

REPUBLIC OF KENYA
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC)
DISPUTE RESOLUTION COMMITTEE
COMPLAINT NO. 3 OF 2019

BETWEEN

McDONALD MARIGA WANYAMA.....COMPLAINANT

AND

THE RETURNING OFFICER, KIBRA CONSTITUENCY.....RESPONDENT

JUBILEE PARTY OF KENYA.....1ST INTERESTED PARTY

LEINA KONCHELLAH.....2ND INTERESTED PARTY

DECISION

BACKGROUND

1. On the 14th August 2019, vide a notice sent to the Independent Electoral and Boundaries Commission (“the Commission”) by the speaker of the National Assembly dated 13th August, 2019 the Kibra Constituency parliamentary seat was declared vacant following the demise of the area elected member of parliament, Hon Kenneth Okoth. Upon receipt of the subject declaration of vacancy, the Commission in the exercise of its mandate under, *inter alia*, article 88(4) of the Constitution, issued a notice for a by election in Kibra constituency to be held on 7th November 2019 vide special issue carried in volume CXXI-No.106 of the Kenya Gazette published on 16th August 2019.
2. The Commission reserved, in the said gazette notice the 9th and 10th September 2019 as the dates for the registration of candidates for the by-election.

3. On the 10th September, 2019, the Complainant herein, McDonald Mariga Wanyama presented his nomination application as the duly nominated candidate for Jubilee Party to the Respondent in order that he may be issued with a nomination certificate as a candidate for the position of member of parliament for Kibra Constituency. His Application was rejected by the Respondent on account that the Complainant was not a registered voter and therefore did not meet the requirements for qualification as a member of parliament as set out under the law. Dissatisfied with the Respondent's decision, the Complainant lodged the present complaint before this Committee on 11th September, 2019.

THE PARTIES

4. The Complainant was nominated by the Jubilee Party of Kenya as its candidate to contest for the seat of a member of parliament for Kibra Constituency in the by-elections slated for 7th November, 2019.
5. The Respondent, Beatrice Muli, is the Returning Officer for Kibra Constituency having been appointed by the Commission in accordance with section 39 A of the Elections Act, 2011 ("the Elections Act)."
6. The 1st Interested Party, Jubilee Party of Kenya, is a political party duly registered under the Political Parties Act, 2011 (No. 11 of 2011) and has nominated the Complainant to vie for the Kibra Constituency Parliamentary seat.
7. Leina Konchellah, a duly registered voter in Kibra Constituency was admitted as a 2nd Interested Party in these proceedings on 13th September, 2019 vide a notice of motion application dated 12th September 2019. His admission to the proceedings followed the Committee's Ruling on his application hereinabove in which he only sought, according to ground (b) on the face of the subject application for leave to be enjoined in the proceedings as an interested party on the grounds that he intended "to advance the centrality of integrity in the electoral process and particularly in the Kibra by-election." The application did not seek any other substantive prayer or order. In its Ruling on the Application, the Committee directed the 2nd Interested Party to limit his representations to the matters under consideration in the

complaint with a rider that any other matter not touching on the complaint could be addressed in a different forum. Consequently paragraphs 12, 13, 14 and 15 of his Affidavit in support of the application were expunged from record.

THE DISPUTE

8. The dispute before the Committee arises from the Respondent's decision of 10th September, 2019, rejecting the nomination of the Complainant as the candidate for the forth-coming Kibra's by-election for the reason that the Complainant's data was not found in the Kenya Integrated Electoral Management System (KIEMS). In his Complaint dated 11th September, 2019 and the Supporting Affidavit sworn on the same date, the Complainant avers that the Respondent's decision was "improper, null and void for want of lawful invalidation since the Complainant is a registered voter."
9. The Complainant further asserts that he was registered as a voter on 26th August, 2019 at Kariokor Social Hall Polling Station in Starehe Constituency and was issued with an acknowledgment slip bearing Elector's No. 0145211908261205-9. It is his contention that he met all the requirements for nomination as was confirmed by the 1st Interested Party in its replying affidavit, sworn by Andrew Musangi on the 13th September 2019.
10. On account of the foregoing, he prays, at paragraph 7 of his complaint, that this Committee should make a finding that the decision of the Respondent is void and of no legal effect; and that it be determined that the Complainant was validly nominated by the Jubilee Party and his nomination affirmed by the issuance of a certificate of Nomination by the Commission for the position of member of parliament for Kibra Constituency.

