



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 365 OF 2017

**IN THE MATTER OF: ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS
APPLICATION FOR JUDICIAL REVIEW**

AND

**IN THE MATTER OF: ARTICLE 1, 2, 10, 38, 47, 159 AND 259 OF THE CONSTITUTION OF
KENYA,**

AND

IN THE MATTER OF: SECTION 33 OF THE ELECTIONS ACT NO 24 OF 2011,

AND

IN THE MATTER OF: THE POLITICAL PARTIES ACT

AND

IN THE MATTER OF: ELECTIONS(GENERAL) REGULATIONS, 2012

AND

IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORMS ACT,

BETWEEN

OSCAR OTIENO LORE.....APPLICANT

VERSUS

THE CHAIRMAN, INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

RULING

What is before court for determination is the Notice of Motion dated the 27th day of June, 2017 brought under sections 8 and 9 of the Law Reform Act and order 53 Rule (1) (2) (3) & 4, 3 (1) of the Civil Procedure Rules. The applicant has sought the following orders;

(1) THAT the honourable court be pleased and do hereby grant Judicial Review Order of **CERTIORARI** to remove into the High Court and quash the decision of the IEBC to decline to gazette and list the Applicant as an independent candidate for the position of the **Member of County Assembly of Mathare North Ward Ruaraka Constituency**.

(2) THAT the honourable court be pleased and do hereby grant Judicial Review Orders of **MANDAMUS** to remove into the High Court and compel the IEBC to gazette and list the Applicant as an independent candidate for the position of the **Member of country Assembly of Mathare North Ward Ruaraka Constituency**.

(3) THAT such further and other reliefs that this honourable court may deem just and expedient to grant.

It is premised on the grounds set out on the body of the same and on the annexed affidavit sworn by Oscar Otieno Lore on the 27th June, 2017.

The Exparte applicant who is the incumbent member of County Assembly of Mathare North Ward in Ruaraka Constituency, avers that on the 8th day of May, 2017, he resigned from the Orange Democratic Party (ODM) vide a letter of even date. The said letter was presented to the ODM party and to the Registrar of Political Parties on 8th May, 2017 in accordance with section 14 of the Political Parties Act, and sections 22 and 32 of the Elections Act.

It is also averred that he presented his identification card and an application to be cleared as an independent candidate by the office of the registrar of Political Parties as well as the symbol that he intends to use for his independent party. The clearance was done vide a letter dated 8th May, 2017.

That he thereafter presented his clearance by the Registrar of Political Parties to the IEBC in accordance with Regulation 15 (b) of the Elections (General Regulations) 2012, and he filled forms 11 (P) and 11N to enable him to be a candidate. That, in a pre-nomination meeting on the 23rd May, 2017, called by the respondent for all the independent candidates, they were briefed of all the requirements for clearance to vie as an independent candidate and pursuant to the briefing, he sought to obtain 500 signatures of registered voters in his ward as required under regulation 36 (1) and 2 of the Elections (General Regulations) 2012 and bought a Bankers Cheque in the name of the Respondent. That he also filled forms 18 and 19 as he waited for presentation of his papers which was scheduled for the 29th day of May, 2017.

That on the 29th May, 2017, he learnt with utter shock, dismay and consternation that the respondent had not submitted his name for gazette as an independent candidate which was contrary to Regulation 10 of the Elections (General Regulations) 2012. That the respondent to-date has not made any formal communication to the applicant on the reason why it did not gazette his name, which is a violation of his rights to fair administrative action as enshrined under Article 47 of the constitution.

The applicant further avers that the respondent declined to accept his complaint that he lodged with it on 6th June, 2017 on the ground that the same was submitted late as the deadline for submission of complains was on the 5th June, 2017. That to-date, the respondent has negligently and recklessly declined to list the applicant as an independent candidate.

The respondent has opposed the application vide a replying affidavit sworn by Douglas Bargorett on the 10th July, 2017 in which he depones that the respondent is a constitutional commission established under the provisions of Article 88 of the constitution and its mandate is to supervise or conduct referendum and elections to any elective body or office. That it performs its functions in an independent, free, fair, transparent and accountable manner.

He contends that the applicant did not submit to the respondent the documents envisioned under regulation 15 of the Elections (General Regulations) 2012. He avers that there are doubts as to the

authenticity of the annexed documentation including the clearance certificate from the office of the Registrar of Political Parties and it is therefore necessary that the Registrar of Political Parties be enjoined to establish the veracity or otherwise of the said clearance.

