



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**JUDICIAL REVIEW NO. 2 OF 2018**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY ASSEMBLY OF WAJIR.....1<sup>ST</sup> RESPONDENT**

**SPEAKER COUNTY ASSEMBLY OF WAJIR.....2<sup>ND</sup> RESPONDENT**

**CLERK COUNTY ASSEMBLY OF WAJIR.....3<sup>RD</sup> RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES**

**COMMISSION (IEBC).....4<sup>TH</sup> RESPONDENT**

**SAADIA AHMED MUMIN.....INTERESTED PARTY**

**EX-PARTE.....KALTHUMA ABDULAHI MAALIM**

**RULING**

**BACKGROUND:**

1. Before me is a Notice of Motion brought under Order 53 rule 3 (1) of the Civil Procedure Rules and Section 6 of the Civil Procedure Act, section 8 and 9 of the Law Reform Act Cap. 26 as well as the Constitution of Kenya 2010, filed on 28<sup>th</sup> September 2018. It was brought by the Exparte Applicant who described herself as “the subject” – Kaltuma Abdulahi Maalim, seeking the following two orders –

**(1) An order of mandamus do issue against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents compelling them to undertake public duty owed in law and swear in as duly nominated member of the County Assembly of Wajir Kaltuma Abdulahi Maalim per Gazette Notice No. VOL. CX1X – No. 131 dated 6<sup>th</sup> September 2017.**

**(2) The costs of this application be provided for.**

**BASIS OF APPLICATION:**

2. The application is grounded on the statement filed with the Chamber Summons for grant of leave to file Judicial Review Proceedings dated 12<sup>th</sup> September 2018 and an affidavit verifying the facts dated the same date and sworn by the Exparte Applicant.

3. The grounds for the reliefs sought per that statement are as follows –

**(1) That the 2<sup>nd</sup> and 3<sup>rd</sup> respondents neglected their lawful duties by refusing to swear in the applicant herein.**

**(2) That the actions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents amounts to abuse of power.**

**(3) That section 4 (1) of the Fair Administrative Action Act 2015 gave every person the right to administrative action which was expeditious, efficient, lawful, reasonable and procedurally fair, true and applied to the Exparte Applicant.**

**(4) That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' actions were illegal and breach of the fundamental principles of the natural justice of the right to be heard and fair administrative action as espoused in our Constitution.**

**(5) By reasons aforesaid, the Exparte Applicant prays for the grant of leave to apply for Judicial Review Orders of Mandamus.**

4. I will say straight away that the 5<sup>th</sup> ground above was dispensed with once leave to apply for Judicial Review Orders was granted by this court.

5. The affidavit verifying the facts was in brief to the effect that pursuant to Gazette Notice No. VOL. CX1X – No. 131 dated 6<sup>th</sup> September 2017, the Exparte Applicant was gazetted as a duly nominated Member of the County Assembly of Wajir, and Nairobi Chief Magistrate's Petition 12 of 2017 challenging her nomination was dismissed. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents had upto date failed or neglected to swear her notwithstanding that the stay orders granted in Miscellaneous Judicial Review No. 576 of 2017 restraining her swearing had lapsed by virtue of the judgment delivered on 23<sup>rd</sup> July 2018. That the Exparte Applicant's advocates wrote a letter to the respondents but to date she had not been sworn in nor had the letter been answered. That the decision of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents was unlawful, unprocedural and offended and defeated the meaning and spirit of Article 49 and 50 of the Constitution of Kenya 2010 and thus should be declared a nullity. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were supposed to follow the gazettelement done by the 4<sup>th</sup> Respondent herein in carrying out their mandate of swearing of the Members of County Assembly, and that their actions amounted to abuse of powers and ought to be set aside in the interest of justice. In addition, the Exparte Applicant on advice of her advocates believed that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' decision was in violation of her rights to information, fair hearing and against the principles of fair administrative action as stated in section 4 and 5 of the Fair Administrative Actions Act.

