REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW NO. 356 OF 2017

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE VIOLATION OF ARTICLES 10, 24(1), 25, 27, 38, 41, 47 50 AND 51 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER THE ELECTIONS ACT, 2016

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT

AND IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

BETWEEN

AND

REPUBLIC...APPLICANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION...RESPONDENT

PETER KIHANDA KAHUKI...................................EX PARTE APPLICANT

JUDGMENT

[1] The Notice of Motion dated **28 June 2017** was filed by the *ex parte* Applicant, **Peter Kihanda Kahuki** for the following orders:

[a] That an Order of **Certiorari** be issued to remove into this Court for quashing the decision of the Respondent's Dispute Resolution Committee made on **8 June 2017**.

[b] That an Order of **Mandamus** be issued to compel the Respondent to include the name of the *Ex Parte* Applicant as a candidate for the position of Member of County Assembly in the forthcoming **August 8, 2017** General Elections.

[c] That the Court be pleased to grant such other orders and/or relief as it may deem fit in the circumstances.

[d] That the costs of the application be provided for.

[2] The grounds upon which the application was based are that the Applicant is an Independent Candidate for **Gaichanjiru Ward** in Muranga County in the forthcoming General Elections; and that the Respondent's Dispute Resolution Committee, vide a decision made on **8 June 2017,** barred the Applicant from vying for the Member of County Assembly seat (hereinafter MCA) without according him a hearing. It was further the contention of the Applicant that the Respondent, in arriving at the impugned decision, did not comply with the principles laid down in the **Constitution of Kenya, 2010,** particularly the requirement for fair administrative action; and therefore that it was in the interests of justice that the orders sought are granted, so as to protect the constitutional foundations of the Bill of Rights, the constitutional principles of the electoral system, the **Fair Administrative Action Act** and the **Elections (General) Regulations, 2012.**

[3] The application is supported by the Affidavit annexed thereto, sworn by the Applicant on **28 June 2017**. He averred therein that following due diligence by him and in compliance with the applicable procedure, he presented himself to the Respondent's Returning Officer on **31 May 2017** to be cleared for the position of MCA. He further averred that upon perusal of his nomination papers, the Returning Officer informed him that his List of Supporters had insufficient names, as some of the individuals listed therein were either not in the IEBC system as voters in the said Ward or were registered voters in another Ward; and that for that reason, the Returning Officer refused to admit his List of Supporters, which was said to have only 490 valid supporters instead of the mandatory 500 registered voters.

[4] It was further averred by the Applicant that he requested the Returning Officer to grant him time to provide a replacement list; which request was granted. He thus compiled a new List of Supporters and availed the same to the Returning Officer, but was again dismissed summarily on the ground that his electronic copy of the List of Supporters had only 390 valid voters. The Applicant added that he could not fathom how the names of valid voters on his list could have dwindled to 390 within a span of an hour; thereby raising doubts as to whether the Returning Officer really bothered to conduct any verification of the replacement list. It was therefore his contention that the Respondent's decision is unreasonable, violates the provisions of the Constitution, the Elections Act and Regulations and the Fair Administrative Action Act.

[5] The application was opposed by the Respondent, to which end an affidavit sworn by **Chrispine Owiye**, the Respondent's Manager, Investigations and Prosecution, was filed on **11 July 2017**. It was deposed therein that pursuant to its constitutional mandate, the Respondent published a public notice dated **6 February 2017** and a **Gazette Notice No. 2692** setting out the timelines for the nomination of MCA candidates for the purposes of the **August 8, 2017** General Elections to be **28 May 2017** and **31 May 2017**.

[6] It was further averred by the Respondent that the Applicant was scheduled to present his nomination papers on **30 May 2017** for clearance to vie as an Independent MCA Candidate for the **Gaichanjiru Ward,** but failed to do so; and that instead he presented his nomination papers on **31 May 2017**. That upon perusal of the Applicant's nomination papers, the Returning Officer established that the List of Supporters had only **490** supporters and not **500** as required; whereupon the Applicant was granted an opportunity to look for additional supporters and submit a replacement list.

[7] It was the contention of the Respondent that the Respondent returned at about 4.30 p.m. with the List of 500 Supporters, but when the Returning Officer ran the electronic copy of the List of Supporters through the Respondent's system, only **390** out of the **500** supporters were found to be registered voters in **Gaichanjiru Ward**; and that it was for that reason that the Returning Officer rejected the Applicant's nomination papers. Being aggrieved with the decision of the Returning Officer, the Applicant lodged a complaint with the Respondent's Dispute Resolution Committee.

