REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL CAUSE NO. 706 OF 2017

IN IN THE MATTER OF: AN APPLICATION BY HON. ALFRED KETER,

HON. SILAS TIREN KIPKOECH, HON. DAVID KANGONGO BOWEN AND

HON. JAMES MWANGI GAKUYA FOR JUDICIAL REVIEW ORDERS

OF CERTIORARI AND PROHIBITION AGAINST THE RESPONDENTS

AND

IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM

ACT (CAP 26 OF THE LAWS OF KENYA) AND ORDER 53

OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS

BETWEEN

REPUBLIC...APPLICANT

VERSUS

HON. BENJAMIN JOMO WASHIALI, MAJORITY CHIEF

WHIP, NATIONAL ASSEMBLY.......................................1ST RESPONDENT

HON. ADEN DUALE, LEADER OF MAJORITY

NATIONAL ASSEMBLY..2ND RESPONDENT

THE SPEAKER OF THE NATIONAL ASSEMBLY.......3RDRESPONDENT

AND

HON. ALEXANDER KIMUTAI

KIGEN KOSGEY..INTERESTED PARTY

AND

HON. ALFRED KIPTOO KETER.................1ST EX PARTE APPLICANT

HON. SILAS TIREN KIPKOECH..................2ND EX PARTE APPLICANT

HON. DAVID KANGONGO BOWEN.............3RD EX PARTE APPLICANT

HON. JAMES MWANGI GAKUYA.................4TH EX PARTE APPLICANT

RULING

Introduction

1. The ex parte applicants herein, **Hon. Alfred Kiptoo Keter**, **Hon. Silas Tiren Kipkoech**, **Hon. David Kangongo Bowen** and **Hon. James Mwangi Gakuya**, who are elected Members of the National Assembly representing various constituencies, are all members of the Jubilee Party having been elected on that political party's ticket.

2. According to the applicants, consequent to their elections, they became members of various Departmental Committees of the National Assembly.

3.According to the applicants, on account of being members of the National Assembly and in accordance with the provisions of Standing Orders No. 173 and 175 of the National Assembly Standing Orders, the 1st, 2nd, 3rd and 4th *ex parte* applicants herein were duly nominated and consequently approved by the House as members of the Labour and Social Welfare Committee, Agriculture and Livestock Committee, Environment and Natural Resources Committee and Parliamentary Broadcasting and Library Committee respectively in the National Assembly.

4. It was averred that Standing Order No. 178 of the National Assembly Standing Orders provides that upon appointment, a select committee shall elect its own chairperson and vice chairperson from amongst its members. Anchored upon the foregoing, the ex parte applicants herein expressed interest in being considered as leaders of their respective Committees the effect of which is that the 1st *ex parte* applicant was elected as the Chairperson of the Labour and Social Welfare Committee, 2nd *ex parte* applicant the Chairperson of the Agriculture and Livestock Committee, 3rd *ex parte* applicant the Vice Chairperson of the Environment and Natural Resources Committee while the 4th *ex parte* applicant was elected the Chairperson of the Parliamentary Broadcasting and Library Committee during the elections held on the 20th of December, 2017.

5. It was averred that subsequent to the said elections, the *ex parte* applicants herein were served with notices from the 3rd Respondent herein on the 21st of December, 2017, purporting to notify them of their intended discharge from the departmental Committees herein above explicated. The applicants revealed that they have since discerned that the letters from the 3rdRespondent written individually to them, were anchored upon a previous letter dated the 19th of December, 2017 from the 1st Respondent herein purporting to discharge the *ex parte* applicants from the various National Assembly Departmental Committees. This is despite the fact that the said letters were all received by the office of the Clerk on the 20th of December, 2017 after the said Departmental Committee elections had already taken place.

6. Apart from that the *ex parte* applicants have also been able to discern that the letters dated 19th December, 2017 were accompanied by letters dated 18th December, 2017 in which the 1st Respondent herein had ostensibly written to the *ex parte* applicants in an attempt to dissuade them from contesting for the various leadership positions in their various Departmental Committees the consequence of which would be to discharge them from the various departmental Committees in which they served.

7. The applicants however relied on Standing Order No. 176 of the National Assembly Standing Orders which provision, in their view, is binding on the National Assembly.

8. According to the applicants, despite the foregoing express provisions of the standing orders, the *ex parte* Applicants herein were never informed of the pendency of the decision by the 1st Respondent to discharge them from their various Departmental Committees nor were they given an opportunity to be heard.In addition to the foregoing, in as far as the *ex parte* applicants were aware, the Jubilee Party disciplinary mechanisms were never instigated so as to de whip them from their various Departmental Committees and as such, the 1st Respondent herein acted whimsically, arbitrarily and without any colour of right by purporting to discharge the *ex parte* applicants from the various departmental committees in which they served.

9. The applicants insisted that in any event, no cogent and/or valid reasons have been provided for the purported discharge of the *ex parte* applicants from their respective Committees contrary to the rules of natural justice as it has not been alleged or proven that the *ex parte* applicants by contesting for the leadership of the various Departmental Committees in which they serve, behaved in a manner that is inconsistent with the vision and/or policies of the Party.