#### **RESPONSES:**

6. In response, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents on 12<sup>th</sup> October 2018 filed a Notice of Preliminary Objection in the following terms –

**(1) That the Honourable Court lacks the jurisdiction to hear and determine the Judicial Review Application dated 19<sup>th</sup> September 2018 as the issues raised therein relate to an Election Dispute and within the exclusive jurisdiction of an Election Court.**

**(2) That the constitutionally provided timeline for resolution of election disputes have lapsed and this court has no jurisdiction to entertain this Judicial Review Application out of time.**

**(3) That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents be awarded the costs of the application.**

7. The 4<sup>th</sup> respondent on their part, filed both a Notice of Preliminary Objection and a replying affidavit. In the Notice of the Preliminary Objection they object to these Judicial Review Proceedings in the following terms –

**(1) That this court pronounced itself as having no jurisdiction in a similar case filed by the Exparte Applicant in Constitutional Petition No. 14 of 2017.**

**(2) That there was a similar case filed by the Exparte Applicant in Constitutional Petition No. 14 of 2017 heard and determined by this court.**

**(3) That for the foregoing reasons, the Applicant's application dated 19<sup>th</sup> September 2018 is incompetent and legally untenable and ought to be dismissed with costs.**

8. The same 4<sup>th</sup> respondent filed an affidavit sworn by Salome Oyugi the Legal Manager of the 4<sup>th</sup> respondent (IEBC) in which the Legal Manager deponed that the 4<sup>th</sup> respondent vide Gazette Notice No. 8752 dated 6<sup>th</sup> September 2017 gazetted the Exparte Applicant as the duly nominated member of the County Assembly under the Gender Top Up Category representing the Kenya African National Union (KANU). That the 4<sup>th</sup> respondent gazetted the Exparte Applicant on the strength of a consent entered between the Exparte Applicant and KANU where it was agreed by consent that the Applicant be gazetted as the duly nominated Member of the County Assembly of Wajir. It was also deponed that the 4<sup>th</sup> respondent in gazetting the Exparte Applicant performed its constitutional and statutory duties of gazetting the (KANU) Party's preferred candidate as long as the said party list complied with the Constitution and the relevant provisions of the Law and that it was not within the 4<sup>th</sup> respondent's power to swear in candidates.

9. The interested party Saadia Ahmed Mumin who joined the proceedings at a later date, filed Preliminary Grounds of Objection to the application stating as follows –

**(1) The Notice of Motion/Judicial Review application raises a question of election of a nominated Member of County Assembly and the jurisdiction of this court has not been properly invoked.**

**(2) This Honourable Court lacks jurisdiction to entertain this Notice of Motion application and the entire suit by virtue of section 75 of the Elections Act No. 24 of 2011.**

**(3) The issues raised herein are *res judicata*.**

**(4) The said Judicial Review Application is bad in law, incompetent, misconceived and an abuse of the process of the court.**

**(5) The said Judicial Review Application is incompetent and fatally defective for failure to comply with mandatory provisions of the law.**

#### **SUBMISSIONS OF THE PARTIES:**

10. The parties herein through counsels proceeded in the matter through the filing of written submissions. On the hearing date, Mr. Warsame holding brief for Mr. Anyoka for the Ex-parte Applicant asked for Judgment and said that Mr. Anyoka had instructed him to abandon issue (b) of their proposed issues on validity of nomination of the Exparte Applicant as Member of the Wajir County Assembly.

11. In response, Mr. Munene for the Interested Party and holding brief for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents stated that the abandonment of an issue cannot be imposed on other parties. All counsels present opted not highlight the written submissions filed, but relied on the same.

12. I have considered the application, documents filed, the written submissions by all parties, the authorities cited and the law applicable together with the Constitution of Kenya 2010.

13. Though counsel for the Exparte Applicant said that Mr. Anyoka had instructed him to abandon their issue (b) on the nomination of the Ex-parte Applicant, counsel who appeared for the other parties submitted that they were not bound by that step. The request of the Exparte Applicant in the Notice of Motion filed on 28<sup>th</sup> September 2018 is only one that – ***“an order of Mandamus do issue against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents compelling them to undertake public duty owed in law and swear in as duly nominated Member of the County Assembly of Wajir Kaltuma Abdulahi Maalim per a Gazette Notice No. VOL. CX1X – No. 131 dated 6<sup>th</sup> September 2017.”***

14. The main thrust of the argument between the parties herein is on jurisdiction. According to the Exparte Applicant, the court has the jurisdiction to hear these Judicial Review Proceedings while the Respondents and the Interested Party challenge the jurisdiction of this court on the basis that other cases have been determined in court, on the same issues now brought before this court in these proceedings. The 4<sup>th</sup> respondent, the IEBC also contended that it gazetted the Exparte Applicant because of a consent entered in court between the Exparte Applicant and the Kenya African National Union Party (KANU).

#### **CONSIDERATIONS:**

15. In my view, this application brought by way of Judicial Review Proceedings cannot proceed further because it is incompetent and an abuse of the processes of the court, and on that basis cannot be sustained. There are a number of reasons to this, especially on non-disclosure of material facts.