[8] As to whether the Applicant was accorded fair administrative action, the Respondent averred that, due to the numerous nomination disputes lodged with its Dispute Resolution Committee, and the strict timelines within which the disputes were to be resolved, it was impracticable for the Respondent to personally serve each and every complainant with a written hearing notice; that it was more expedient to call and inform the complainants of the hearing dates of their complaints via the telephone. According to the Respondent, several efforts were made by it to reach the Applicant through his mobile phone number xxxxxxxxxxxx, as was indicated on the Complaint Form, but he did not receive or respond to those telephone calls; and that the Dispute Resolution Committee, having been satisfied that efforts were made to inform the Applicant of the hearing date of his Complaint without success, proceeded to hear the matter *ex parte* and dismissed the same.

[9] The parties hereto had their respective positions articulated by Learned Counsel by way of oral submissions. **Ms. Kioko** for the Applicant reiterated the Applicant's posturing that he was not fairly treated by the Respondent's Returning Officer; and that he was never notified of the date of hearing of the Complaint that he lodged with the Respondent's Dispute Resolution Committee. For the Respondent, **Mr. Barasa** submitted that the Applicant was accorded an opportunity to present his nomination papers but failed to comply with the relevant provisions of the Elections Act and the Elections (General) Regulations. He added that efforts were made to reach the Applicant to inform him of the hearing date for his Complaint but he opted not to receive or respond to the telephone calls of the Respondent. According to Learned Counsel, the Applicant had himself to blame for not being able to attend the hearing of his Complaint.

[10] It was further the submission of **Mr. Barasa** that, in determining who qualifies for clearance to vie in the forthcoming General Elections, the Respondent exercises discretion, in respect of which an Order of Mandamus cannot issue. He relied on the case of **Republic vs. Chief Land Registrar & Another, Ex Parte Dubai Bank Kenya Limited [2015] eKLR** among other authorities as set out in the Respondent's List and Bundle of Documents filed on **11 July 2017** and urged the Court to dismiss the application in its entirety.

[11] I have carefully considered the application, the affidavits filed in respect thereof, as well as the submissions made by Learned Counsel for the parties, including the authorities relied on by **Mr. Barasa**. The issue for my determination herein is whether the Applicant has presented good case to warrant the granting of the judicial review orders prayed for herein by him. In this connection, it is now well settled that the remedy of judicial review is concerned with the decision-making process itself as opposed to the merits of the impugned decision. As was observed by the Court of Appeal in **ShabanMohamud Hassan and 2 Others vs The Attorney General and Others Nairobi Civil Appeal No. 281 of 2012:**

> **"...the courts in discharging their judicial function must always bear in mind the supremacy of the Constitution and to respect the manner it has distributed functions to various state organs and independent bodies. The function of the High Court is to see that lawful authority vested in these organs and bodies is not abused by unfair treatment. They cannot step outside the bounds of authority prescribed to them by the Constitution or statute because the supremacy of the Constitution is protected by the authority of an independent Judiciary, which acts as the interpreter of the Constitution and all other legislation."**

[12] With the foregoing caution in mind, the question to pose is whether the well established grounds for judicial review have been established herein. These grounds were well explicated by **Lord Diplock** in **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374,** in the following words:

> **“Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’...By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision- making power and must give effect to it...By ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as ‘procedural impropriety’ rather than failure to observe asic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”**

[14] Needless to say that the Respondent has the constitutional mandate to conduct the nomination exercise in readiness for the forthcoming General Elections, including the settlement of electoral disputes relating to or arising from the nomination exercise. This mandate is set out in **Article 88** of the Constitution as well as **Section 74** of the **Elections Act;** which have been operationalized through the **Election (General) Regulations, 2012,** as amended**. Section 25(1)(c)(ii)** of the **Elections Act** as read with **Regulation 36(1)** of the **Election (General) Regulations** required those vying for MCA positions as Independent Candidates to present to the Returning Officer of the Respondent, on the appointed dates an application for nomination together with a List of Supporters, indicating their respective signatures and electoral numbers. In particular, **Regulation 36(1)** of the **Elections (General) Regulations** reads:

> **"The person delivering a nomination application under regulation 35 shall at the same time deliver to the returning officer, standard A4 sheets of paper bearing the name, respective signatures and electoral numbers of five hundred voters registered in the ward."**

[15] There is further no dispute that pursuant to the mandate aforestated, the Respondent, vide **Gazette Notice No. 2692** of **17 March 2017**, fixed the timelines for the nomination of Independent MCA hopefuls to be **Sunday, May 28, 2017** and **Wednesday, May 31**, **2017** between the hours of eight o'clock and four o'clock in the afternoon.(see **Annexure CO.01** to the Replying Affidavit). It is common ground that the Applicant presented his nomination papers on **31 May 2017**, and that when the soft copy of the List of Supporters was subjected to verification in the Respondent's system, the valid names were found to be only **390**; whereupon the Returning Officer rejected.