He has deponed that, issuing the orders sought in the application herein is likely to pose challenges to the preparation of the general election and thereby incapacitate the respondent's constitutional obligation to deliver a free and fair election in respect of the ward.

The court has given due consideration to the application and the submissions by the respective parties. The applicant has sought orders of Certiorari and Mandamus against the respondent for its failure to gazette his name as an independent candidate for the position of member of County Assembly of Mathare North Ward, Ruaraka Constituency. He contends that he has met all the requirements as provided for under regulation 15 of the Elections (General Regulations) 2012. The said regulation provides;

“A person who is a Kenyan Citizen, and who intends to contest for an elective post as an independent candidate shall-

(a) Obtain and file with the commission a clearance certificate from the Registrar of Political Parties certifying that the person has not been a member of any political party for at least three months immediately before the date of the election; and

(b) File with the commission a form of intention to contest, in form 11N.

The court has perused the documents annexed to the chamber summons dated the 20th June, 2017 and among such documents is the letter dated 8th day of May, 2017 addressed to the Secretary General of ODM party by the applicant resigning as a member of ODM party. Also annexed to the chamber summons, is the clearance certificate from the Registrar of Political parties dated the 8th day of May, 2017 which confirmed that as at 8th may, 2017, the applicant was not a member of a fully registered political party. The date of the letter confirms that the applicant was not a member of a political party at least three months before the date of the elections.

The applicant has also complied with rule 15(b) by filling form 11N which is the intention to contest as an independent candidate. The above stated documents are in addition to the other requirements provided for under the various provisions of the Elections (General Regulations) 2012.

On the part of the respondent, it is alleged that there are doubts as to the authenticity of the said documents. The court wishes to note that save for that general allegation, there is no evidence that was placed before the court to prove that the documents are not genuine or the basis for the allegations. It is trite law that the one who alleges must prove and sections 107 and 108 of the evidence Act are clear on that. It is not enough for a party to merely make allegations without any basis.

The respondent has also alleged that the applicant did not append his details in a book provided by the respondent. The required details include his name, elective seat, the county, the constituency, the ward, the phone number, the date when the application was made and his signature. The applicant has not given any plausible explanation why he did not sign the book as required by the respondent like all the other candidates.

Lastly, the issue of the jurisdiction of this honourable court has been raised. The same is based on the provisions of Article 88 (4) of the constitution and section 4 of the Independent Electoral and Boundaries Commission Act. The position of the respondent in this regard is that the applicant never submitted his application as envisioned under regulation 15 of the Elections (General Regulation) 2012.

This court notes that though the documents by the applicant were received by the respondent on 8th day of May, 2017, the respondent has doubted the authenticity of the documents including the clearance certificate. I concur with the counsel for the applicant that it is a cardinal principle of law that a party that

alleges must proof. No evidence was brought forth by the respondent to prove that the documents were not authentic.

This court is alive to the provisions of Article 88 (4) of the constitution and section 4 of the independent and Boundaries Commission Act regarding the functions of commission and in particular 4 (f) which provides as follows;

“The settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results”.

The applicant in his affidavit in support averred that he lodged his complaint with the respondent on the 6th day of June, 2017 but the respondent declined to accept the same on the ground that the deadline for submission of any complaint was on the 5th June, 2017. He further deponed that the deadline was never part of the Newspaper advert published on the 4th June, 2017 notifying the candidates of the date it would hear the complains relating to nominations which was from 4th June, 2017 to 13th June, 2017. Though the applicant avers that he lodged his complaint but the respondent declined to accept the same as it was filed out of time, the court is at a loss as to how the applicant was not aware of the timelines and the processes that were being undertaken by the respondent. As a prudent candidate vying for an elective post, he is reasonably expected to have been aware of the deadline for filing any complaint and he also ought to have signed the book provided for by the respondent. This court is inclined to belief that there was something amiss on the part of the applicant in the way he presented his papers for clearance by the respondent and this may shed some light as to why he did not sign the book provided for by the respondent which a candidate was required to sign upon presentation of his documents. In view of the above observation, I find that the court has jurisdiction to hear the matter but for the reasons I have given, this court finds that the applicant has not come to court with clean hands.

The application dated 27/6/2017 is hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 14th day of July, 2017

.....

L. NJUGUNA

JUDGE

In the presence of:

.....**for the Applicant**

.....**for the Respondent**