JURISDICTION

11. The jurisdiction to hear and determine disputes relating to or arising out of nominations is donated to the Commission by Article 88(4)(e) of the Constitution, section 74 of the Elections Act, and Regulation 99 of the Elections (General) Regulations, 2012 ("the General Regulations") as well as the Rules of Procedure on Settlement of Disputes ("the Settlement of Disputes Rules"). To this end, Article 88(4)(e) of the Constitution provides that:

(4) *The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—*

(e) 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 (emphasis supplied)

12. The above provision is replicated under section 74 of the Elections Act and section 4 of the Independent Electoral and Boundaries Commission Act, 2011 (“IEBC ACT”), which outlines the functions of the Commission. Thus “pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for 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.
13. Under rule 2 of the Settlement of Electoral Disputes Rules, the term ‘dispute’ has been defined as “a complaint, challenge, claim or contest relating to any stage of the electoral process and includes an objection to the acceptance of the nomination papers of a candidate by the Returning officer.” The purview of complaints under Rule 9 extends to complaints relating to whether “...the candidate [has] all the qualifications required under any law.”
14. In the case of *Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & 10 others [2013] e KLR*, the court stated at paragraph 94 of the Judgment that “A reading of Article 88(4)(e) of the current Constitution and section 74 of the Act clearly shows that the IEBC now has power to settle disputes, including nomination disputes, other than election petitions and disputes subsequent to the declaration of election results. The mandate to settle disputes therefore runs up to the election date. The Committee hence had jurisdiction to hear the complaints of the interested parties.”
15. Guided by the above provisions of the law, we are satisfied that the Committee has jurisdiction to determine the present dispute. We now proceed to consider the law applicable to the resolution of the dispute.

APPLICABLE LAW

16. Article 38 (1) of the Constitution guarantees the right of every person to exercise their political rights which includes the right to:

- a) to form, or participate in forming, a political party;*
- (b) to participate in the activities of, or recruit members for, a political party; or*
- (c) to campaign for a political party or cause.*

17. Additionally, Article 38(2) provides that “*every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for “any elective public body or office established under this Constitution; or any office of any political party of which the citizen is a member.”* In order to exercise the rights, it is the right of every person to be registered as voter and/ or to vie for public or political office, thus under:]

Article 38(3);

Every adult citizen has the right, without unreasonable restrictions—

- (a) to be registered as a voter* (emphasis added);
- (b) to vote by secret ballot in any election or referendum; and*
- (c) to be a candidate for public office* (emphasis added), *or office within a political party of which the citizen is a member and, if elected, to hold office.*

18. The right to participate in the electoral process either as a voter or a candidate connotes the basic element of democracy. Mativo J in the case of *Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others [2017] e KLR* thus expressed himself as follows:

82. Article 38 of the Constitution guarantees political rights which include the right to be a candidate for public office. Undoubtedly, the right created under Article 38 in favour of citizens of Kenya to participate in the election process is an integral part (for the sake of convenience, I call it an ELEMENT) of the basic feature of democracy.

83. There are two important points to note. The first is that the right to participation in the electoral process (which would include both voting and standing for election), is part of the basic structure of a democratic state. This would mean that restrictions upon participation in the electoral process can only be **justified through very strong reasons, and in a way that the core of the basic feature – democracy – is not damaged** (emphasis added).

84. Secondly – and even more significantly – while the rights under articles 38 and 27 are not absolute rights, they cannot “be limited except by law, and then only to the extent that the limitation is reasonable, justifiable in an open democratic society.”[40] Any limitation must be subject to a three part test:- (a) a limitation will only be acceptable when ‘prescribed by law; (b) when it is necessary and proportionate; and (c) when the limitation pursues a legitimate aim’ namely:- **the interests of national security or public safety; the prevention of disorder or crime; the protection of health or morals; or the protection of the rights and freedoms of others.**(emphasis added)

19. The principles for conducting elections are as set out under *Article 81 of the Constitution*. They include the freedom of citizens to exercise their political rights under Article 38 and universal suffrage based on the aspiration for fair representation and equality of vote. The qualifications for one to be registered as a voter are outlined under Article 83 (1), which stipulates that:

(1) *A person qualifies for registration as a voter at elections or referenda if the person—*

(a) *is an adult citizen;*

(b) *is not declared to be of unsound mind; and*

(c) *has not been convicted of an election offence during the preceding five years.*

(2) *A citizen who qualifies for registration as a voter shall be registered at only one registration centre.*

20. Article 83(3) further provides that **administrative arrangements for the registration of voters and the conduct of elections “shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election”** (emphasis added).

21. The Commission is obligated under Article 88(4)(a) of the Constitution and section 4 (a) of the IEBC ACT to conduct continuous registration of citizens as voters and to undertake regular revision of the voters' roll. Section 2 of the Elections Act defines a Register of voters as "***a current register of persons entitled to vote at an election prepared in accordance with section 3 and includes a register that is compiled electronically.***" It is the duty of the Commission to establish a Register of Voters, which under section 4 of the Elections Act, comprises of; —

- (a) a poll register in respect of every polling station;*
- (b) a ward register in respect of every ward;*
- (c) a constituency register in respect of every constituency;*
- (d) a county register in respect of every county; and*
- (e) a register of voters residing outside Kenya.*

22. Whereas Article 88(4)(a) of the Constitution as read together with section 4(a) of the IEBC Act requires the Commission to conduct continuous registration of voters, there is a limitation imposed by section 5 of the Elections Act which provides that;

1. *Registration of voters and revision of the register of voters under this Act shall be carried out at all times except—*
 - a) *in the case of a general election or an election under Article 138(5) of the Constitution, between the date of commencement of the sixty day period immediately before the election and the date of such election;*
 - b) *in the case of a by-election, between the date of the declaration of the vacancy of the seat concerned and the date of such by-election; or*
2.
3. *Any citizen of Kenya who has attained the age of eighteen years as evidenced by either a national identity card or a Kenyan passport and whose name is not in the register of voters shall be registered as a voter upon application, in the prescribed manner, to the Commission.*

4. *All applicants for registration under this section shall be registered in the appropriate register by the registration officer or any other officer authorised by the Commission.*
5. *The registration officer or any other authorised officer referred to in subsection (3) shall, at such times as the Commission may direct, transmit the information relating to the registration of the voter to the Commission for inclusion in the Register of Voters*
23. By dint of section 8 of the Elections Act, the Commission is under an obligation to maintain an updated register and for this purpose a further obligation is placed on the commission to regularly revise the Register of Voters.
24. The process of registration of voters is provided under the “Elections (Registration of Voters) Regulations, 2012 (“the Voters Regulations”) and the Elections (General) Regulations 2012 (“the General Regulations”) which were promulgated pursuant to section 109 of the Elections Act. Regulation 13 of the Voters Regulations, provides that in respect to first time Applicants;
- (i) *A person who desires to be registered as a voter shall make an application in Form A set out in the Schedule.*
- (ii) *An application under sub regulation (1) shall be made to the registration officer for the constituency in which the person wishes to be registered.*
25. Applications for registration as a voter may be made at any time except on the occasions provided for under Regulation 15, namely “during a time in which the registration of voters and revision of the register is not allowed as provided for under section 5 of the Elections Act; and during a period in which the Commission has suspended Applications by way of a notice published in the *Gazette* as was done by the commission in respect of Kibra constituency vide special issue gazette notice carried in volume cxxI-106, published on the 16th August 2019.
26. Regarding the process of registration, Regulation 13 A of the Voters Regulations provides as follows;

- (1) *A person who applies to be registered as a voter shall present his or her identification document to the registration officer stationed at a Registration Centre of his or her choice.*
- (2) *The registration officer shall, where the applicant is qualified to be registered as a voter, issue the applicant with Form A as set out in the Schedule.*
- (3) *The applicant shall return the duly completed Form A to the registration officer and the registration officer shall confirm the details in the form and enter them in the biometric voter registration system and the Voters Record Book.*
- (4) *The applicant shall be issued with an acknowledgement slip upon registration.*

27. Under Regulation 16 (1) of the Voters Regulations, the “registration officer to whom an application is made under regulation 13 or 14 shall consider the application and—

- a) in the case of an application for registration under regulation 13, register the applicant if the registration officer is satisfied the applicant is qualified to be registered;*
- b) If the registration officer registers a person or makes a change under subregulation (1), the registration officer shall issue an acknowledgement slip, to the applicant.*

28. Our understanding of the above cited Regulations is that a person is only issued with an acknowledgment slip after the conclusion of the registration process in which case, the Registration Officer must be satisfied that the person has met the requirements for registration stipulated under Article 83 of the Constitution.

29. Even though there is no express provision on deregistration of voters, a reading of section 9 of the Elections Act and Article 99 (2) of the Constitution pre-supposes that once a person has been declared to be of unsound mind, is adjudged bankrupt or is convicted of an election offence then the person is disqualified from being a registered voter. What happens if a registered voter is subsequently declared to be of unsound mind, is adjudged bankrupt or

convicted of an election offence? Within the meaning of Article 83 (1) of the Constitution, they are not entitled to be registered as voters or to remain on the register of voters.

30. Even then disqualification of a voter cannot be whimsical and must be on the premise of the grounds and procedure set out in section 9 of the Elections Act which is reproduced herein below;

“9. Postponement of disqualification to enable Appeal

Where a person has been adjudged or declared to be of unsound mind, adjudged bankrupt or convicted of an election offence and is thereby disqualified from being registered as a voter, then, if that person is entitled to appeal against the decision, that person shall not be disqualified from being so registered until the expiration of thirty days after the date of the decision or such further period as the commission may at the request of the person, direct in order to enable the person to appeal against the decision.”

31. Insofar as eligibility of a person to vie as a member of Parliament is concerned, Article 99(1) of the Constitution stipulates *inter alia* that one must be **registered as a voter**, who is defined under section 2 of the Elections Act as “**a person whose name is included in a current register of voters** (emphasis added).” The same provision has been replicated under section 24 of the Elections Act on the qualifications thus;

I. *Unless disqualified under subsection (2), a person qualifies for nomination as a member of Parliament if the person—*

(a) is registered as a voter;

32. Having set down the law which we consider to be relevant, we now turn to the Submissions which were made by parties in support of their rival positions.

33. At the hearing of the Complaint Mr. Ongoya, Mr. Lusi and Mr. Majimbo appeared for the Complainant, while Mr. Sigei appeared for the 1st Interested Party. The 2nd Interested Party was represented by Mr. Ambala while the Respondent appeared in person.

The Complainant's submissions

34. The Complainant relied on his Submissions dated 12th September, 2019 which were adopted and highlighted orally by his Counsels. The gist of the Submissions by the Complainant is that he was duly registered as a voter on 26th August, 2019 in Kariokor Social Hall Polling Station in Starehe Constituency of Nairobi County before submitting his nomination papers to the Respondent. The Complainant contends that he met the requirements set out in articles 83 and 99 of the Constitution, section 24 of the Elections Act and the Regulation 13A of the Voters Regulations.
35. The Complainant further submitted that the definition of a register under section 2 of the Elections Act is not limited to KIEMS and therefore the Respondent's decision to disqualify him was ill-conceived, grossly illegal and tantamount to taking away his constitutional right due to possible administrative failure and/or fault of the Respondent and the Commission to upload his biometrics and alphanumeric into KIEMS as required under section 5(5) of the Elections Act.
36. In view of this, Mr. Ongoya submitted that the question for determination was whether the Complainant is eligible in law to vie as a candidate in Kibra Constituency. Making reference to the annexure in the Supplementary Affidavit, in which there is a remark by the Respondent (Returning Officer) that the **nomination of the Complainant is invalidated because he has not been found in the register of voters in the KIEMS'**, counsel submitted that the Committee is called upon to decide whether the Respondent was right in law by her decision of invalidating the nomination of the Complainant.
37. Counsel further submitted that under Article 99 of the Constitution, a person is eligible to vie as a member of parliament if the person is registered as a voter. In the case at hand, Mr Ongoya submitted that the Complainant is the holder of acknowledgment slip which he had at the time he presented the nomination papers. The acknowledgment slip bears electors number

0145211908261205-9 and is serialised 0003403985-17. Counsel also submitted that under section 2 of the Elections Act, the Register of Voters ‘**includes a register compiled electronically,**’ and that in making her decision, the Respondent must have proceeded on the fact that the electronic register is exclusive and not inclusive.

38. Asked by the committee through the Chairman on what his understanding of paragraph 90 of the Kethi Kilonzo’s case (*supra*) as regards the issue of the value of the acknowledgment slip, Mr. Ongoya responded that the Judgment in the Kilonzo related to the law as it was in the year 2013 when the decision was made. There had been subsequent amendments to the law vide L.N 17/2017, which then, in terms of Regulation 13A of the Elections (Registration of voters) regulations, codified the process of registration and thus in his opinion the Kethi Kilonzo case as regards the value of an acknowledgment slip, could not apply in this instance. Mr. Ongoya further stated that in the Kethi Kilonzo’s case, the only documentation under consideration then was the acknowledgment slip and that there was no other documentation on evidence of registration as is the case in the dispute before the Committee.

1st Interested party’s submissions

39. On behalf of the 1st Interested Party, Mr. Sigei relied on the Affidavit sworn by Andrew Musangi Chairperson, Jubilee Elections Board together with their written submissions dated 13th September, 2019. It was Counsel’s submissions that the question before the Committee is one on the invalidation of the nomination of the Complainant’s candidature by the Respondent.

40. Counsel further relied at paragraph 5,6 and 7 of Mr. Musangi’s replying affidavit in which Mr. Musangi deponed that;

“the Jubilee Party sought to confirm the registration status of the Complainant as a voter and affirmed that he registered on 26th August, 2019 at Kariokor Social Hall in Ziwani Ward of Starehe Constituency in Nairobi County which registration has been confirmed by registration acknowledgment slip issued, serial number 003403985-17 with the elector’s number 01452119082612015-9. The decision by the Jubilee Party to nominate the Applicant was on the basis that he had complied with all the requirements for qualification and was the best candidate for the party.”

41. Counsel also submitted that the Party is aware that registration is a continuous process and urged the Committee to review the decision of the Respondent as it was made in error. The review, in Counsel's view, would guarantee the party its right to field a candidate of its choice.

2nd Interested Party's submissions

42. Mr. Ambala for the 2nd Interested Party relied on the averments in the Affidavit in support of the Notice of Motion Application and submitted that section 24 of the Elections Act, one of the qualifications for one to qualify for election as a member of parliament was registration as a voter. It was his further submission that under section 5(1) (b) of the Election's Act registration can be carried out except between the date of declaration of a Vacancy and date of the by election.
43. The Gazette Notice 7378 declared that there shall be a by-election on 7th November, 2019 in Kibra Constituency. The seat was also declared vacant. Paragraph (N) of the Gazette Notice suspended registration of voters and revision of the register.
44. Counsel further submitted that the Complainant made an application for registration 12 days after the seat had been declared vacant with the consequence that the purported registration was not legal. He also made reference to the definition of an acknowledgment slip under the Voter Regulations and made a point that the complainant is not a registered voter since he only applied for registration hence not in the register of voters. He urged the Committee to dismiss the complaint.