[16] Although the Applicant pitched the argument that the Returning Officer contradicted himself by first saying the List of Supporters was less by 10 names, and thereafter by 110, suggesting a defect in the system, the explanation offered by the Respondent is that the first scrutiny was on the basis of the hard copies presented, and that the second verification was a system based verification. At paragraph 14 of the Replying Affidavit it was deposed that, **"upon perusal"** of the Applicant's nomination papers, the Returning Officer established that the List of Supporters had signatures for only **490** supporters, as opposed to the mandatory statutory number **500** supporters; whereupon the Applicant was afforded an opportunity for compliance. Atparagraph 16 of the Replying Affidavit it was averred that the Applicant returned at around 4.30 p.m. with the List of Supporters, which had the requisite 500 supporters and signatures; but that when the list was run through the Respondent's system, only **390** out of the **500** supporters were found to be registered voters in **Gaichanjiru Ward.**

[17] The Respondent's explanation is consistent with the Applicant's own affidavit sworn on **3 June 2017** in support of his Complaint to the Respondent. At paragraph 3 thereof, he confirmed that upon presentation of his nomination papers, the Returning Officer "**upon perusal"** thereof indicated that he did not have the required number of supporters; and that he thereafter complied and went back with **"the full list of 500 supporters."** Granted that **Regulation 43(2)(a) and (d)** of the **Elections (General) Regulations, 2012** mandates the Respondent to verify such lists with a view of ensuring that the supporters so listed are registered voters in the ward/electoral area in question, the decision of the Returning Officer cannot, in the circumstances, be faulted on the ground of illegality, irrationality or unfairness. It is instructive that, according to the Respondent, the Applicant was scheduled to appear

before the Returning Officer on **30 May 2017**, but opted to wait until that last day; and therefore had less time to correct any anomalies.

[18] As for the procedure adopted by the Respondent's Dispute Resolution Committee, a careful consideration thereof shows that the Complaint was given consideration and dismissed on the basis of the very reason that was given by the Returning Officer, namely that the List of Supporters that the Applicant provided, had less names than the required number of **500**. I note that in Respondent's Decision dated **7 June 2017,** there appear to be discrepancies in the figures as well as the introductory summary of facts. In the Summary of Facts, it was stated that the Applicant's complaint was that he could not be cleared as he was out of time; and in terms of the figure that was found valid in the List of Supporters it has been indicated that when the Applicant's documents were ran through the system, **"...only 300 out of 500 were valid..."** In my view, the said contradictions do not go the substratum of the decision. In any event, they go more to the merit of the decision than the process, in respect of which the Court of Appeal in **Municipal Council of Mombasa vs. Republic &Umoja Consultants Ltd Civil Appeal No. 185 of 2001,** held thus:

> **"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision… It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."**

[19] Thus, the only valid ground relied on in terms of process, is the question as to whether the Applicant was accorded an opportunity to be heard. He contends that he was not informed of the hearing date and therefore was condemned unheard. The Respondent's answer to this was that due to the numerous nomination disputes that had been lodged with its Dispute Resolution Committee, and the strict statutory timelines set for the resolution of the said disputes, it was impracticable for it to serve each person with a hearing notice. It therefore opted to call the parties and the Applicant was no exception; but that the Applicant did not answer the numerous calls made to him through the mobile phone number that he had provided in his Complaint Form.

[20] The Applicant did not refute the Respondent's argument. Indeed**, Section 74(2)** of the **Elections Act** provides that complaints arising from the nomination exercise be resolved within 10 days. It is not the Applicant's contention that he was singled out or treated differently from others in terms of the mode of notification of the hearing date. In this respect, I would agree with the expressions of **Majanja J** in **Francis Gitau Parsimei & 2 Others vs. The National Alliance Party & 4 Others, Petition No. 356 and 359 of 2012** that:

> **"...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 the 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."**

[21] Accordingly, I would take the view that, in the circumstances hereof, the Respondent acted lawfully and rationally in the circumstances; and that due process was followed in disposing of the Complaint filed by the Applicant. (see**Kenya National Examinations Council vs Republic, ex parte Geoffrey GathenjiNjoroge& Others [1997] eKLR**). In the premises, it is my finding that the Notice of Motion dated **28 June 2017** is lacking in merit, and is accordingly hereby dismissed with an order for each party to bear own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY, 2017

OLGA SEWE

JUDGE