10. It was the applicants' case that they jointly and individually had every right as members of their various committees to offer themselves for consideration to Chair and/or Deputize the said Committees in accordance with the provisions of Article 38 of the Constitution of Kenya.

They accordingly averred that their intended discharge from their various Committees merely because they offered themselves for such consideration was unreasonable, irrational and arbitrary thus ripe for orders of certiorari before this Court.

11. The ex parte applicants emphasised that it is exceptionally vital for this Court to note that the said *ex parte* applicants were duly elected as leaders of their respective Committees by members from all political parties represented and as such it would be grossly against natural justice for them to be discharged from the said Committees arbitrarily without due process. It was the ex parte applicants' case that the net effect of the *ex parte* applicants herein being discharged from their respective Committees is that they will effectively also lose their positions as leaders of the various Committees in which they serve.The *ex parte* applicants contended that the provisions of the Constitution reigns supreme and is binding on all state organs and state officials purporting to exercise delegated powers.

12.The ex parte applicant therefore sought leave to apply for:

> **a. An Order of Certiorari to remove to this Honourable Court to be quashed the whimsical and arbitrary decision of the 1st and 3rd Respondents herein purporting to discharge the 1st, 2nd, 3rd and 4th*ex parte* applicants herein from being members of the Labour and Social Welfare Departmental Committee, Agriculture and Livestock Departmental Committee, Environment and Natural Resources Departmental Committee and the Parliamentary Broadcasting and Library Departmental Committees respectively, of the National Assembly.**
>
> **b. An Order of Prohibition prohibiting the 2nd and 3rd Respondents, their officers, agents or any other person or entity acting under their authority, from implementing in whole, part or in whatsoever manner the arbitrary decision of the 1st Respondent purporting to discharge the 1st, 2nd, 3rd and 4th*ex parte* applicants herein from the Labour and Social Welfare Departmental Committee, Agriculture and Livestock Departmental Committee, Environment and Natural Resources Departmental Committee and the Parliamentary Broadcasting and Library Departmental Committee respectively, of the National Assembly.**
>
> **3. The grant of leave herein do operate as a stay of the decision by the 1ST and 3rd Respondents delivered on the 19th and 20th of December, 2017 respectively purporting to discharge the 1st, 2nd, 3rd and 4th*ex parte* applicants from the Labour and Social Welfare Departmental Committee, Agriculture and Livestock Departmental Committee, Environment and Natural Resources Departmental Committee and the Parliamentary Broadcasting and Library Departmental Committee respectively, of the National Assembly.**
>
> **4. The costs of the application be in the cause.**

13. When the matter came before **Mativo, J** on 27th December, 2017, the Learned Judge gave a considered ruling in which he granted leave to the applicants commence judicial review proceedings and directed that the said leave would operate as a stay of the decision of the 1st and 3rd Respondents of 19th and 20th December, 2018 respectively purporting to discharge the applicants from their various departmental committees pending the hearing and determination of the substantive motion.

14. In the meantime on 4th January, 2017, the 1st and 2nd Respondents filed a Chamber Summons dated the same day in which they sought the following orders:

> **1. That application be certified as urgent so as to be heard ex parte and during the current High Court vacation and service thereof be dispensed with on the 1st instance.**
>
> **2. That the judicial review proceedings herein dated the 22nd of December 2017 commenced by the ex parte applicants be hereby dismissed and the said ex parte applicants be referred to the appropriate forum for the adjudication of the dispute herein.**
>
> **3. That pending the hearing and determination of the prayer for the dismissal of the judicial review proceedings herein the stay order obtained during the ex parte proceedings be discharged forthwith.**
>
> **4. That costs of this application be provided for.**

15. That application was supported by two affidavits sworn by **Benjamin Washiali**, the National Assembly's Majority Whip on 4th January, 2018 and **Raphael Tuju**, the Secretary General of the Jubilee Party of Kenya (hereinafter referred to as "the Party").

16. According to the said Respondents, the Jubilee Party, being the a party in majority in the House and therefore controlling the government, has the extra responsibility to deliver to the general public what is good in terms of policy and legislation. One such critical policy of the Party is to do all that is possible to ensure an ethnic and regional balance in all positions of leadership. It was disclosed that the Party held a meeting on the 13th December 2017 in the presence of the top party leadership, to wit, the party leader and the deputy party leader. In this meeting it was agreed that in order to achieve some form of ethnic and regional balance they would approach the parliamentary committee elections in a guided way so as to give each region a fair share of the leadership positions available to their political party.

17. It was averred that since the parliamentary committee elections were scheduled to take place on the 19th December 2017, there were six days within which if there was any complaint by any member, they could have raised it and it could have been solved. Also in the same meeting, the opportunity was there for any member to express any objection to the suggestions agree to achieve the regional and ethnic

balance. The *ex parte* applicants however did not take advantage of the opportunities made available to them. It was disclosed that having all made the pledge of commitment and all of them being members, nominated by the party, campaigned as one party and elected as a member of parliament in the party, they were all duty bound to follow the agreed position on the Party leadership contests. However, near the date of the committee elections, some reliable information went out that some of their members were going to go against the decision of the 13th December 2017. It was averred that attempts to reach out to their colleagues, the *ex parte* applicants herein, did not bear any fruit. In view of their reluctance to even go to discuss with the leadership of the party in the house, a letter was sent to the *ex parte* applicants dated the 18th December 2017 but they did not respond. In the said letter the *ex parte* applicants were alerted of the possible consequences of their actions but again they ignored the written warning and all the pleadings to resolve the issues through the parliamentary leadership of the party. Subsequently another letter was issued discharging the ex parte applicants in the morning on 19th December 2017.

