REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 402 OF 2017

IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION COMPLAINT NO 97 OF 2017

AND

IN THE MATTER OF ARTICLES 47 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE JUDICIAL REVIEW PROCEEDINGS AGAINST THE RESPONDENTS

BETWEEN

FRANKLIN IMBENZI KALUMBO……APPLICANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION……1ST RESPONDENT

MILARE RONALD MELKIZEDEK……2ND RESPONDENT

RULING

1. By a chamber summons dated 28 June 2017 and filed a day later under urgency, the applicant herein seeks leave to institute judicial review proceedings against the Respondents. In particular, the applicant seeks orders of prohibition to restrain the 1st Respondent from registering the name of the 2nd Respondent as the candidate for Member of County Assembly Harambee Ward Nairobi County. The applicant also seeks orders of certiorari to remove into this court and quash the proceedings and order of the 1st Respondent in complaint No. 97 of 2017. Finally, the applicant asks that leave so granted do operate as stay of the 1st Respondent's orders made in the complaint No. 97 of 2017 of 8 June 2017.

3. The application is supported by the statutory statement filed together with the chamber summons and the applicant's affidavit sworn on 28 June 2017.

4. The application is further based on the grounds that the 1st Respondent, denied the applicant the

chance to be heard and made a decision which adversely affected the applicant. Further that the applicant states that his democratic rights are under threat of being violated.

5. In his affidavit the applicant has given a narrative leading to the decision of the 1st Respondent of 8 June 2017.

6. I will shortly repeat the story.

7. The applicant is a Kenyan citizen interested in participating in the forth coming general elections as a candidate. The elections are scheduled for 8 August 2017. The applicant has been intent in vying for the position of Member of the County Assembly, Harambee Ward Nairobi County on an Orange Democratic Movement (ODM) ticket.

8. The applicant claims that he won the ODM party primaries, was declared the winner and issued with a provisional nomination certificate. The certificate was later revoked by the ODM Special County Appeals Board (SCAB) and awarded to the 2nd Respondent on 6 May 2017. The applicant then moved to the Political Parties Dispute Tribunal (the PPDT) and the decision by the ODM tribunal was quashed on 12 May 2017. This prompted the 2nd Respondent to move on appeal to this court. The court allowed the appeal and the applicant's nomination certificate as issued pursuant to the PPDT order of 12 May 2017 was revoked by the High Court on 23 May 2017 in Election Petition Appeal No 45 of 2017. The High court also ordered for repeat nominations.

9. On the same day, the ODM issued the 2nd Respondent with a certificate of nomination and two days later the applicant claims to also have been issued with a nomination certificate by ODM. Then the 1st Respondent apparently certified the applicant only for the 2nd Respondent to challenge such certification before the 1st Respondent's tribunal. The tribunal allowed the challenge brought by way of a complaint and proceeded to grant the ticket to the 1st Respondent while revoking the applicant's certification. The decision by the 1st Respondent prompted this application.

10. The applicant states that he was condemned unheard. To the applicant the very core of natural justice was not observed.

11. Counsel , Mr. Collins Mbanda, who appeared for applicant urged me to grant leave as there was a prima facie case shown by the mere fact that the applicant had been denied the chance of being heard. Counsel stated that there was need to protect the applicant's constitutional rights and ensure that the applicant participated in the elections.

12. I have considered the submissions. I have also carefully read through the application as well as all the supporting documents.

13. I must foremost point out that the rationale for the requirement that leave be sought and obtained, before filing applications for judicial review, is to exclude frivolous or vexatious applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred: see **Bosire, Mbogholi-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993**.

14. Leave should ordinarily thus be granted, if on the material available the court considers, without conducting a mini trial, that there is an arguable case. Leave stage effectively assists in the screening out of hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant : see **Meixner & Another *v* Attorney General [2005] 2 KLR 189** where the

Court of Appeal held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

15. In **Mirugi Kariuki *v* Attorney General [1992] KLR 8** the court stated as follows:

"*If he [the Applicant] fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers…"*

13. It is clear that the grant of leave is however not a formality. The applicant has to show the court that he has a prima facie arguable case and that he moved the court with expedition. The grant of leave even where there is an apparent prima facie case must also not be in vain. If it is obvious that even if successful on the main motion, the reliefs may be of no use, then leave ought not to be granted.

14. Returning to the instant application, the applicant has shown that the decision by the 1st Respondent affected him adversely. The main complaint by the applicant is that he was not heard. The law does not however state that every person must be heard physically. Determinations have been known to be made on the basis of the material available to the decision maker. It always depends on the circumstances of the case, though of course, opportunity to hear a party ought to be in the fore.

15. In the instant case, the contest to be resolved by the 1st Respondent was as to which of the two parties had the genuine certificate to represent ODM. This seems to have been resolved the moment the ODM party appeared before the 1st Respondent through counsel and confirmed to the 1st Respondent that the 2nd Respondent was the genuine nominee.

16. I do not in the circumstance believe that the applicant has a prima facie case with some prospects of success.

17. Secondly, the applicant does not seem to have moved the court expeditiously in the circumstances of this case. The impugned decision was rendered on 8 June 2017 and the applicant only moved the court on 29 June 2017. The delay in the circumstances was inexplicable. The applicant admits that he became aware of the decision on 9 June 2017, yet it still took him some three weeks to move this court.

18. and more critically, is the issue of public interest and the applicant's private interest.

19. Will it be in the interest of justice and the public at large to entertain the instant application and grant leave" This is a difficult question and testing the interest of justice may be an elaborate process that involves a consideration of the prospects of success on the application, as well as consideration of the public interest in the subject matter of the application and other considerations.

20. I must first point out that the closer the court contests are to the election, the greater the risk of disruption to the elections. Yet it is clear that elections should not unnecessarily be disrupted. On the other hand, political rights are always central to a democratic society and their protection is an important constitutional purpose. Certainly, these two interests may at times point in opposite directions.

21. The instant application may raise an important question of the applicant's political rights but entertaining the application and ultimately granting the relief may result in the disruption of the election in

a manner quite disproportionate to the right claimed by the applicant. It may necessitate stalling the process. The wheels of the electoral process are moving even faster now and halting the same even for a bit may not augur well.

22. In each case, the court has to consider the nature and extent of the rights asserted by applicant in the light of any potential disruption to an election. The timing of the application for leave to file the substantive application was therefore of great importance. It should have been filed earlier.

23. It is for the reason of balancing the private interests of the applicant with those of the public that I had to reflect on the prospects of success and as has been shown the applicant's prospects of success is not absolute given that during the proceedings ODM's counsel disowned the applicant. It is noteworthy that it has not been suggested that the counsel did not have instructions from ODM.

24. I reach the conclusion that it would not be in the interest of justice or of the public to stir the electoral process in the circumstances of this case where success of the individual is itself in doubt.

25. The elections, as already stated, are hardly five weeks away. There is a lot to be gained if the process is not interrupted. I am certain that the public would wish to see , nay have, a well organized electoral process than a shambolic one. This requires time. The applicant has himself confirmed that the process of ballot printing is underway. I view it that leave in the circumstances ought to be declined. This in my view is one instance when an individual interest has to be overpowered by the wider public interest.

26. Taking the foregoing into consideration, I take the view that this is not case which warrants the grant of leave. Accordingly, leave is denied.

27. I dismiss the Summons dated 28 June 2017 but make no order as to costs.

Dated ,signed and delivered at Nairobi this 30th day of June 2017

J. L. ONGUTO

JUDGE