The Respondent's case

45. The Respondent filed a Response to the Complaint dated 13th September, 2019 and made oral submissions during the hearing. She is the Returning Officer for Kibra Constituency and stated that she is seasoned Returning Officer having presided over several elections and the referendum of 2010. On 9th and 10th September, 2019 she presided over nominations of candidates for Kibra Constituency and cleared 23 candidates while 3 of the candidates were disqualified 3 candidates one of whom was the complainant.
46. She stated that under Section 24(1) of the Elections Act the KIEMS Kit bears the gazetted register of voters. She was assisted by her ICT team in the verification of the Complainant's name in the register. They were unable to find the Complainant's name in the register despite

all efforts. She also stated that she searched the Complainant's details in the register per the details in his National Identification card but could not find the details. Guided by the Election's (General Regulations) 2012, the Elections Act the checklist and the nomination guide she invalidated the Nomination of the Complainant as according to her, the Complainant was unqualified. She also tried calling the party through a number provided by IEBC for Jubilee Party of Kenya but they did not pick.

47. When probed by the counsel for the Complainant on whether the Complainant was called, she stated that she could not have called the Complainant because his party had not furnished the Commission with the Complainant's phone numbers. Additionally, she was asked to confirm that all those who registered before the Declaration of the seat vacant were uploaded in the KIEMS and responded that she relied on the register of voters that was provided to her by the Commission and that as an employee of the Commission she works with the register provided by the Commission.
48. She further stated that it is electoral practice that once a political party holds nomination, it forwards the names of the candidates to the commission and the details are sent to the Returning Officer. Aspirants then come to the office of the Returning Officer to register their contacts. Jubilee Party is not a young party, as it has engaged in elections previously and they know the practice yet they did not come. She concluded by stating that the 2017 register of voters in Kibra Constituency had 118,276 persons.

Registration Officers' Starehe Constituency testimonies

49. Mr. Moses Simiyu, the Registration Officer at Starehe Constituency informed the Committee that he came with the Deputy Registration Officer, Mr. Ismael Yassim who was involved in the case. Mr. Simiyu further stated that he was away from office on the material day and requested that the Committee to allow Mr. Yassim to give evidence regarding the process. He then invited Mr. Yassim.
50. Mr. Ismael Yassim, the Deputy Registration Officer testified that the Complainant appeared before him on 26/8/2019 sometime before mid-day. The Complainant initially did not have his Identification Card (ID) and had to send for it. The actual registration occurred at 12:05pm. That the elector's number, 0141211908261205-9, on the Acknowledgement slip indicates the date, month and time of receipt of application for registration, i.e, 1205 denotes the time of

capturing the voters data in the kit, 26 denotes the date of registering the voter while 08 denotes the month, being August and 19 denotes the year with the preceding numbers being the biometric voter registration (BVR kit) kit number. The last number 9 is a random number auto generated by the BVR kit upon registration.