18. It was averred that the problem with the actions of the *ex parte* applicants is that unknown to them, they contested in and took positions which were meant for Wajir, Mandera, Tana River and Garissa Counties and therefore marginalizing those areas. Further instead of the Rift Valley Area having its allocated 17 positions, they would now end up with 20 positions thus leaving other areas totally disadvantaged.

19. It was the said Respondents' position that the ex parte applicants ought to have followed the normal legal requirements in the ***Political Parties Act*** that they first of all register the dispute with the Party to try and resolve the matter using the internal party dispute resolution mechanism, then an appeal would lie in the Political Parties Tribunal and then followed by the High Court and finally the Court of Appeal only on matters of law.

20. The Respondents clarified that the *ex parte* applicants are still at liberty to go and discuss this matter with the Party's Secretary General as his doors are not closed and at any rate, there has been no dispute registered formally to trigger the internal dispute resolution mechanism into action.

21.It was disclosed that under Article 11 of the Jubilee Party Constitution, the members of parliament sign a commitment to abide by all duties and obligations required to them by the party, one of which is to support party decisions and where one does not agree, they are obligated to raise their complaints following the laid down party procedure. It was therefore averred that the ex parte applicants being members of the Party ought to have gone to the Party first before rushing to either the Political Parties Tribunal or the High Court. It was also revealed that the ex parte applicants signed a nomination application/declaration form that bound them expressly to promote the policies of the party and act as an ambassador of the party and to further expressly submit all disputes to the party internal dispute resolution mechanism. It was further averred that upon their election all Members of Parliament signed a pledge of commitment which also bound them to support the position of the party.

22. Apart from the said application, a Notice of Preliminary Objection was filed by the 3rd Respondent on 22nd January, 2018 dated the same day in which the following were raised:

> **1. The proceedings herein are essentially a dispute between Jubilee Party and its Members relating to the former's purported exercise of its disciplinary powers over the latter.**
>
> **2. This Honourable Court lacks jurisdiction to hear and determine these proceedings in view of the provisions of Art. 88 (4) of the Constitution, Section 74 (1) of the Elections Act, 2011 and Section 39 of the Political Parties Act, which vest Jubilee Party's internal dispute resolution mechanisms, the Political Parties Dispute Tribunal and the IEBC's Dispute Resolution Committee with jurisdiction to hear and determine such disputes.**
>
> **3. This Honourable Court's orders granting the *ex parte* Applicants leave to institute these proceedings pursuant to the *ex parte* Applicants' Chamber Summons dated 22 December 2017 (the "said orders"), are nullity *ab initio* having been made without jurisdiction and ought to be set aside *ex debito justitiae*.**
>
> **4. Accordingly, this Honourable Court lacks jurisdiction to hear and determine these proceedings.**

23. Both the application dated 4th January, 2018 and the preliminary objections were argued together and they form the subject of this ruling. According to **Mr Mungatana**, Learned Counsel for the 1st and 2nd Respondents, this Court has no jurisdiction at this point to entertain this matter. His argument was based, firstly on the ground that the application arises from a dispute between members of a political party and the political party to allocate party seats in parliamentary committees. It was submitted that where there is a dispute between the members of a political party the Constitution created a different jurisdiction vide section 40 of the ***Political Parties Act*** under which a Tribunal was created to deal with such disputes.

24. It was contended that such avenue is meant to save the court's time by referring all such disputes to the said Tribunal since the Act appreciates the intrigues within the parties. It was also disclosed that the same Act in section 40(2) creates the first port of call as the Internal Dispute Resolution Mechanism of the political parties which the applicants failed, neglected or refused to opt for despite being requested to do so.

25. It was further averred that the ex parte applicants having committed to adhere to the Party's policies ought to have first attempted to sort out their grievances within the Party's machineries which they had committed themselves to comply with.

26. The Learned Counsel also referred to the various provisions of the ***Civil Procedure Act*** in support of his submissions. Reliance was also placed on the provisions of Article 47 of the Constitution as read with the ***Fair Administrative Action Act***.

27. It was learned counsel's view that when one chooses to subject oneself to the authority of a political party, one cannot declare independence once one is elected otherwise it would have grave implications.

28. On his part **Mr Mbarak**, learned counsel for the3rd Respondent associated himself with the submissions made by **Mr Mungatana** and added that this Court lacks jurisdiction in the matter due to separation of powers in respect of parliamentary process still being undertaking as was the case in this dispute. In this respect reliance was placed on **Dr. Lilian Gogo vs. Joseph Mboya & Others** among other cases and the Court was urged to exercise restraint save where there is violation of the Constitution.

