



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NANYUKI  
JUDICIAL REVIEW NO 7 OF 2017

BETWEEN

1. PAULINE WANJIKU KIGERA

2. EMILY CHEPKEMOI.....EX PARTE APPLICANTS

AND

1. COUNTY ASSEMBLY OF SAMBURU

2. SPEAKER, COUNTY ASSEMBLY OF SAMBURU

3. CLERK, COUNTY ASSEMBLY OF SAMBURU

4. JENIFER LETUYA

5. STAFANIA LANGASUNYA

6. INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC).....RESPONDENTS

J U D G M E N T

1. The *Ex Parte* Applicants herein, **PAULINE WANJIKU KIGERA** and **EMILY CHEPKEMOI**, sought leave by *ex parte* chambers dated 26/09/2017 to apply for judicial review to seek –

a. An order of *certiorari* directed at the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to “quash the decision taken to swear in the 4<sup>th</sup> and 5<sup>th</sup> Respondents as nominated members of the 1<sup>st</sup> Respondent....”

b. An order of *prohibition* directed at the 4<sup>th</sup> and 5<sup>th</sup> Respondents from continuing to act as members of the **County Assembly of Samburu**.

c. An order of *mandamus* directed at the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents compelling them to undertake the “public duty owed in law and in respect of which the *Ex Parte* Applicants have a legally enforceable right and legitimate expectation and swear them in as duly nominated members of the **County Assembly of Samburu**.”

2. The court (Kasango, J) directed that the application for leave be served and heard *inter partes*. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents filed notices of preliminary objection upon the ground that what the *Ex Parte* Applicants had brought before the court was actually an election dispute disguised as a judicial review matter which the court should not entertain.

3. Before the preliminary objections were canvassed the *Ex Parte* Applicants withdrew the proceedings as against the 4<sup>th</sup> and 5<sup>th</sup> Respondents by notice of withdrawal of suit dated 11<sup>th</sup> and filed on 14<sup>th</sup> December 2017.

4. In a ruling dated and delivered on 27/02/2018 the court (Kasango, J) held that as the *Ex Parte* Applicants had withdrawn the suit as

against the 4<sup>th</sup> and 5<sup>th</sup> Respondents, they were not seeking to unseat those two respondents from their nominated seats in the **Samburu County Assembly**; that the *Ex Parte* Applicants were only seeking a finding by the court that the decision of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents (refusing to swear them in) was wrong; and that therefore the *Ex Parte* Applicants could legitimately seek an order of **mandamus** to compel them to do so. The court therefore granted leave in that respect. The court however refused leave to seek **certiorari** and **prohibition**.

5. A little background is necessary. In the course of the **General Elections** of 2017, the 4<sup>th</sup> and 5<sup>th</sup> Respondents were gazetted by the 6<sup>th</sup> Respondent (IEBC) as nominees of the **Democratic Congress Party** to be members of the **County Assembly of Samburu**. They were sworn in and they took their seats. The 6<sup>th</sup> Respondent subsequently gazetted the *Ex Parte* Applicants as the nominees of the same **Democratic Congress Party**, and deleted the 4<sup>th</sup> and 5<sup>th</sup> Respondents as the nominees of that party. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents declined to swear in the *Ex Parte* Applicants because the 4<sup>th</sup> and 5<sup>th</sup> Respondents had already been sworn in and taken their place in the **Samburu County Assembly**.

6. In this state of affairs there was obviously an election dispute between the *Ex Parte* Applicants, the 4<sup>th</sup> and 5<sup>th</sup> Respondents, as well as the 6<sup>th</sup> Respondent (IEBC). The *Ex Parte* Applicants did not file an election petition under the relevant law as they should have done. Instead they brought the present proceedings. Similarly the 4<sup>th</sup> and 5<sup>th</sup> Respondents did not file an election petition. They too instituted judicial review proceedings to quash the 6<sup>th</sup> Respondent's (IEBC) gazette notice naming the *Ex Parte* Applicants as the nominees of the party and deleting the 4<sup>th</sup> and 5<sup>th</sup> Respondents' names. This was vide **Nanyuki HC Judicial Reviews Nos 6 and 5 of 2017** respectively. In judgments delivered respectively on 1<sup>st</sup> and 27<sup>th</sup> February 2018 (Kasango, J), both cases were dismissed upon the ground that what was before the court were actually election disputes that should be resolved by way of election petitions as provided for by the **Constitution of Kenya, 2010** and statute, and not by way of judicial review.

7. That is exactly the same situation that the *Ex Parte* Applicants must find themselves in. What is good for the goose is certainly good for the gander! It cannot be any different for them. It bears to repeat that what there is here is a fully fledged election dispute between the *Ex Parte* Applicants, the 4<sup>th</sup> and 5<sup>th</sup> Respondents, as well as the 6<sup>th</sup> Respondent (IEBC). That election dispute cannot be resolved by this court in judicial review. The scenario does not change merely because the *Ex Parte* Applicants chose to withdraw the present proceedings as against the 4<sup>th</sup> and 5<sup>th</sup> Respondents. The order of **mandamus** they seek in the present proceedings, if granted, would directly affect and prejudice the 4<sup>th</sup> and 5<sup>th</sup> Respondents. An appropriate election petition under the relevant law should have been filed by the four (4) nominees; none was filed. A short-cut through judicial review proceedings is not appropriate at all. This court does not have jurisdiction to resolve the clearly identifiable election dispute through judicial review.

8. There is yet another practical problem. As already seen, the 4<sup>th</sup> and 5<sup>th</sup> Respondents are already occupying the offices that the *Ex Parte* Applicants seek to be sworn into. The 4<sup>th</sup> and 5<sup>th</sup> Respondents were themselves gazetted and sworn into those offices before the *Ex Parte* Applicants were gazetted by the 6<sup>th</sup> Respondent (IEBC). If this court were to direct that the *Ex Parte* Applicants be sworn in, it means that, either the 4<sup>th</sup> and 5<sup>th</sup> Respondents are thrown out of the county assembly, yet the present proceedings were withdrawn as against them, or there would be 4 occupants of offices where there ought to be only two! The **Democratic Congress Party** would in that event have 4 nominees instead of 2; and the legal establishment of the members of the **Samburu County Assembly** would thereby no doubt be exceeded by two. This court will not countenance such absurdities.

9. In the circumstances, and having considered the able submissions of the learned counsels appearing, I must decline the **notice of motion dated 28<sup>th</sup> February 2018**. It is hereby dismissed. It is so ordered.

10. There were many other issues addressed by the learned counsels that I did not, respectfully, consider germane to the main issues, and I thus found no need to adjudicate on them.

11. As for costs, I invite the parties to address the court on the issue.

**DATED AND SIGNED AT NANYUKI THIS 1<sup>ST</sup> DAY OF MARCH 2021**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 18<sup>TH</sup> DAY OF MARCH 2021**