



Republic v Swalha Ibrahim Yusuf (Sued as, Mombasa County Returning Officer. & 2 others; Sonko (Exparte) (Judicial Review Application E022 of 2022) [2022] KEHC 11341 (KLR) (8 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11341 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E022 OF 2022**

JN ONYIEGO, J

AUGUST 8, 2022

IN THE MATTER OF ARTICLES 10; 23; 27; 38; 47; 159; AND 258 OF THE CONSTITUTION OF KENYA, 2010 AS READ WITH THE CIVIL PROCEDURE ACT; AND THE FAIR ADMINISTRATIVE ACTION ACT; AND ALL OTHER ENABLING PROVISIONS OF LAW

BETWEEN

REPUBLIC APPLICANT

AND

SWALHA IBRAHIM YUSUSF (SUED AS, MOMBASA COUNTY RETURNING OFFICER. 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION. 2ND RESPONDENT

WIPER DEMOCRATIC MOVEMENT PARTY 3RD RESPONDENT

AND

GIDEON MBUVI MIKE SONKO EXPARTE

RULING

Factual background

1. The Kenyan general elections cycle of 2017, will for ever remain a memorable event in the history of Nairobi County as the hon. Gideon Mbuvi Mike Sonko (hereafter the ex parte applicant) shook the electorate in the said county by being elected as Governor after garnering the highest number of votes than any other Governor country wide contesting for similar position in their respective counties.
2. Unfortunately, the hon. Governor could not complete serving his constitutional full term of five years after the same was cut short following presentation of an impeachment motion before the Nairobi



- County Assembly sometime 2020 where he was accused of acts of abuse of office and generally engaging in conduct that was in breach of chapter six of the constitution of Kenya.
3. Subsequently, a motion for his impeachment and removal from office was presented before the senate which in exercise of its oversight role in respect of county governments roared with a frightening voice on 17th December 2020 thereby impeaching the ex parte applicant after finding him culpable and guilty of; Gross violation of the constitution; abuse of office; gross misconduct and crimes under national law.
 4. Aggrieved by the said verdict, the applicant moved to the high court which upheld the impeachment. An appeal to the court of appeal did not salvage the situation either as the high court decision was upheld. Undeterred, the ex parte applicant landed before the Supreme Court being the apex court in the land.
 5. As the applicant engaged in his legal redress, another electioneering cycle for the general elections scheduled for 9th August 2022 came knocking faster than expected as the supreme court was yet to determine the appeal. Determined to be at the ballot box, the ex parte applicant presented his nomination papers under the ticket of the Wiper Democratic Movement party (hereafter the 3rd respondent) for the position of governor Mombasa County. To his surprise, his nomination papers were rejected by the IEBC Mombasa County Returning officer (hereafter the 1st Respondent) on grounds among others that he was not qualified on account of integrity owing to his impeachment by the Senate. His appeal to the IEBC Dispute Resolution Committee was equally unsuccessful.
 6. Dissatisfied by the said rejection/decision, he moved to the high court at Mombasa vide Constitutional and Humans Rights Petition Number E027 of 2022 seeking various declarations inter alia; that his constitutional rights under Articles 20,27,38(2) 47(2),50(2) and 180 as read with Article 193 had been violated; that he was qualified to vie for the position of Governor Mombasa County under Article 180 of the *constitution* as read out with Article 193(3) ; an injunction to issue restraining the wiper party from nominating any other candidate to vie for the same position; that an order of certiorari quashing the decision of the returning officer and IEBC dispute resolution committee for disqualifying him from vying for the governor's position Mombasa County and; an order of Mandamus directing the 2nd respondent to accept his nomination papers.
 7. After canvassing the hearing, the Court pronounced itself on 13th July 2022 thereby upholding the petitioner's prayers. In arriving at that conclusion, the court observed that the exparte applicant had not exhausted his legal rights of redress as his appeal then pending before the Supreme Court challenging his impeachment had not been determined. According to the high court decision, Article 193(3) and Section 25(3) of the *Elections Act* of 2011 protects a person who has not exhausted his right of appeal in case of any appeal or review of the relevant sentence or decision from being disqualified from vying for an electoral position.
 8. In a nutshell, the high court directed the Returning Officer to accept Sonko's nomination papers and IEBC to clear him as a candidate for the position of Governor Mombasa County. In obedience to the said court order, the returning officer and the IEBC Dispute Resolution Committee (DRC) received and accepted Sonko's nomination papers thus registering him as a candidate to vie for the said position and at the same time undertook to gazette his name as such.
 9. However, before gazette, the Supreme Court on 15th July 2022 delivered its Judgment in respect of Sonko's appeal thus dismissing it. Effectively, Sonko was stripped off the protection and or immunity of Article 193(3) of the Constitution and Section 25(3) of the elections Act 2011 given that he had now exhausted his right of appeal. With vigour and unrelenting determination to be in the ballot box, the applicant filed an application before the Supreme Court on 18th July 2022 seeking



to review its judgment. Unfortunately, there was no stay of execution granted and the application is still pending hearing and determination; On the same day, the applicant moved to the East African court of justice vide reference number 34 of 2022 seeking several declarations against the supreme court decision inter alia; stay of execution of the supreme court judgment.

10. After the Supreme Court decision, IEBC swiftly moved and issued a letter dated 18th July 2022 to the ex parte applicant revoking the nomination certificate issued on 14th July 2022.
11. Consequently, the ex parte applicant moved to this court vide a judicial review chamber application dated 28th July, 2022 filed under Certificate of urgency and supported by an affidavit sworn on the same day by Gideon Mbuvi Mike Sonko seeking the following orders; leave pursuant to Section 9 of the *Fair Administrative Action Act* to file a substantive judicial review application challenging the 1st respondent's decision contained in the letter dated 18th July, 2022; leave to apply for an order of certiorari for purposes of quashing the decision of the 1st respondent, communicated in her letter dated 18th July, 2022 revoking the registration of the applicant as a candidate for the Mombasa County Gubernatorial Election scheduled for the 9th August 2022; the grant of leave to operate as a stay of the decision contained in the letter dated 18th July, 2022, revoking the registration of the applicant as a candidate for Mombasa County Gubernatorial Election scheduled for 9th August, 2022 and to stop/ stay and halt the printing of ballot papers for the position of Governor Mombasa County pending the hearing and determination of this application and the substantive Judicial Review Application; the grant of leave to operate as a stay to stop the conduct and holding of general elections for the position of Governor, Mombasa County, pending the hearing of the application herein and the substantive Judicial Review Application.
12. When the application came before the duty Judge on 29th July 2022, the same was certified urgent and ex parte orders granting the applicant leave pursuant to Section 9 of the *Fair Administrative Action Act* to apply for an order of certiorari to quash the decision of the 1st respondent contained in her letter dated 18th July, 2018, revoking the registration of the applicant as a candidate for the Mombasa county gubernatorial election scheduled for the 9th August, 2022 was issued.
13. The applicant was then directed to file and serve a substantive notice of motion within two days. Upon service, the respondents were also directed to file their response within two days. Interpartes hearing was then scheduled for 3rd August 2022. Parties were further directed to file skeleton submissions together with their pleadings.
14. Subsequently, the applicant filed a substantive application vide Notice of Motion dated 30th July, 2022 seeking the following orders;
 - (a) That an order of certiorari be and is hereby granted to move into this court for purposes of being quashed, the decision of the 1st respondent, communicated in her letter dated 18th July, 2022, revoking the registration of the ex parte applicant as a candidate for the Mombasa County Gubernatorial Election scheduled for the 9th August 2022.
 - (b) That the grant of leave to operate as stay of the decision contained in the letter dated 18th July, 2022, revoking the registration of the ex parte applicant as a candidate for the Mombasa County Gubernatorial Election scheduled for 9th August, 2022 and to stop/ stay and halt the printing of ballot papers for the position of Governor Mombasa County pending the hearing and determination of this application and the substantive judicial review application.



- (c) That the grant of leave to operate as a stay to stop the printing of ballot papers for the position of Governor Mombasa County pending the hearing of this application and the substantive Judicial Review Application.
 - (d) That the grant of leave to operate as a stay to stop the conduct and holding of general elections for the position of Governor, Mombasa County, pending the hearing of the application herein and the substantive Judicial Review Application.
 - (e) That the instant application and suit be disposed expeditiously on, or before or during the high court vacation set to commence on the 1st day of August, 2022.
 - (f) That the honourable court be pleased to grant such other or further relief as it may deem fit in the circumstances.
 - (g) That the cost of this application be borne by the respondents.
15. The application is premised upon grounds stated on the face of it and further amplified by the supporting affidavit of the applicant herein sworn on 30th July, 2022.
16. Basically, the applicant's contestation is that the high court in petition number E027 of 2022 having directed the returning officer Mombasa County and by extension the IEBC on 13th July 2022 to accept his nomination papers and subsequently gazette him as a candidate on grounds that he had not exhausted his appeal or review mechanism, the 1st respondent had no capacity to revoke the nomination certificate issued to him on 14th July 2022. He averred that having filed an application for review before the Supreme Court against its judgment, Article 193(3) of the constitution was once again relevant hence insulated from any form of disqualification from contesting for the position he had been cleared of until the review application is exhausted.
17. He further averred that despite being notified of the existence of the application for review at the Supreme Court of Kenya and reference before the East African Court of Justice, the 1st and 2nd respondents wilfully declined and in blatant disregard of the law, revoked his clearance without citing any provisions of the law.
18. He stated that the actions of the 1st respondent is not founded on any known law and is contrary to Regulation 43 of the Elections (General) Regulations and the Elections Act. Further, it is his belief that the pending application for review before the supreme court and the East African Court of justice reference offered him sufficient protection under Article 193(3) of the Constitution of Kenya, 2010 and as such, the 1st and 2nd respondents had no basis in law or otherwise in cancelling and blocking his participation in the forth coming general elections.
19. The applicant deposed that he has no other means of enjoying his political rights under the Constitution of Kenya, 2010 as read with various international law instruments, to contest for the position of Governor, Mombasa County, as directed by the honourable court in Petition No. E027 of 2022, unless the said revocation of his registration as a candidate is quashed. That he was not accorded a hearing as envisaged under Article 47 and 50 of the Constitution as read together with Section 5 and 7 of the *Fair Administrative Action Act* in making the decision to revoke his registration as a candidate for the position of Governor Mombasa County.
20. The applicant stated that the actions of the 1st and 2nd respondents were unreasonable, unlawful, illegal and contrary to Section 5 and 7 of the Fair Administrative Actions Act as he was not given a right of hearing before his nomination could be revoked thus violating Article 47 and 50 of the constitution. He urged the court to intervene and halt the illegality and/or violation of the Constitution, the rule of