29. On behalf of the ex parte applicants, **Mr Walukwe** submitted that as the matter before the Court is not related to elections, Article 88 of the Constitution, section 74(1) of the ***Elections Act*** and section 39 of the ***Political Parties Act*** are not applicable. In this case the applicants are already elected Members of Parliament. Based on Standing Orders 173 and 176 of the ***National Assembly Standing Orders***, it was submitted that the issue before the Court is whether the proceedings to discharge the ex parte applicants from the various committees was proper and procedural in light of the requirement that they ought to have been heard hence the constitutionality of the said process was brought into question.

30. According to learned counsel, a reading of Standing Order 176 reveals a three-pronged step for the discharge of a member from a select committee these being an opportunity to be heard, information by the party whip to the Speaker of such intention and the information by the Speaker to the member of the intention to discharge them. It was submitted that in this case as at the time the 3rd Respondent received a notice from the 2nd Respondent, they had been discharged hence there was no ongoing process. It was the ex parte applicants' case that the role of the Speaker is simply to infer that the process has been followed.

31. It was contended that since a member of the select committee is elected by the whole House, the House must have an interest in the discharge of the member. It was submitted that where the right to be heard is violated it is not simply a matter of violation of Standing Orders but the Constitution as read with sections 4 and 5 of the ***Fair Administrative Action Act***.

Determinations

32. I have considered the issues raised before me the subject of this ruling.

33. In my view the effect of the application and the preliminary objection is the setting aside of the leave granted herein and with it the direction in the nature of the stay.

34. The 1st and 2nd Respondents relied partly in support of their submissions on the various provisions of the ***Civil Procedure Act*** and the Rules made thereunder. However, it must be made clear that the provisions of the ***Civil Procedure Act*** as well as the Rules made thereunder do not ordinarily apply to judicial review proceedings since the ***Civil Procedure Act*** is expressed to be "*An Act of Parliament to make provision for procedure in civil courts*". In **Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995** and **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** it was held that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply since it is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the ***Civil Procedure Rules*** being the procedural law. See also **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486; Paul Kipkemoi Melly vs. The Capital Markets Authority Nairobi HCMA No. 1523 of 2003.**

35. That this Court has jurisdiction to set aside leave and/or stay granted in judicial review proceedings is not in doubt. The Court of Appeal made this clear in **R vs. Communications Commission of Kenya & 2 Others ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199** where it held:

> **"Leave should be granted if, on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the Court, to the Judge who granted leave to set it aside."**

See also **Njuguna vs. Minister for Agriculture Civil Appeal No. 144 of 2000 [2000] 1 EA 184.**

36. However as was expressed in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR**:

> **"Although leave granted *ex parte* can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear cut cases unless it be contended that judges of the Superior Court grant leave as a matter of course which is not correct. Unless the case is an obvious one, such as where an order of *certiorari* is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the application coming to court and there is, therefore, no prospects at all of success, the court would discourage practitioners from routinely following the grant of leave with application to set aside. Fortunately such applications are rare and like the Judges in the United Kingdom, the court would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."**

37. Similar sentiments were expressed by the same Court in **Aga Khan Education Service Kenya vs. Republic & Others Civil Appeal Number 257 of 2003** where the court pointed out that:

> **"We would, however, caution practitioners that even though leave granted ex parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave**

aside. Fortunately such applications are rare and like the judges in the United Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."

38. The law is however clear that where a party, at the *ex parte* stage of an application fails to disclose relevant material to court and thus obtains an order from the court by disguise or camouflage the court will set aside the ex parte orders so obtained.

39. It is trite that where there is an efficacious remedy provided by law, the same ought to be resorted to first. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

> **"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in** John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, **for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in** Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992**, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."**

40. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425,** where it held that;

> **"Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure...In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions."**

41. On the issue whether the Court's jurisdiction under Article 165 can be limited and/or restricted by an Act of Parliament, it is important to note that under Article 165(2)(a) as read with Articles 162(2) and 165(5) of the Constitution the High Court has unlimited jurisdiction in Criminal and Civil matters save for matters reserved for the exclusive jurisdiction of the Supreme Court and matters relating to employment and labour relations and the environment and the use and occupation of, and title to, land. However, under Article 2 of the Constitution, sovereign power which is delegated to *inter alia*, the judiciary, is to be exercised in accordance with the Constitution. In terms of administrative action, Article 47 as read with Article 165(6) donates to the High Court supervisory powers of the High Court with respect to decisions of the subordinate Courts and inferior tribunals or bodies. Pursuant to Article 47 Parliament enacted the ***Fair Administrative Action Act***, 2015. Section 9(2), (3) and (4) thereof provides:

> ***(2) The High Court or a subordinate court under subsection (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.***

42. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort. I therefore associate myself with the position adopted by **Emukule, J** in **Revital Healthcare (EPZ) Limited & Another vs. Ministry of Health & 5 Others [2015] eKLR** at paragraph 10 where he cited with approval the case of **Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004** in which it was held that:-

> **"…where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court's process."**

43. It was similarly held in **Republic vs. National Environment Management Authority [2011] eKLR**, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment:

> **“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge , in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in t he statute with respect we agree with the judge.”**

44. Therefore if there is a particular procedure provided under the Constitution or any written law the provisions of section 7 of the ***Administration of Justice (Miscellaneous Provisions) Act, 1938***, of the United Kingdom, which was in existence before the enactment of the ***Fair Administrative Acton Act***, ought not to be invoked if the invocation would amount to contravention of the provisions of an Act of Parliament passed by the Legislature. Accordingly, where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the Court, the Court ought to ensure that that dispute is resolved in accordance with the relevant statute. Accordingly I agree with the decision in **Pasmore vs. Oswaldtwistle Urban District Council [1988] A C 887** that where an obligation is created by statute and a specific remedy is given by that statute, the persons seeking the remedy is deprived of any other means of enforcement. I therefore agree with **Mwera, J** (as he then was) in **Safmarine Container N V of Antwerp vs. Kenya Ports Authority** (supra) to the extent that it is not only the Constitution that can limit/confer jurisdiction of the court but that any other law may by express provision confer or limit that jurisdiction. In his decision the learned Judge relied on Article 159 of the Constitution. Clause (2)(c) of the said Article provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. Courts and Tribunals cannot be said to be promoting alternative dispute resolution mechanisms when they readily entertain disputes which ought to be resolved in other legal forums. Accordingly I agree that where there is an alternative remedy and procedure available for the resolution of the dispute that remedy ought to be pursued and the procedure adhered to.

45. I associate myself with **Majanja J’s** views in **Dickson Mukwelukeine vs. Attorney General & 4 Others Nairobi High Court Petition No. 390 of 2012** that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution of Kenya, 2010, the Court is obligated to promote these modes of alternative dispute resolution and that it is not inconsistent with Articles 22 and 23 to insist that statutory processes be followed particularly where such processes are for the specific purpose of realising, promoting and protecting certain rights. Accordingly the Court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the Court and leave the parties to pursue the alternative remedy.

46. In **Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000,** the Court of Appeal expressed itself as follows:

> **“Although section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a minister as part of his statutory duty; it is otherwise where the statute is silent on what is to be done in the event of a disagreement...Where the statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit...If the Court acts without jurisdiction, the proceedings are a nullity...The extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by the constitution but also, that which the constitution or any other law, may by express provisions or by necessary implication, so confer or limit...The jurisdiction of the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister...Even though resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the Judge to do not only what he was not requested to do, but also, to do what he had no jurisdiction to embark upon...Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute”.**

47. In the result I am of the view and I hold that the Court’s jurisdiction under Article 165 can be limited and/or restricted by an Act of Parliament.

48. However, the decision of **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** ought to be taken note of. In that case, the learned Judge expressed himself as follows:

> **“The Courts guard their jurisdiction jealously, but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest a curtailment of the Courts’ power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. Judges must search for critical balance and deploy various techniques in trying to find it. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal…It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. It is a well established**

principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court."

49. Therefore any provision purporting to limit the jurisdiction of the High Court must itself derive its validity from the Constitution itself and must do so expressly and not by implication unless the implication is necessary for the carrying into effect the provisions of the Act.

50. In this respect in **Kenya Airways Limited vs. Kenya Airline Pilots Association Nairobi HCMA No. 254 of 2001 [2001] KLR 520, Visram, J** (as he then was) held, based on **Anisminic Ltd. vs. The Foreign Compensation Commission & Another [1969] 1 All ER 208**, that in determining whether the High Court has power to correct an error on the face of the record by way of certiorari notwithstanding the ouster clause, a distinction is to be drawn between an error of law which affects the jurisdiction and one which does not.

51. In matters of jurisdiction of superior courts, it is however my view that one ought to take in consideration the well-known principle as enunciated in **East African Railways Corp. vs. Anthony Sefu [1973] EA 327,**where it was held that

"It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect."

52. It was my view that even in cases where the alternative remedy is in addition to the right to access the Court, to interpret the provisions in such a manner as to render the provision for alternative remedy illusory, would defeat the whole purpose of making provisions for alternative remedies. Therefore where the alternative route does not necessarily lock out judicial process, the alternative remedies being a route provided under the relevant Act ought to be adhered to unless circumstances militate against that route. That notwithstanding as was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013 while citing **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. In my view, where a remedy provided is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) of the Constitution are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. In appreciating this position the East African Court of Appeal in **The District Commissioner Kiambu, vs. R and Others Ex Parte Ethan Njau [1960] EA 109**, quoted **Smith vs. East Elloe Rural District Council [1956] AC 736 at 750-1** and **R vs. Port of London Authority Ex Parte Kynoch Ltd [1919] 1 KB 176 AT 188** and stated that anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal.

53. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament through the procedure provided under an Act of Parliament an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

54. The law is a living thing and a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which causes damage to the property of another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

55. That leads me to whether in the present case the Court's jurisdiction has been limited and/or restricted in respect of the issues in dispute herein. Section 40 of the ***Political Parties Act*** provides as follows:

(1) The Tribunal shall determine—

(a) disputes between the members of a political party;

(b) disputes between a member of a political party and a political party;

(c) disputes between political parties;

(d) disputes between an independent candidate and a political party;

(e) disputes between coalition partners; and

(f) appeals from decisions of the Registrar under this Act;

(g) disputes arising out of party primaries.

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.

56. According to Article 169(2) of the Constitution, Parliament is empowered to enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1) which clause establishes subordinate courts. Under section 169(1)(d) subordinate courts are Magistrate's Courts, Kadhi's Courts, Courts Martial and any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162(2) of the Constitution. The Political Parties Tribunal is established pursuant to section 39 of the ***Political Parties Act***. Pursuant to Article 169(2) the jurisdiction, functions and powers of the subordinate court are conferred by the respective Acts of Parliament establishing the particular subordinate Court. In other words subordinate courts being creatures of the statute must only exercise the powers conferred upon them by the statute creating them pursuant to the Constitution.

57. Article 23(1) and (2) of the Constitution of Kenya, 2010 which provides for jurisdiction in matters dealing with applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights for example provides as hereunder:

(1)The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."

58. It is therefore clear that subordinate Court can only be empowered by Parliament in appropriate cases to deal with applications seeking redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. From the said Article, it is Parliament that determines the parameters of the said appropriate cases since it was left to Parliament to enact the legislation conferring jurisdiction on the subordinate courts. It is however clear that the people of Kenya in their wisdom did not expressly empower Parliament to enact legislation empowering subordinate Courts to deal with questions respecting the interpretation of the Constitution. It must be presumed that the people of Kenya had a good reason for this.

59. Whereas under section 20(4) of the Constitution subordinate courts are empowered to apply the Constitution, the said provision provides as follows:

In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.

60. In my view this provision only applies where the Bill of Rights is being applied in a matter in which the Tribunal is seized of jurisdiction. In my view the subordinate courts are entitled to apply the Constitution in maters which they ordinarily have jurisdiction. To set out to place before a subordinate court what in effect is a constitutional petition when the Act of Parliament creating the Tribunal does not clothe it with such jurisdiction is to embark on a futile mission. See **Republic vs. Chairman, Political Parties Disputes Tribunal & Others ex parte Susan Kihika Wakarura Milimani High Court Judicial Review Miscellaneous Civil Application No. 305 of 2017.**

61. In this case, the applicants' case is hinged on whether the process through which they were to be discharged from their various committees was constitutional and whether their rights to be heard was violated before the matter was transmitted to the Speaker. Standing Order No. 176 of the ***National Assembly Standing Orders*** provides that:

(1) "A parliamentary Party may discharge a member from a select Committee after according the member an opportunity to be heard.

(2) The Parliamentary Party Whip of the party that nominated a member to a select committee shall give notice in writing to the Speaker of the intention to discharge a member from a select committee.

(3) The speaker shall, within three days of receipt of the notice under paragraph (2), inform the member of the notice."

73. The issue that this Court will have to determine is the point at which the applicants ought to be afforded an opportunity of being heard. It is true that Article 93(2) enjoins the National Assembly and the Senate to perform their respective functions in accordance with the Constitution and in so doing they are enjoined by Article 124(1) to make Standing Orders for the orderly conduct of their proceedings. That Parliament must comply with its own procedures, in this case the Standing Orders, was emphasised in Uganda Constitutional Court Constitutional Petition [2014] UGCC 14 - **Oloka-Onyango & 9 Others vs. The Attorney General** where the Court expressed itself as follows:

"Parliament as a law making body should set standards for compliance with constitutional provisions and with its own Rules. The Speaker ignored the law and proceeded with the passing of the Act. We agree with counsel Opiyo that the enactment of the law is a process and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it. We have therefore no hesitation in holding that there was no coram (quorum) in parliament when the Act was passed, that the Speaker acted illegally in neglecting to address the issue of lack of coram (quorum)".

We come to the conclusion that she acted illegally. Following the decision of Makula International vs Cardinal Emmanuel

<u>Nsubuga,</u> supra failure to obey the Law (Rules) rendered the whole enacting process a nullity. It is an illegality that this court cannot sanction".

74. The same principles were applied by the Supreme Court of Zimbabwe in the case of **<u>Tendai Laxton Biti and Another vs The Minister of Justice, Legal and Parliamentary Affairs and Another, Civil Application No 46 of 2002</u>** in which the Court stated that:

> **"There is therefore merit in the submission that, having made such a law, Parliament cannot ignore that law. Parliament is bound by the law as much as any other person or institution in Zimbabwe. Because Standing Orders arise out of the Constitution, and because the Constitution mandates Parliament to act in accordance with Standing Orders, they cannot be regarded merely as "rules of a club". Standing Orders constitute legislation which must be obeyed and followed".**

> **"Commonsense dictates that Parliament is required to comply with its own laws regarding the enactment of legislation. This principle stems from as far back as the decision in <u>Minister of the Interior & Anor v Harris & Ors 1952 (4) SA 769 (A)</u>, in which the Appellate Division struck down legislation passed by the Nationalist Government in South Africa to create a High Court of Parliament to override the Appellate Division's earlier decision in respect of voting rights of non-white persons, see <u>Harris & Ors vs. Minister of the Interior & Anor 1952 (2) SA 428 (A</u>). In other jurisdictions, the courts have applied the principle that legislation which is enacted by a legislative body without compliance with the existing law in respect to the enactment of legislation will be declared void by the courts, even where the Constitution provides for a parliamentary democracy form of government."**

75. The Supreme Court of Malawi also considered the question of the role of the court in such matters in the case of **<u>The Attorney General vs The Malawi Congress Party and Others</u>, <u>MSCA Civil Appeal No 22 of 1996</u>.** It opined that:

> **"Our standpoint with regard to SO 27 is simply this. The Courts are not concerned with purely procedural matters which regulate what happens within the four walls of the National Assembly. <u>But the Courts will most certainly adjudicate on any issues which adversely affect any rights which are categorically protected by the Constitution where the Standing Orders purport to regulate any such rights. In the case under consideration, we do not believe that a breach of SO 27 by the Speaker of the House affected any rights guaranteed by the Constitution".</u>.... Stephen J summed up this point very clearly in Bradlaugh v. Gosset, at page 286, <u>We also accept that over their own internal proceedings, the jurisdiction of the National Assembly is exclusive, but, it is also our view that it is for the Courts to determine whether or not a particular claim of privilege fell within such jurisdiction.</u> We conclude by holding that by acting in breach of SO 27, the Speaker of the House did not infringe on any constitutional right which is justiciable before the Courts. The remedy for such breach can only be sought and obtained from the National Assembly itself."** (Emphasis added)

76. In my view, the principle that emerges from the above decisions read together with Article 124(1) of the Constitution is that in a jurisdiction such as ours in which the Constitution is supreme, the Court has jurisdiction to intervene where there has been a failure to abide by Standing Orders which have been given constitutional underpinning under the said Article. However, the court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case.

77. In this case therefore the issue will require the interpretation and application of some constitutional provisions. Apart from that it is contended that the ex parte applicants were not just elected by the members of the Jubilee Party but were elected by the whole House hence their discharge cannot be treated just like an internal party affair. Whether that argument holds water or not cannot be determined in a summary manner as the Respondents believe. That is a matter that requires arguments before the Court can make a determination thereon.

78. It is therefore my view and I hold that the purported alternative dispute resolution mechanism prescribed by section 40 of the ***Political Parties Act*** cannot be said to be a more convenient, beneficial and efficacious remedy.

79. While this Court appreciates the importance of party discipline amongst its members, it must be appreciated that party membership does not necessarily imply that a member of a political party by virtue of such membership surrenders or cedes his or her inalienable constitutional rights to the political party. To my mind political parties are vehicles through which one's freedom of association and political rights under Articles 36 and 38 respectively of the Constitution are enjoyed, fulfilled and realised. They are not cemeteries or graveyards where such rights and ambitions are interred, extinguished or dimmed.

80. Article 19(3) of the Constitution provides as follows:

> ***The rights and fundamental freedoms in the Bill of Rights—***
>
> > ***(a) belong to each individual and are not granted by the State;***
> >
> > ***(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and***
> >
> > ***(c) are subject only to the limitations contemplated in this Constitution.***

81. It is therefore clear that the State or in this case political parties does not grant rights and fundamental freedoms to any person. This is necessarily so because human rights are generally universal and inalienable rights of human beings. A constitution simply recognises the natural and original human rights of mankind which any and every human being should have in order to lead a dignified life till his or her natural death. To emphasise that the State does not grant the same Article 3(b) is clear that the rights and fundamental freedoms in the Constitution ***<u>do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to</u>***

***<u>the extent that they are inconsistent with the Bill of Rights</u>*.** Therefore the rights contained in the Constitution are not the only rights to be enjoyed by persons but are just examples of the same. That the rights and fundamental freedoms are not favours dished by the State was made clear by **Nyamu, J** (as he then was) in **<u>Kenya Bus Services Ltd & 2 Others vs. Attorney General [2005] 1 KLR 787</u>** where he held that:

> **"The only difference between rights and the restrictions are that the restrictions can be challenged on the grounds of reasonableness, democratic practice, proportionality and the society's values and morals including economic and social conditions etc. whereas rights are to the spiritual, God given, and inalienable and to the non-believers changeless and the eighth wonder of the World."**

82. As was appreciated by **Nyamu, J** (as he then was) in **<u>Richard Nduati Kariuki vs. Honourable Leonard Nduati Kariuki & Another HCMA No. 7 of 2006 [2006] 2 KLR 356:</u>**

> **"The International instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (The ICCPR) and International Covenant on Economic Social and Cultural Rights (The ICESC) give recognition that human rights belong to an individual as a human being, hence the inherent dignity and the fact that those rights are equal and inalienable of all human beings. The rights are inherent to man. They are universal and inalienable and hence their ethical base, since they are intrinsic to the human condition. They are not dependent on the states or the geographical location. They are owed to all persons. For the above reasons human rights are owed by the States to all individuals within their jurisdiction and in certain situations to groups of individuals. It is a general principle in international human rights law that human beings cannot be deprived of the substance of their rights hence reference to their individuality. It is only the exercise of some of the rights that can be limited in certain circumstances. Many Constitutions of the world provide for state responsibility for not complying with the legal obligations as regards human rights. It is now recognized, that under international law, States incur responsibility or liability for not complying with their legal obligations to respect and ensure, that is, to guarantee, the effective enjoyment of the human rights recognized either by International instruments binding on the State concerned or any other source of law. An impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the legal, source concerned."**

83. The only avenue via which these rights and fundamental freedoms can be limited is pursuant the provisions of Article 24 of the Constitution which provides as follows:

> ***(1) 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, including—***
>
> > ***(a) the nature of the right or fundamental freedom;***
> >
> > ***(b) the importance of the purpose of the limitation;***
> >
> > ***(c) the nature and extent of the limitation;***
> >
> > ***(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***
> >
> > ***(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.***
>
> ***(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—***
>
> > ***(a) in the case of a provision enacted or amended on or after the expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;***
> >
> > ***(b) 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***
> >
> > ***(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.***
>
> ***(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.***

84. It therefore follows that any political party's constitutive instruments in so far as they purport to limit or restrict the rights and fundamental freedoms of their members, must satisfy the provisions of Article 24 of the Constitution.