51. He further testified that the complainant, upon producing his national Identity card and upon confirmation that the applicant was not in the register, he issued him with Form A for purposes of registering as a voter. The Complainant filled the form and his biometrics and alphanumerics were subsequently entered into the BVR system and the Voter's Record Book. He then issued the complainant with an Acknowledgment slip.
52. The Committee through the Chairperson upon looking at Form A in the Kit, realized that the form which Mr. Yassim had witnessed was not signed by the Applicant and sought to know why the form is unsigned. In response Mr. Yassim stated that he could not assign the blame for the omission as this was a common inadvertence experienced during continuous voter registration and mass voter registration, however in such cases, such omissions would be addressed by calling back the applicant to sign off the form. In the complainants case he only realised the omission after the complainant had left the registration office. Mr. Yassim also stated that the registration process in Starehe Constituency is still ongoing. This was a response to a question by Mr. Sigei.
53. In relation to the question of the authenticity of the complainants' acknowledgement slip, Mr Yassim in response to Mr. Ongoya's question affirmed its genuineness and authenticity. Mr Yassim also produced for the committees inspection, the subject BVR kit which bore the complainants biometrics and alphanumerical details, the voter record book in which the complainant is recorded as having been duly registered as a voter number 1759, the IEBC counterfoil book in respect of the acknowledgement slip in issue which bore the counterpart copy of the acknowledgment slip . The BVR kit also contained and displayed the elector's number similar to the one seen in the acknowledgement slip.
54. In a rejoinder to the submissions, Mr. Lusi submitted that the returning officer indicated that the reasons why she invalidated the Complainant's nomination is because she did not find the details of Mariga in the KIEMS. According to counsel, the check-list used by the Applicant indicates that an aspirant must be a registered voter yet the Respondent had invalidated the Complainant's nomination on the grounds that his name was not in the KIEMS.

55. On his part, Mr. Ongoya submitted that the Respondent ought to have gone a step further to establish that the Complainant had registered in Starehe Constituency. Since this was not done, the Respondent therefore made an innocent mistake which the Committee is urged to rectify.

ANALYSIS AND DETERMINATION

56. From the pleadings on record, the submissions by parties and the relevant laws, we consider the issue that we are called to determine to be:

“Whether the complainant was duly registered as a voter”

57. In order to address this question, we first must ascertain whether the Complainant complied with the voter registration process as stipulated under the various provisions cited herein-above, including Articles 83 and 99(1) of the Constitution, section 24 Elections Act, Regulation 13, 13A and 16 of the Voters Regulations.
58. The Complainant claims that he presented himself to be registered as a voter at Kariokor Social Hall on 26th August, 2019. He was issued with an acknowledgement slip bearing Elector’s No. 0145211908261205-9 which he annexed in his Supporting Affidavit. This we find is consistent with the testimony of the Deputy Registration Officer of Starehe Constituency who confirmed both the attendance of the applicant as well as the subsequent registration and issuance of the acknowledgement slip.
59. Regulation 13A (2) of Voters Regulations, imposes upon the Registration Officer, the duty to ensure that a person is qualified to be registered as a voter before being issued with Form A for purposes of registration.
60. The foregoing assertion by the complainant was not controverted. If anything, the Deputy Registration Officer’s testimony confirms that indeed the Complainant presented himself to the Registration Centre at Kariokor for registration where upon verification that the Complainant was not registered as a voter anywhere else and was qualified for registration as a voter issued him with Form A. The Complainant duly filled the form as required and his biometric and alphanumeric details were entered into the BVR kit. Following this process, the Complainant was issued with an acknowledgment slip as envisaged under Regulation 13A of the Voter Regulations. The authenticity of this slip has not been questioned by any party.

61. The Committee has looked at the Acknowledgment slip which the Deputy Registration Officer confirmed to be authentic. In addition the Committee looked at the Complainant's details in the BVR Kit and were satisfied that the Elector's number on the acknowledgment slip and as shown in the BVR kit matches. It is our finding that under Regulation 13 A (3), the Complainant was duly registered as a voter and subsequently issued with the Acknowledgment slip.
62. Indeed and by way of comparison, the process of voter registration in South Africa is similar to the one in Kenya, to the extent that once a person fills his registration details which are accepted by the Registration Officer that person is considered to have been registered as a voter unless (for the case of South Africa) the person is formally notified of the decision to reject his registration.
63. In the case of South Africa, Voter Registration Regulations 1998 made pursuant to section 100 of the Electoral Act 73 of 1998 provides for the registration of voters. Section 2 of the Regulations specifically provide for a step by step registration process as follows:

The Applicant must in person submit the completed application form together with his or her identity document to a registration officer at a place identified by the chief electoral officer within the voting district or in respect of the voting district where he or she is ordinarily resident....