law, his fundamental freedoms and rights and those of the general members of the public, including the electorate, and those of the 3rd respondent under Article 10,27,28,38,47 and 81 of the Constitution as read with the provisions of Section 4,5,7 and 9 of the Fair Administrative Actions Act.

21. According to the applicant, the 1st and 2nd respondents had no capacity to determine any issue relating to nomination disputes given that such mandate expired on 9th June 2022 in compliance with the IEBC gazette notice of 20th January 2022. It is his contention that the decision of the 1st and 2nd respondents was actuated with malice and driven by political considerations hence defeating his legitimate expectation that the 1st and 2nd respondents shall at all material times be guided by the constitution, rule of law and *fair administrative action Act*.
22. In conclusion, he urged the court to quash the decision of the 1st and 2nd respondent to revoke his registration as a candidate for the position of Governor Mombasa County.
23. In response to the applicant's notice of motion application, the 1st and 2nd respondents filed a replying affidavit sworn by Swalha Ibrahim Yusuf the 1st respondent herein on 2nd August, 2022. The 1st respondent reiterated and indeed gave a replica of the chronology of events preceding the revocation of his nomination certificate vide the letter issued on 18th July 2022 revoking his nomination and subsequently the institution of these proceedings as alluded to by the ex parte applicant in his supporting affidavit to the notice of motion.
24. The 1st respondent further stated that with the new set of circumstances arising from the judgement of the Supreme Court dismissing the applicant's appeal and upholding his impeachment, she was under obligation to discharge her constitutional mandate under Article 75 of the Constitution as read with Article 193 of the Constitution to implement the said judgement thereby revoking the ex parte applicant's nomination certificate as he was not fit to hold any public office.
25. She deposed that by the time she was being served with the applicant's application for review against the decision of the Supreme Court, she had already dispatched the letter dated 18th July, 2022 revoking the Certificate of nomination to the applicant via Whatsapp. That the applicant herein sent her a message indicating that he had filed an application for review of the decision of the Supreme Court on 18th July, 2022 at 12.01 p.m by which time she had already acted.
26. She further stated that the applicant had prosecuted two applications within Constitutional Petition No.E027 of 2022 dated 12th July, 2022 and 18th July, 2022 respectively seeking; to cite her and the 2nd respondent for contempt of court for failure to obey the orders of the court of 4th July, 2022 and the judgement of 13th July, 2022; to quash the gazettement of gubernatorial candidates for Mombasa County in the forthcoming elections as well as the revocation of his nomination certificate vide the letter dated 18th July, 2022 and; to issue an order of mandamus directing the 2nd respondent to gazette him as one of the contestants for the position of Governor, Mombasa County and include his name in the ballot in the General Elections. That the court in its ruling of 28th July, 2022 dismissed the two applications for lack of merit.
27. She went further to state that the ballot papers for the general elections scheduled for 9th August, 2022 have already been printed and forwarded to the 2nd respondent for purposes of making preparations for the General Elections thus the orders sought in this regard have been overtaken by events.
28. Regarding the question of lack of jurisdiction, she deposed that this court can not interfere with the election date as it is a creation of the law under Article 101(1), 136(2), 177(1) and 180(1) of the Constitution. She further contended that this court lacks jurisdiction to hear and determine the dispute herein as the same ought to have been referred to the 2nd respondent's dispute resolution



committee for hearing and determination in accordance with the provisions of Article 88(4)(e) of the Constitution as read with Section 74 of the Elections Act.

