's returning officer on 28.5.2017 and was told to come back on 29.5.2017 when the applicant came with the documents containing anomalies. It would appear those anomalies were pointed out to the applicant. In the circumstances it cannot be said that the applicant was not given a right of hearing. It is also clear from the annexure of the nomination check list attached to the applicant's verifying affidavit that the column on the number of voters was not ticked. There is also an averment that the complaint, if any, was filed out of time. This assertion was not resisted by the applicant. It is the submission of the applicant that he filed a complaint before the respondent's dispute Resolution Committee on 28.6.2017 which complaint was heard and declined.

7. It has been pointed out that the complaint was filed out of time. With respect, I agree with the submissions of the respondent that the applicant filed the complaint outside the 10 days from the date of nomination prescribed by gazette notice no. 2965 of 17.3.2017. Another issue which came out from the replying affidavit is that the final list of candidates to contest in the August election was gazetted on 27.6.2017 and therefore any complaint not filed before then, is therefore belated. In my view, the applicant's application, apart from lacking in merit also appears to be overtaken by events in view of the uncontested publication in the Kenya gazette of the final list of candidates.

8. In the end, the motion dated 6th July 2017 is dismissed with no order as to costs.

Dated, Signed and Delivered in open court this 20th day of July, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent