



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

MISC CIVIL APPLICATION NO. 7 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

PAULINE WANJIKU KIGERA.....1ST EXPARTE APPLICANT

EMILY CHEPKEMOI.....2ND EXPARTE APPLICANT

VERSUS

COUNTY ASSEMBLY OF SAMBURU.....1ST RESPONDENT

SPEAKER COUNTY ASSEMBLY.....2ND RESPONDENT

CLERK COUNTY ASSEMBLY OF SAMBURU..3RD RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....6TH RESPONDENT

RULING

1. This Judicial Review matter was brought by Pauline Wanjiku Kigera and Emily Chepkemoi, the exparte applicants.
2. By this ruling this court is dealing with two preliminary objection; Those objections are raised by the Assembly of Samburu County, hereinafter referred to as County Assembly; by the Samburu County Assembly speaker, hereinafter referred to as the speaker; and by the clerk to the county assembly of the Assembly, hereinafter referred to as the clerk.
3. The court is also dealing with the preliminary objection raised by the Independent Electoral and Boundaries Commission, herein after referred to as IEBC.
4. The two preliminary objections are essentially the same. In summary the objections are that the ex parte applicants in filing a Judicial Review matter in this court erred and should instead have filed an election petition.

BACKGROUND

5. Ex parte applicants were gazetted by IEBC on 6th September 2017 as nominees of the Democratic party, as members of the County Assembly of Samburu. Their gazettelement as members of the Samburu County Assembly resulted in the deletion of Jennifer Letuiya and Stephania Stain Lanyasunya, hereinafter referred to as other nominees. The ex parte applicants deponed in their affidavit that despite their said gazettelement the County assembly, the speaker and the clerk had failed to have them sworn into office as Members of the Samburu county assembly. That instead that the other nominees had been sworn into that office. It ought to be noted that the ex parte applicants withdrew this action against the other nominees.

6. The ex parte applicants stated in the affidavit that the refusal to swear them into office was discriminatory and that it was unfair treatment by the county assembly, the speaker and the clerk. The ex parte applicants' view was those officers were abusing their power.

PRELIMINARY OBJECTION

7. The preliminary objections are that the ex are parte applicants should have filed an election petition and not judicial review matter. The

basis of the objection was that what ex parte applicants sought by this action was that they be sworn instead of the other nominees.

8. The ex parte applicants opposed the preliminary objections stating that the same was not premised on the principles laid down in the case of **Mukisa Biscuit Company Vs Westend Distributors Ltd. (1969) E. A. 696** it was held in that case that a preliminary objection should be raised on pure points of law which is argued on the assumption that all the facts that are pleaded are correct. That it cannot be raised if facts are to be ascertained or where what is sought is exercise of the court's discretion.

ANALYSIS AND DETERMINATION

9. Were the ex parte applicants wrong to approach this ought by way of judicial review? **Article 87** of the constitution mandated Parliament to enact legislation to establish mechanism for timely settling of electoral dispute. Parliament enacted the Elections Act. Under **section 74** of that Act IEBC is the body which settles election disputes including disputes of nomination: but that power to settle disputes does not extend to the period after the declaration of election results. In this regard see the case of **Steven Kariuki versus George Mike Wanjohi & 2 others (2014) eKLR** where it was stated:-

“Under Article 88 (4) (e) of the constitution IEBC is responsible for settlement of electoral disputes including disputes relating to or arising from nomination but excluding election petitions and disputes subsequent to the declaration of election results.”

10. In the case **Moses Mwigigi & 14 others (2016) eKLR** the Supreme Court emphasised the need to adhere to the correct procedure when approaching a court of law. This is what the Supreme Court stated:-

“This court has on a number of occasions remarked upon the importance of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with substance of the case that it benefits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked a by litigant, the court would not hesitate to declare the attendant pleadings incompetent.”

From the above it is clear that laid down procedure is important.

11. In answer to the question that I posed above I find that the ex parte applicants, having withdrawn the action against the other nominees who were sworn into the assembly, cannot be said to be seeking to unseat the other nominees. What the ex parte applicants are seeking from this court is a finding that the decision of the Assembly Speaker and the Clerk is wrong and that they improperly exercised their discretion in refusing to swear in the ex parte applicants into office. That being so the preliminary objections raised herein must and do fail. I find that the ex parte applicants' application through the judicial review process does not fall within the realm of an election dispute. It is an action that seeks to question their Assembly speaker's and the clerk's refusal to have them sworn into office as members of the county Assembly.

12. In view of the fact that the ex parte applicants withdrew the action against the other nominees the prayer for certiorari and prohibition cannot be granted. The only prayer that can proceed to a full hearing is the prayer for Mandamus. Accordingly the orders of this court are as follows:-

a) The preliminary objections filed by the 1st, 2nd and 3rd respondents and by the 6th respondent are hereby dismissed with costs.

b) Leave is hereby granted to the ex parte applicants to file the substantive motion for orders of Mandamus.

Dated and Delivered at Nanyuki this 27th day of February 2018.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

For 1st Ex Parte Applicant

For 2nd Ex Parte Applicant

For 1st Respondent:.....

For 2nd Respondent:.....

For 3rd Respondent.....

For 6th Respondent.....

Language.....

COURT

Ruling delivered in open court

MARY KASANGO

JUDGE