29. In her view, the application herein is defective for want of exhaustion of internal remedies. That the circumstances surrounding this application were not exceptional to warrant the grant of leave to bypass the 2nd respondent's internal dispute resolution mechanism. She further contended that even if this court was properly vested with jurisdiction to hear this application, the issues arising herein are res judicata the same having been considered and determined by this court when considering the applications dated 12th July, 2022 and 18th July, 2022.
30. She stated that the rights and interests of the people of Mombasa County to elect their Governor under the provisions of Article 38 and 180 of the constitution supersedes the individual rights of the applicant to contest for the elections and therefore the applicant's rights are not absolute.
31. She further stated that the orders sought are inefficacious as the applicant still remains disqualified and ineligible to hold any public office under Article 75 of the Constitution as he stands impeached by virtue of the Supreme Court decision. That the Reference before the East Africa Court of Justice does not challenge the decision of the Supreme Court to uphold the impeachment nor does the EACJ have appellate jurisdiction and or authority to overturn the decision of the Supreme Court.
32. On the existence of an application for review in the Supreme Court, it was her contention that it did not cloth the applicant with immunity as alleged. That the applicant had exhausted his option of appeal thus cannot purport to fall back on the option of review for protection. She held the position that the applicant's averments of illegality, irrationality, unreasonableness, procedural unfairness and ultra vires conduct is not merited.
33. Apart from filing the replying affidavit, the 1st and 2nd respondent also filed a notice of preliminary objection based on the following grounds; that this honourable court lacks jurisdiction to hear and determine the present dispute in the first instance; the dispute the subject of this application ought to be referred to the 2nd respondent's Dispute Resolution Committee(hereafter DRC) to hear and determine the same in accordance with the provisions of Article 88(4)(e) of the Constitution of Kenya,2010 as read with Section 74 of the Elections Act,2011; that the application herein constitutes an attempt to circumvent the jurisdiction bestowed upon the 2nd respondent by law; that this application is defective for want of exhaustion of internal remedies and that the circumstances surrounding the present application are not exceptional as to warrant the grant of leave to bypass the 2nd respondent's internal dispute resolution mechanism.
34. The third respondent herein filed a response in support of the applicant's application sworn by Agatha Solitei the chairperson of its National Elections Board on 2nd August, 2022. She basically concurred with the applicant's averments in his supporting affidavit and stated that they had written to the 1st and 2nd respondents on various dates namely 18th July,2022, 20th July,2022 and 26th July,2022 raising complaints on the revocation and cancellation of the applicant's registration with no response.
35. She further stated that the 3rd respondent had legitimate expectation that the 1st and 2nd respondents would at all times be guided by the law when executing their mandate and that the applicant was to be in the ballot come 9th August 2022,
36. When the matter came up for hearing, the 1st and 2nd respondents confronted the court with a notice of motion dated 3rd August 2022 supported by an affidavit sworn by the 1st respondent on 3rd August 2022 seeking review or setting aside and stay of the orders of the court issued by the court pursuant to the ex parte application for leave to institute judicial review proceedings in particular order number two



- which meant that the ex parte applicant was exempted from the doctrine of exhaustion under section 9 of the *Fair Administrative Action Act*. That the application was based on the ground that it was issued ex parte instead of being served and then canvassed interpartes and that the court was misled into giving the ex parte exemption order as there were no exceptional circumstances to warrant such exemption
37. At the same time, the Ethics and Anti-Corruption Commission (EACC) filed a notice of motion dated 3rd August 2022 seeking to be enjoined as an interested party. The application was anchored on grounds stated on the face of it and averments contained in the affidavit in support sworn by Emily Ibeere on 3rd August 2022. Principally, the EACC claimed that as a body mandated constitutionally to oversee implementation of chapter six, they have an interest in the suit just as they have participated in other related cases.
38. Due to pressure of time, parties by consent agreed to have EACC enjoined as a party to the proceedings and then rely on their grounds of opposition as their response to the extent that; the ex parte applicant does not meet the ethical morals to be a state officer; the applicant has been found guilty of breaching chapter six of the constitution and that he is disqualified under Art.193(3) of Constitution. Parties further agreed that the affidavit in support of the ex parte application for leave to commence JR proceedings by the applicant be treated as the response to the 1st and 2nd respondents' notice of motion of 3rd August 2022 and, the 1st and 2nd respondents' replying affidavit to the substantive motion be treated as their further affidavit to their notice of motion.
39. Consequently, parties agreed to canvass the application with the ex parte applicant relying on his skeleton submissions filed on 1st August 2022 by the firm of Wanyanga and company advocates while the 1st and 2nd respondents filed theirs through Mukele Moni and company advocates on 3rd August 2022. The 3rd respondent filed theirs dated 2nd August 2022 through the firm of Katsiya and company advocates. The interested party did not file any written submissions hence made oral submissions.

Submissions by the ex parte Applicant

40. During the hearing, the ex parte applicant was represented by S.C.Dr. Khaminwa, Mr. Wanyanga, Mr. Gikandi, Mr. Odhiambo, Mr. Kirui, Mr. Magolo and Mr. Oginga as the lead counsel. In highlighting their submissions, counsel agreed to share time in addressing specific issues in controversy. Mr. Oginga basically submitted on issues regarding; the legality of the order; irrationality, unlawfulness and unreasonableness act of the 1st Respondent in revoking the nomination certificate; the right to fair administrative action and hearing and; legitimate expectation that the 1st and 2nd respondents were to be guided by the constitution and the rule of law in discharging their mandate.
41. On the first issue, counsel reiterated the applicant's position in his supporting affidavit on the pending review application at the Supreme Court, Reference in the East Africa Court of Justice and protection under Article 193(3) of the Constitution thus submitting that the decision of the 1st and 2nd respondents was contrary to the express provisions of the Constitution of Kenya, 2010, the Elections (General) Regulations, the *Fair Administrative Action Act* and the rules of natural justice.
42. It was counsel' submission that the action of revoking the applicant's nomination certificate was not consistent with the Kenya 2010 Constitution which demands that all state organs do engage in public participation, transparency and accountability before making any decision affecting the public or any person. Counsel submitted that under the *Fair Administrative Action Act*, before a decision is taken, a notice has to issue to any person whom the decision is intended to affect; such person must be accorded an opportunity to be heard and, the reasons for the decision made must be given. That in respect of the applicant herein, such procedure was not followed.



43. Learned counsel contended that despite the 1st and 2nd applicant's knowledge that the applicant was still protected under Article 193(3) of the constitution owing to the existence of an application for review pending before the supreme court and a reference before the EACJ, they ignored the same and proceeded to revoke the certificate. That as long as the review application is pending, Article 193(3) of the constitution is still applicable. In support of this proposition, the court was referred to the holding in the case of Republic vs Independent Electoral and Boundaries Commission and others Ex parte Paul Karungo Thangw'a Judicial Review Application No. 2 of 2022 Kiambu where the court held that the ex parte applicant could not be disqualified from contesting as he had not exhausted the appeal process. The court was further referred to the case of Mike Mbuvi Sonko vs Swalha Ibrahim Yusuf and others Mombasa high court petition No. E027 of 2022 where similar holding was held.
44. According to Mr. Oginga, even where there is an application pending leave to appeal, such person is protected hence cannot be disqualified from contesting. To buttress his submission, reliance was placed in the holding in the case of Commission On Administrative Justice v John Ndirangu Kariuki and others petition number 408 of 2013.
45. Regarding the pending reference before the EACJ, counsel opined that the same must be dispensed with before the applicant is deemed to have exhausted his legal redress. In this regard, counsel urged the court to be guided by the finding in the case of Martha Wangari Karua vs The Attorney General of the Republic of Kenya and others reference number 20 of 2019 where the court held that it had the mandate to interrogate the decision of the supreme court of Kenya to determine compliance with the treaty.
46. On the second issue, counsel submitted that the decision contained in the letter dated 18th July, 2022 is irrational and unreasonable as it was made without consideration of the fundamental freedoms and rights of the ex parte applicant, the 3rd respondent and the people of Mombasa as guaranteed in the Constitution of Kenya, 2010 and that the applicant was not accorded an opportunity to be heard.
47. Counsel submitted that it is trite law that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard. That any decision made in breach of this cardinal principle of natural justice is a nullity and void ab initio. Counsel submitted that failure to issue notice summoning the applicant for a hearing before making their decision was not only irrational but arbitrary and therefore liable to be quashed. In support of that position, reliance was placed in Wednesbury principles as established by Lord Green.M.R. in Associated Provincial Picture Houses v Wednesbury Corporation(1948)1KB22B 223.
48. Counsel contended that Regulation 43 of the Elections Regulations does not give power to the 1st respondent to cancel a nomination certificate once issued; the 1st respondent acted in excess of power and secretly with ulterior motive, in bad faith and abuse of office powers.
49. Turning to the 3rd issue regarding denial of fair hearing, counsel opined that such decision is a nullity and void ab initio as it contravenes both the the Constitution and the *Fair Administrative Action Act*. In support of that contention, reference was made to several authorities inter alia; *Republic v National Police Service Ex parte Daniel Chacha Chacha* [2016] eKLR, Daniel Musau Mbithi v Rael Kavili Munyao & another; Timothy Ngila Nzuki & 6 others (interested Parties); and *Joyce Chepkoech Too v Egerton University & another* [2021] eKLR. Counsel urged the court to find that the applicant's fundamental rights and freedoms under Article 10, 27, 47 and 50 of the Constitution were equally infringed.
50. On the fourth issue, counsel submitted that the applicant has legitimate expectation that the 1st and 2nd respondents were to be guided by the provisions of the law and adhere to the same in discharging their



mandate and obligations. Touching on the question whether the suit amounts to res judicata, counsel submitted that the issue was never canvassed in Petition number E027 of 2022 Mombasa.

51. On the question whether ex parte leave was properly issued, counsel contended that the court has the discretion to issue such orders hence nothing irregular as contended in the notice of motion filed by the 1st and 2nd respondents. Counsel went further to state that the question of exhaustion of internal legal mechanism does not arise as the IEBC dispute resolution mechanism expired on June 2022 Pursuant to the IEBC notice published in the Kenya Gazette of 20th January 2022 hence the applicant had nowhere to lodge his complaint.
52. Mr. Odhiambo submitted on the notice of motion seeking review of the ex parte orders made on 29th July 2022 granting leave under Section 9 of the *Fair Administrative Action Act*. According to learned counsel, the application was irregularly filed as it did not comply with the high court vacation rules. That this court has no power to set aside its own orders as it will amount to exercising appellate jurisdiction over its own decision.
53. Mr. Kirui also supported Mr. Odhiambo's sentiments and added that issuance of the ex parte orders is a discretionary issue under order 53 of the CPRS hence nothing irregular.
54. On his part, S.C. Dr. Khaminwa urged the court to strictly protect and apply the constitution to ensure that parties comply with the law and ensure that devolution is realized by people being represented by leaders of their choice. Mr. Wanyanga submitted that the invocation of chapter 75 without reading it together with Article 193(3) of the constitution is a misnomer.
55. M/s Mango appearing for the 3rd respondent basically relied wholly on her submissions hence fully associating herself with the position of the ex parte applicant.
56. Mr. Mukele for the 1st and 2nd respondents adopted the content contained in their replying affidavit and his submissions. Learned counsel submitted that this court has no jurisdiction to entertain the matter as jurisdiction squarely lies in the docket of the 2nd respondent's dispute resolution committee which has the mandate to deal with pre-election disputes pursuant to Article 88(4)(e) of the Constitution and Section 74 of the elections Act.
57. To support the above submission, counsel urged the court to down its tools in compliance with the holding in the case of *In the matter of the interim independent electoral commission*(2011) eKLR and *Owners of Motor Vessel "LillianS" v Caltex Oil (Kenya) Limited*(1989)KLR. To further support the position that pre-election disputes purely lie with the IEBC in the first instance, the court was referred to the case of Constitutional petition number E090 of 2022(consolidated); Okiya Omutatah Okoiti & 15 others vs The Attorney General & 23 others and *Dianah Kethi Kilonzo & another v independent Electoral & boundaries commission & 10 others*(2013)eKLR.
58. Further, learned counsel submitted that the application and grant of leave for the ex parte applicant to be exempted from exhausting internal mechanism does not apply under Section 9(4) of the Fair Administrative Act as no exceptional circumstances were demonstrated from the word ago nor were the respondents invited to argue the application seeking exemption. In support of this proposition, counsel referred to the holding in the case of *Krystalline Salt limited v Kenya Revenue Authority* (2019)e KRL. In counsel's view, the application is premature.
59. On the question whether the issues raised and orders sought amount to res judicata, counsel contended that two applications dated 4th July and 18th July 2022 citing the 1st respondent for contempt over the same subject had been determined hence cannot be litigated again. As to whether the reliefs sought can



issue, counsel submitted that no basis has been laid to warrant the orders sought as the court has not sufficiently been moved to warrant exercise of jurisdiction in his favour.

60. Counsel submitted that even if the court found the prayers sought to be merited which is not, it can still decline if; such orders are not efficacious in the circumstances; to allow the prayers herein will be futile as the supreme court has already determined the applicant's application with finality; the prayer seeking the court to stop printing ballot papers cannot apply as the same have already been printed; stopping the election for the position of governor will be against public policy and interest; there are candidates or persons involved in the same election exercise who are not parties in this case hence will be affected without being given a hearing. To fortify this position, the court was referred to the wisdom displayed in the case of *Republic v minister of Agriculture & 2 others Ex parte Equitorial Nuts processors limited & 3 others*(2013) eKLR
61. Mr. Mukele contended that the 1st and 2nd respondents were under a duty not to clear a person who is not eligible to contest where there is evidence of breach of chapter six. Support of this submission was derived from the holding in JR No. E004 of 2022 Republic vs Independent Electoral and boundaries commission & 3 others ex parte Shukin Oenga Mongare
62. As to the applicability of Regulation 43 of the general election regulations, counsel opined that the 1st respondent properly exercised her authority under that provision. Mr. Gacheru teaming up with Mr. Mukele termed as incorrect the claim that the IEBC disputes resolution committee's mandate had expired by 9th June 2022 as the basis for exemption from exhausting the internal legal mechanism. Counsel held the position that the IEBC's DRC's mandate will expire upon commencement of the election exercise and that the same is ongoing hence no special ground for exemption.
63. On his part, Mr. Kagucia for the interested party basically relied on chapter six to express the point that there is no appeal pending hence Article 193(3) of the Constitution is spent and not available for the ex parte applicant.

Determination.

64. I have considered the application herein, response thereof and submissions by parties' respective counsel; Issues that arise for determination are
 - 1) Whether the 1st and 2nd respondents have established sufficient ground for review of the ex parte order number two issued on 29th July 2022 pursuant to Section 9(4) of the *Fair Administrative Action Act*.
 - 2) Whether this court has jurisdiction to entertain the application.
 - 3) Whether the application herein is res judicata
 - 4) Whether the ex parte applicant has met the criteria for grant of the reliefs sought.
65. From the litigation history already outlined herein above, certain facts are undisputed in this matter. Firstly, there is a high court Petition number E027 of 2022 whose judgment delivered on 13th July 2022 directed the 1st respondent to accept nomination papers for the ex parte applicant and issue him with a nomination certificate to contest for the position of Governor Mombasa county which she did comply with on 14th July 2022; Secondly, there is a supreme court decision delivered on 15th July 2022 dismissing the ex parte applicant's appeal; Thirdly, there is appealing review application pending before the supreme court and a reference before the EACJ; Fourth, Pursuant to the Supreme court's decision, the 1st respondent issued a letter dated 18th July 2022 revoking the ex parte applicant's nomination certificate; Fifth, following that revocation, the applicant filed an application dated 18th



July 2022 citing the 1st respondent for contempt; Sixth, the contempt application was dismissed on 28th July 2022 on grounds that the applicant's rights under Article 193(3) of the constitution had extinguished.

66. The proceedings herein are a culmination of the revocation of the nomination certificate by the 1st respondent vide a letter dated 18th July 2022. This court was approached vide an ex parte application seeking leave to commence judicial review proceedings in the nature of certiorari to quash the decision revoking his nomination certificate aforesaid and such leave to operate as stay. Secondly, the applicant be granted leave pursuant to section 9 of the *Fair Administrative Action Act* to be exempted and allowed to sustain the JR proceedings.
67. After perusing the ex parte application, the court certified the application urgent and granted prayers 2 and 3. The basis upon which prayer two was granted was on the averment that the IEBC dispute resolution committee's mandate having expired on 9th June 2022 pursuant to the IEBC' gazette notice of 20th January 2022, the applicability of the internal dispute resolution mechanism in the circumstances was spent hence the only recourse was to commence proceedings in the high court which is clothed with unlimited jurisdiction under Article 165(3) of the constitution.
68. The question which begs for an answer is whether the court properly acted in issuing prayer two and whether there is sufficient ground to review or set aside the same. Section 9 of the *Fair Administrative Action Act* provides;
- (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.
 - (2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
 - (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
 - (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
 - (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.
69. According to Mr. Mukele, the court was misled by the applicant by quoting an old notice yet there was a gazette notice of 6th June 2022 constituting DRC to determine disputes pursuant to Article 88(4) of the Constitution and that had the new information been laid before the court, it would not have made the decision it did. Have the 1st and 2nd respondents established sufficient ground to review the impugned order.
70. Before I determine the merits of the review application, I wish to address the question raised by the ex parte applicant challenging the legality of the review application as leave under the high court vacation rules was not sought. This suit was filed two days to commencement of vacation and directions made for hearing to be held during vacation. With this direction, leave was technically granted suo moto



by the court hence it was not necessary for each pleading filed in the same file leave be sought. That technicality is further cured under Article 159(2) (d) of the constitution.

71. Order 45 of the CPRS under which the review application was filed requires a party seeking review of an order or decision from which he or she is aggrieved to prove; discovery of new matter or evidence that was not within his knowledge after exercise of due diligence; mistake or error apparent on the face of the record or for any other sufficient cause. This position was emphasized in the case of *Republic vs Cabinet Secretary Interior and Co-ordination of National Government Ex parte Abulabi said salad*(2019)eKLR.
72. Have the 1st respondent and 2nd respondents established existence or discovery of new evidence or matter that was not within their knowledge? This ground is not relevant as the impugned order was issued ex parte against the 1st and 2nd respondents. Have they proved existence of mistake or error apparent on the face of the record? In the case of Republic vs cabinet secretary interior and coordination of National government above quoted, the court held that;

“the term “mistake or error apparent” by its very connotation signifies an error which is evident perse from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position...To put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court or tribunal on a point of fact or law”
73. For the ground of mistake or apparent error on the face of record to be sustained, the court is not expected to scrutinize afresh the facts leading to the issuance of the order. The mistake or error must be obvious even before the eyes of an ordinary person. In the circumstances of this case, those grounds are not applicable.
74. Having held as above, am left with the last element on whether there is sufficient cause to warrant review or setting aside those orders. The law governing grant of leave to commence judicial review proceedings ex parte is anchored under order 53 of the civil procedure rules. The objective is to sieve out frivolous, vexatious and hopeless applications being filed by busy bodies hence save on judicial time to perform other duties. See *Republic v County council of Kwale & another Ex parte kondo & 57 others* Mombasa HCMCA No.384 of 1996.
75. On the other hand, grant of leave at the ex parte stage for a party to institute JR proceedings, can only apply if there is proof that based on the material available, the court considers, without going into the matter in depth, that there is an arguable case for granting the relief sought by the applicant. In this regard, I am guided by the holding by the court of appeal in the case of *Justus Ongera v Director of Public Prosecutions & another*(2018)eKLR. It is however worth noting that grant of leave ex parte to commence JR proceedings is a matter of discretion and the same can be set aside under order 50 rule 15 of the CPRS or reviewed if there is sufficient cause.
76. In the circumstances of this case, the ex parte applicant pleaded exemption from exhausting IEBC’s internal dispute resolution mechanism by alleging that IEBC had none as the mandate of the then existing DRC had expired pursuant to Kenya gazette notice of 20th January 2022. This in my view was an exceptional circumstance that propelled the court to granting prayer number two leading to the issuance of order number two exempting the ex parte applicant from being subjected to an internal dispute resolution mechanism which was not in place.