(2) Every registered political party is entitled to be represented by an agent duly authorised thereto in writing by the party concerned on a form similar to Appendix 3 at any place referred to in sub regulation 1 (a) for the purpose of observing the registration process of voters.

(3) In every case where a registration officer refuses to accept an application for registration as a voter, such registration officer must immediately complete and hand to the applicant a notification of refusal in a form similar to appendix 4. (emphasis ours).

64. In South Africa therefore an applicant whose registration has been rejected leaves the registration point knowing that they are not registered which is expressly filled and handed over to him.

65. In analogy, it follows that once an applicant has gone through the procedure set out in Regulation 13A cited above, he is deemed to have been registered save for deregistration on any lawful grounds including the grounds provided for in section 9 of the Elections Act 2011.
66. Although the Respondent submitted that he was unable to find the Complainant's name in the KIEMS kit at the point of verification, she could not confirm whether the register being used was updated to reflect subsequent registrations of voters which might have taken place. We are of the view that the absence of the Complainant's name in the register that was used by the Respondent could not have been taken as conclusive proof of lack of registration of the Complainant, more so given that the Complainant had indicated he was registered in a different Constituency. We are aware of the technological challenges which might result in a delay in real time update of the KIEM's kit especially where registration process is conducted in different areas using different BVR machines.
67. In our circumstances as a country, we must be alive to certain constraints that inhibit the regular and continuous updating of our register of voters principally being limited or inadequate financial resources which affect the Commission's, effective discharge of its obligations under section 8 of the Elections Act 2011.
68. For the process of continuous registration of voters and simultaneous update of the database of the register of voters to be efficient and to achieve the real time update of the register, the Commission requires adequate financial resources in order to redress the challenges currently being witnessed in the conduct of the process.
69. With respect to the submissions by the 2nd Interested Party, that the Complainant registered after the Gazette Notice No. 7378 dated 16th August 2019 in which the Commission suspended the voter registration exercise in Kibra until 18th November, 2019 contrary to section 5(1) (b) of the Elections Act which provides that;

*Registration of voters and revision of the register of voters under this Act shall be carried out at all times except –
in the case of a by-election, between the date of the declaration of the vacancy of the seat concerned and the date of such by-election (emphasis added).*

It is our finding that the provisions of section 5(1)(b) of the Elections Act ,2011 are exclusive to the electoral area,in our case,Kibra constituency, where the by-election is to be conducted. It does not apply to other Constituencies where there are no by-elections and neither does it apply to registration of candidates. It is limited to the registration of voters. There was therefore no impediment for the Complainant being registered in any other Constituency which was not subject to the by-election.

70. It is our further finding that importing the limitations envisaged in section 5(1)(b) of the Elections Act ,2011 to the criteria set out in section 24 of the Elections Act would amount to legislating a limitation to candidature which does not exist in law or the constitution particularly Articles 83 (3) as read with Articles 38, 24(1) and 259(1). Article 83(3) of the Constitution decrees that **“administrative arrangements for the registration of voters and the conduct of elections “shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election”** (emphasis added). They ought to be facilitative and not restrictive.

71. Further Article 24 of the Constitution on the limitation of a right or fundamental freedom provides that:

A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors,


And that a legislation limiting a right or fundamental freedom “shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

CONCLUSION

For all the foregoing reasons, we come to the following conclusion and issue the following Orders:

- a) That the Complainant is duly registered as a voter.
- b) That the Respondent's decision of 10th September, 2019 declining the nomination of the Complainant on account that he was not registered as a voter is hereby set aside.
- c) The Respondent is hereby ordered to process the Complainant's Application for nomination as the Jubilee Party's candidate for the Kibra Constituency By-election slated for 7th November, 2019 in accordance with the law.
- d) Each party to bear their own costs.

Dated at Nairobi this 16th day of September 2019



Wafula Chebukati - Chairperson



Prof. Abdi Yakub Guliye - Member



Boya Mulu - Member