16. There is lack of disclosure of very material facts in this matter. The Exparte Applicant does not disclose in these proceedings that there was an Interested Party called Saadia Ahmed Mumin already sworn in as the nominated Member of the Wajir County Assembly by the Clerk of the County Assembly of Wajir. She also does not disclose that consent relied upon on which she ended up being gazetted by the IEBC was a consent only between two parties; who were the Exparte Applicant herein and the Kenya African National Union Party (KANU), in Nairobi Political Party Dispute Tribunal at Milimani Complaint No. 500 of 2017 and consent dated 31<sup>st</sup> July 2017. None of the other parties herein were parties in that cause and there was no order therein that the Exparte Applicant be sworn in. Thirdly, the Exparte Applicant also does not say or disclose in her pleadings when the Interested Party Saadia Ahmed Mumin was sworn in as a Member of County Assembly of Wajir. She does not disclose when the decision of the Tribunal was considered by the High Court and what consequences the decision of High Court by **Nyamweya J** had on both the consent decision in the Tribunal case and the swearing in of Saadia Ahmed Mumin as a Member of Wajir County Assembly.

17. In these proceedings also, no prayer has been sought against the swearing of Saadia Ahmed Mumin who is also a sitting Member of County Assembly of Wajir, and it is not stated whether there is a vacancy in the County Assembly.

18. Another glaring non-disclosure is lack of mention of a decision of this court in Garissa High Court Constitutional Petition No. 14 of 2017 involving the same Exparte Applicant as the petitioner, against the Speaker County Assembly of Wajir, the Clerk, County Assembly of Wajir, Saadia Ahmed Mumin, IEBC first Interested Party, Kenya African National Union Party (KANU) as the 2<sup>nd</sup> Interested Party in respect of the same complaints herein of the Exparte Applicant not having been sworn in as the nominated Member of the County Assembly Gender Top Up Group in which this court decided that it did not have jurisdiction to entertain the matter as it was a matter for the determination of Election Court. It is noteworthy also that KANU which was a party in Garissa Constitutional Petition No. 14 of 2017 is not a party in these proceedings.

19. It is trite that Judicial Review Proceedings deal with the processes and not the substance of a dispute. In dealing with the process, all the true and relevant facts to the case have to be disclosed to the court by the Exparte Applicant and to all other parties. It is clear to me that the applicant has deliberately refused to disclose known material facts and was bent on misleading this court and forum shopping and in the process is abusing the process of this court which cannot be allowed. In **Tiwi Beach Hotel vs Sramm – Civil Appeal No. 63 of 1990 Hancox CJ** held that in determining whether a litigant is guilty of material non-disclosure it is important to consider his intention or motive.

20. I find that the motive of the applicant was to abuse the court process. Abuse of court process was considered in **Judicial Review Application No 8 of 2017 – Republic vs DPP – Chief Magistrate’s Court – Ex-Parte Elizabeth Naikuntei Nkukuu & 2 Others [2018] eKLR**, wherein the High Court held inter alia that –

**“26. I have numerous decisions of this court that it is trite law that the court has an inherent jurisdiction to protect itself**

**from abuse or to see that its process is not abused. The Black's Law Dictionary defines abuse as, "Everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to natural legal rules for its use."**

21. If this court's decision in the Garissa High Court Constitutional Petition No. 14 of 2017 was that the court did not have jurisdiction to hear this matter relating to the swearing in the Exparte Applicant as the nominated Member of Wajir County Assembly, the proper and lawful option available to her if dissatisfied, was to appeal against that decision to the Court of Appeal and not to come to this court through the Judicial Review procedure, seeking the same or similar reliefs. In coming to this same court, through the present application, the Ex-Parte Applicant is certainly abusing the court process.

22. On that account, I have to distinguish all the authorities that were cited by the Exparte Applicant advocate in trying to persuade this court to decide that it has jurisdiction to entertain this matter.

23. Being an abuse of a process of the court, and also being obviously a case of forum shopping, such conduct automatically removes the jurisdiction of the court to deal with this matter. In the case of **The Owners of Motor Vessels Lilian S v Cartex Oil Kenya Ltd [1989] KLR 1** by Nyarangi Judge of Appeal stated –

**"Jurisdiction is everything. Without it a court has no power to make one step. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence and a court downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."**

**DETERMINATION:**

24. I hold that this application is incompetent, brought in bad faith and on the basis of forum shopping, and is thus an abuse of the process of the court, and I have no lawful reason or jurisdiction to proceed with it, and I have to dismiss the same without considering the other issues raised by parties counsel. The application thus stands dismissed for the foregoing reasons and the Exparte Applicant will pay the costs of all the respondents as well as the Interested Party.

**Dated and delivered at Garissa this 26<sup>th</sup> Day of February, 2019.**

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**George Dulu**

**JUDGE**