REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 8 OF 2017

IN THE MATTER OF ARTICLES 38(2), 47, 48 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR REVIEW OF A DECISION DECLINING LEAVE TO APPLY FOR JUDICIAL REVIEW

BETWEEN

FREDRICK ISIKA KALUMBO...APPLICANT

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION......................1ST RESPONDENT

ATTORNEY GENERAL..2ND RESPONDENT

RULING

Introduction

1. On 16 June 2017, I dismissed the Applicant's application brought under urgency. The applicant had sought leave to commence judicial review proceedings against the Respondents. I held that the Applicant had failed to establish a prima facie case worthy of further interrogation through a substantive motion for judicial review. The Applicant is now again before me and states that he is in possession of evidence which demonstrates that his rights were actually violated when he was not given an opportunity to be heard by the 1st Respondent. He seeks a review of the orders of 16 June 2017.

Background

2. I need not reprise the full facts leading to the instant application. Suffice to only point out that the Applicant is a citizen of Kenya interested in contesting the seat of Member of the Senate Kitui County in the forth coming general elections. The elections are constitutionally scheduled for 8 August 2017.

3. The Applicant had sought to be cleared by the 1st Respondent to contest the seat as an independent candidate but was turned down. The 1st Respondent's returning officer determined that the Applicant's nomination documents were neither in order nor complete. Not convinced with the determination, the

Applicant moved to the 1st Respondent's dispute resolution committee as established under *s.*74 of the Elections Act, No.24 of 2011. The Applicant lodged his complaint in time but was not heard. The complaint was dismissed for want of attendance. The Applicant, before this court complained that the dismissal was unreasonable and irrational as he was not notified in time of the hearing date, time and place.

4. I then listened to the Applicant's counsel and concluded that whilst the Applicant may have been genuinely aggrieved he had not established on a prima facie basis that the notification he spoke of came too little too late to enable him attend the scheduled hearing. There was, in my view, no evidence upon which I could rely to determine that the Applicant had a prima facie case that his right to fair administrative action had been violated.

5. The Applicant now states that he has the evidence and that the court ought to review its decision of 16 June 2017, find that there is a prima facie case and grant the Applicant leave to file a substantive motion for judicial review.

Discussion and determination

6. I have read through the Applicant's latest Motion. I listened to counsel for the Applicant as well. I also listened to submissions made by counsel for the 1st Respondent.

7. Both submissions were to the point. Ms. Olando for the Applicant pointed to an electronic print-out containing data and intended to show when the call to the Applicant to appear before the dispute resolution committee was made. It was stated that the call was made at 1400hrs. Counsel pointed out that the documents were only just retrieved from the mobile phone provider Safaricom Ltd. On the part of the 1st Respondent, Mr. Kibet submitted that the Applicant had failed to meet the threshold set out under Order 45 of the Civil Procedure Rules to invite this court's jurisdiction for review of an earlier decision which was unfavourable to the Applicant. Counsel also doubted the authenticity of the print out availed by the Applicant as the recently discovered evidence.

8. I have formed the following view.

9. The power of review is circumscribed under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Any litigant must bring himself within any one or a combination of the three factors set out under Rule 1 of Order 45. The applicant must establish that there has been a discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the impugned decree or order was issued. The application for review may also be pegged on the ground that there has been a mistake or error apparent on the face of the record. Finally, an applicant may move for a review on the basis of some "other sufficient reason". Additionally, the applicant must expeditiously act.

10. I do not doubt that the Applicant has moved the court expeditiously, even though the elections date was indeed closing in on the Applicant. I would not fault the applicant for coming to court some two weeks after the impugned decision.

11. econdly, the Applicant relies on the ground of new information now available to both the Applicant and to the court. The information is the Applicant's call-log records stated to have been retrieved from mobile phone provider Safaricom Ltd. The Applicant states that the information was not available when he first appeared before the court in the middle of June 2017.

12. As a ground of review, discovery of a new matter or evidence ought to entail something which existed at the date of the order or decree sought to be reviewed but which the applicant after due diligence was then not able to lay his hands on. In the instant case, the evidence was certainly available. The Applicant simply needed to apply for the same. No evidence has however been laid before me to show that there was ever such an attempt which failed or was somehow frustrated. The Applicant has simply deposed that the evidence is now available. There is no evidence of due diligence on the part of the Applicant and I

take the view that the Applicant was not diligent enough.

13. I am not satisfied that the Defendant has shown that there has been evidence which after due diligence was not within his knowledge or could not be availed to court on 15 June 2017 when the Applicant urged his case before me.

14. Additionally, the evidence sought to be relied upon is electronic evidence. It consists of computer-output. The Applicant however failed to comply with the provisions of *s.*106B of the Evidence Act (Cap 80) for the admissibility and perhaps authenticity of the evidence to be beyond question. There was no certificate of proof as required by *s.*106B(4) of the Evidence Act. I have to snub such evidence.

15. The application ought to fail and it does. For the above reasons, I find that the application dated 30 June 2017 warrants a dismissal and I hereby dismiss it.

16. I however make no order as to costs.

Dated, signed and delivered at Nairobi this 12th day of July, 2017.

J.L.ONGUTO

JUDGE