



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILINMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 287 OF 2017

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 38 (3), 47 AND 48 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF DOCTRINE OF LEGITIMATE EXPECTATION

BETWEEN

GODFREY WANYONYI SICHANGI.....PETITIONER

versus

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....RESPONDENT

JUDGEMENT

Petitioners case

This petitioner states seeks to vie for Member of County Assembly for West Sangalo Ward in Kanduyi Constituency in Bungoma County as an independent candidate. He claims that notwithstanding he was qualified, the Respondent declined to clear him due to "a mistake that was created by the Respondents in ability to sort out its I.T. System before the clearance period lapsed."

His complaint was dismissed by the I.E.B.C. Dispute Resolution Committee. He now seeks to nullify the said decision and to compel the Respondent to issue him with a clearance certificate to contest in the elections scheduled for 8th August 2017.

In opposition to the petition, Ruth Makuthu, in a Replying affidavit filed on 28th June 2017 states that she was informed by Gregory Odhiambo Ouko, the returning officer of Kanduyi constituency that the

upon perusing the petitioners documentation, he established that the petitioner did not meet the requirements of Regulation **43 (2) (d)** of the Election (General) Regulations, 2012. The petitioners' list of supporters was below the minimum number of five hundred required. He was advised to adhere to the said requirement. He attempted to present his papers again on 1st June 2017, but by this time he was time barred as Gazette Vol. CX1X notice No. 35 OF 17th March 2017 clearly prescribed the time and date for presenting the papers which was 28th May 2017 and 31st May 2017. Had the returning officer accommodated the petitioner, it would have been unlawful.

Both parties filed written submissions which I have carefully considered. I have also considered the affidavit evidence filed by both parties.

The I.E.B.C draws its mandate from the constitution, the I.E.B.C. Act and the Elections Act. Additionally, there are regulations that govern the nomination of candidates. It follows that the constitutional and statutory tests for clearance either as independent candidates or as party members apply to the petitioners nomination. Also applicable are the relevant provisions of the Elections (General) Regulations, 2012 and the Elections (General) (Amendment) Regulations, 2017.

A person seeking clearance either as a party member or as an independent candidate must satisfy as of necessity all the requisite constitutional and statutory requirements and the provisions in the applicable regulations. This is because the electoral process is grounded on the constitution and the law and regulations enacted to give effect to the said process. Such regulations aim at ensuring a smooth and credible process. Non compliance with any of the requirement leads to disqualification. Therefore, it is incumbent upon persons seeking nomination to familiarize themselves with all the constitutional and statutory requirements and also the applicable Regulations governing the process to avoid inevitable rejection of their nomination papers.[\[1\]](#)

Evidently, the petitioners' application for nomination was disqualified for non compliance with the law and the regulations. An examination of the reason(s) offered will help in determining whether the rejection was founded on valid legal grounds and whether there are grounds upon which this court to allow this petition. The decision shows that the petitioner failed to comply with Regulation 43 (2) (d) of the Elections (General) Regulations, 2012.

Regulation **43 (2) (d)** of the Elections (General) Regulations, 2012 cited above provides that a returning officer shall hold a nomination paper invalid on the grounds that so many supporters as would reduce the number of qualified supporters to less than the required number of supporters are not qualified to be supporters.

Article 193 (1) (c) of the constitution states that a person is eligible for election as a member of a county assembly if the person is either nominated by a political party or an independent candidate supported by at least 500 registered voters in the ward concerned. I need not emphasize that this is a constitutional requirement and it binds all. The petitioner was bound by this provision. Any attempt by the Returning officer to accept the nomination papers in total disregard of this article would definitely have been a clear breach of the above article.

Also relevant is Regulation **36 (1)** of the Elections (General) Regulations, 2012 which provides that the person delivering nomination application to the Returning officer shall at the same time deliver standard **A4** sheets of paper bearing names, respective signatures and electoral numbers of five hundred voters registered in the ward.

In my view, it is evident that the petitioner did not satisfy the above regulations and the constitutional requirement prescribed under article **193 (1) (c)** of the constitution, hence his papers were validly rejected.

Determination

The mandate of IEBC to conduct nominations and resolve nomination disputes is provided for under the

constitution, the Elections Act and the I.E.B.C Act. There is no allegation that the Respondent breached either the constitution or the law in the entire process. There is no evidence that the Respondent did not follow the provisions in the guidelines. None of the guidelines has been challenged as unconstitutional. One would wonder how an election process would be conducted without adherence to the provisions of the constitution and the set guidelines.

I have carefully considered the provisions of the constitution, the law and the regulations cited above and reasons offered for disqualifying the petitioner and I am persuaded that the disqualification was premised on valid grounds premised on the constitutional and statutory provisions and also the applicable regulations. I reiterate that it is incumbent upon persons seeking nomination to not only comply with the constitutional and statutory requirements but also to adhere to the set guidelines and regulations including observing time frames and submitting the prescribed documents completed as required.

A decision made by a quasi-judicial body or an administrative decision can only be challenged on grounds of ***illegality, irrationality and procedural impropriety***. A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or *ultra vires* and outside the functions of the first Respondent nor has it been shown to be irrational or procedurally wrong.

The grant of the 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 and satisfy itself that there is reasonable basis to justify the orders sought.

Upon analysing the relevant constitutional provisions, the relevant statutory requirements and the applicable regulations and upon due consideration of all the material before me and upon considering the arguments advanced by both sides, I find that the petitioner has not satisfied the threshold for this court to grant orders sought. This petition has no merits at all.

It cannot be lost to it that despite having a conscience, it is a court of law and not of mercy.^[2] It is also bound by the law and more so the Constitution which binds all. Consequently, the constitutional, statutory and applicable regulations governing election nomination processes must apply with equal force so as to effectively serve the desired purpose of guaranteeing a smooth, transparent, fair and credible election process.

The effect is that the orders sought are hereby refused and this petition is dismissed with costs to the Respondent.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this **10th** day of **July** 2017

John M. Mativo

Judge

^[1] Ibid

^[2] Yusuf Gitau Abdalla vs. The Building Centre (K) Ltd & 4 Others, Petition 23 of 2014