77. If indeed there was no DRC in place as per the gazette notice of 20th January 2022, it would then be absurd to expect or direct the ex parte applicant to pursue a mechanism that was non-existent. In the circumstances of that averment, and considering time constraints owing to the fast approaching elections date, the court found it prudent to allow the ex parte applicant an opportunity to be heard before the high court through a substantive motion as in its view, there was a prima facie case.
78. However, during the hearing, Mr. Mukele told the court that the exemption order was obtained through trickery by the ex parte applicant misleading the court that there was no DRC in place yet there was one constituted vide gazette notice issued on the 6th June 2022. This position was not controverted by the applicant. In fact, none of the about 6 advocates representing the ex parte applicant ever commented on Mr. Mukeles' submission on that aspect. I have looked at the gazette notice number 6606 of 6th June 2022 gazetting 12 IEBC commissioners as members charged with the responsibility of hearing disputes arising from nomination of candidates.
79. Based on this revelation, it is apparent that the impugned leave was obtained through non-disclosure of material facts thereby misleading the court into giving orders it could not have given had the correct information or material facts been laid bare before the court. It is trite that a litigant who obtains orders through concealment, non-disclosure of material facts or misrepresentation should not be left to enjoy the comfort or privilege associated with such orders. See *Secretary ministry for education & another ex parte George Bala; Attorney General & 4 others (interested parties)* (2022) eKLR where the court held;
- “Judicial precedence in our jurisdiction has crystallized grounds for varying and/ or setting aside leave to apply for judicial review or other orders to include non-disclosure, concealment of material facts or documents, misrepresentation and where an application is an abuse of the court process”
80. Similar position was held in the case of In the matter of an application by Jutus Nyangaya & others Nairobi Misc. civil case No. 1133 of 2002 and also in the case of; *Republic v Vice chancellor Moi University & 3 others Ex parte Benjamin J. Gikenyi Magare* (2018) eKLR where Omondi J as she then was held that;
- “To request the court to relook at the background leading to the issuance of stay, is in my view not asking the court to sit on an appeal on orders of a court of equal status. It is simply telling the court to reconsider the orders issued in light of the fact that the beneficiary of those orders concealed or did not disclose all the material facts prevailing...”
81. Guided by the above case law, there is no doubt that the ex parte applicant cannot benefit from his wrong doing thus obtaining orders he did not deserve by not disclosing all material facts to the court. In my view, this alone is sufficient ground to vary and set aside the ex parte orders. Such action is within the discretionary power of the court hence it does not amount to sitting on the same as an appellate court. To that extent, the court is not functus officio as submitted by counsel for the ex parte applicant. Consequently, order number two issued ex parte on 29th July 2022 is hereby recall and consequently set aside. This is the consequence of taking a short cut route full of crocodiles instead of a longer but safe route.
82. Having set aside the contentious order, the next issue is, whether this court has jurisdiction to hear this matter pursuant to the P.O raised by the 1st and 2nd respondents. Mr. Mukele submitted that under Art, 88(4) of the constitution and Section 74 of the Elections Act, only IEBC has the jurisdiction to hear the dispute. Dr. Khaminwa submitted that the 1st and 2nd respondents have disobeyed the three judge bench decision in Constitutional Petition Number E027 of 2022 but fell short of commenting



on the dismissal of the contempt application dated 18th July 2022 where the court held that its orders were complied with hence it was functus officio.

83. In view of that ruling, the issue before this court is a product of a fresh rejection of nomination papers pursuant to the delivery of the supreme court decision hence a dispute relating to nomination of a candidate. Does this court have jurisdiction to entertain this matter? It is trite law that a P.O must be based on points law which if determined favourably in favour of the applicant will determine the matter with finality. This position was clearly set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*(1969) EA696.
84. Equally, if the court finds that it has no jurisdiction to entertain the suit, it shall down its tools and move no further step. See Owners of Motor Vessel “LilianS” Vs Caltex Oil(Kenya) Ltd (Supra)
- “...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence”
85. Similar position was held in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank limited & 2 others* (2012) eKLR where the court held that jurisdiction is a creature of either the constitution or statute and that a court cannot arrogate to itself jurisdiction which it does not have.
86. In the circumstances of this case, the state organ mandated to hear and determine electoral disputes on nomination of a candidate, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results is the IEBC. This is a mandate conferred under Article 88 of the Constitution. The said mandate is further amplified by Section 74 of the Elections Act. In view of these two provisions, this court’s mandate is limited until after the IEBC’s mandate is extinguished. This is the process the ex parte applicant was running away from. On the merits of the complaint challenging the decision taken in revoking the nomination certificate, it will be for the IEBC DRC to determine and thereafter challenge it in court by way of judicial review.
87. In the case of *Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & others* (supra) the court expressed itself that under Art. 88(4) of the Constitution the IEBC had the mandate to settle disputes relating to nomination. Similar position was held in *Petition No. E090(Supra)*. There is no doubt that where there is a clear provision for internal dispute resolution mechanism, it is incumbent upon the affected parties to exhaust first such mechanism before approaching the court. In this case, the ex parte applicant was fully aware of this position hence the prayer giving rise to the impugned order number two.
88. Having held as above, I am in agreement with Mr. Mukele that this court has no jurisdiction to entertain and grant the reliefs sought. In the circumstances, I have no power to make any determination on the question whether the 1st respondent acted properly in revoking the certificate or not. In view of that holding, the issue whether this matter is res judicata has been rendered moot as its determination is not of any consequence. The upshot of it all is that the ex parte applicant has a long way to go in search of justice. Accordingly, this court is inclined to respectfully down its tools and therefore find the application herein unmeritorious hence dismissed with costs to the 1st and 2nd respondents.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF AUGUST 2022

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J.N.ONYIEGO

JUDGE