85. The Respondents however raised the issue of separation of powers. In his work, ***The Spirit of the Laws (1948),*** **Montesquieu** sought to address the mischief of abuse of power by those to whom it is entrusted in his work thus:

> ***"When the legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no***

liberty, there is no liberty if the power of judging is not separated from the legislative and Executive, there would be an end to everything, if the same man or the same body were to exercise those three powers."

See **In the Matter of the National Land Commission, Sup. Ct. Advisory Opinion No. 2 of 2014; [2015] eKLR**.

86. The High Court has held that Kenya's Constitution of 2010 still reflects the *Montesquieuian* separation of powers. In **Trusted Society of Human Rights v. The Attorney-General and Others, High Court Petition No. 229 of 2012; [2012] eKLR**, that Court, while considering the principle of separation of powers in relation to the Judiciary and the Legislature, thus observed (Judgment, paragraphs 63-64):

> **"Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, the Constitution, regarding the necessity of separating the Governmental functions. The Constitution consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two."**

87. It was however appreciated in **De Lille & Another vs. The Speaker of the National Assembly (1998)(3) SA 430(c)** as follows:

> **"The National Assembly is subject to the Supremacy of the Constitution. It is an organ of state and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication."**

88. On appeal the Appellate Court in **Speaker of National Assembly vs. De Lille MP & Another 297/98 (1999) (ZASCA 50)** rendered itself as follows:

> **"This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme- not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No parliament, no official and no institution is immune from Judicial scrutiny in such circumstances."**

89. I therefore agree with the position poetically adopted by the majority in Supreme Court Petition No. 1 of 2017 – **Raila Amolo Odinga & Another vs. Independent Electoral and Boundaries Commission & Others** at paragraph 399 that:

> **"This Court is one of those to whom that sovereign power has been delegated under Article 1(3)(c) of the same Constitution. All its powers…[are] not, self given nor forcefully taken, but is donated by the people of Kenya. To dishonestly exercise that delegated power and to close our eyes to constitutional violations would be a dereliction of duty and we refuse to accept the invitation to do so however popular the invitation may seem. Therefore, however burdensome, let the majesty of the Constitution reverberate across the lengths and breadths of our motherland; let it bubble from our rivers and oceans; let it boomerang from our hills and mountains; let it serenade our households from the trees; let it sprout from our institutions of learning; let it toll from our sanctums of prayer; and to those, who bear the responsibility of leadership, let it be a constant irritant."**

90. I associate myself with the position adopted by the Constitutional Court of South Africa in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)**, where **Ngcobo, J** expressed himself as hereunder:

> **"When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O'Regan J explained in a recent minority judgment, 'the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.' In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; '[w]hen deciding a constitutional matter within its power, a court…must declare that any law or conduct that is inconsistent with the Constitution is invalid'. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the 'Constitution is supreme…; law or conduct inconsistent with it is invalid'. It follows therefore that if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid…"**

91. Here at home, the Supreme Court in In our jurisdiction the majority of the Supreme Court in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 eKLR, held that** Courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation.

92. It is similarly my view that when a parliamentary process is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution or the Standing Orders, this Court has to consider whether in its proceedings in question Parliament gave effect to its constitutional obligations or the provisions of the Standing Orders and should the Court hold that it did not do so, the Court is obliged by the Constitution to say so and such determination, though an intrusion into the domain of the legislative branch of government, is nevertheless an intrusion mandated by the Constitution itself. It is therefore clear that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process.

93. While the importance of the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution since that right and duty of protecting the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. In such event, the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.

94. It was contended that since the process being undertaken by Parliament is not complete this Court ought not to interfere at this stage. That is however a general principle. In **Glenister vs. President of the Republic of South Africa [2008] ZACC 19**, the Constitutional Court of South Africa at paragraphs 41-46 the Court held that:

"What are the circumstances that would permit judicial intervention?

> **41. In considering this question, we should bear in mind the following two principles: On the one hand, the Constitution requires the courts to ensure that all branches of government act within the law; on the other, it requires courts to refrain from interfering with the autonomy of the legislature and the executive in the legislative process.**
>
> **42. …In *Doctors for Life*, this Court considered jurisprudence from other jurisdictions concerning the question of when it would be appropriate for a court to intervene in the legislative process before it is complete. The Court noted that the ordinary rule under the jurisprudence, notably of the Privy Council, is that courts will ordinarily not intervene until the process is complete. However, in *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong and Another*, the Privy Council held that a court in Hong Kong may intervene if there is "no remedy when the legislative process is complete and the unlawful conduct in the course of the legislative process will by then have achieved its object".**
>
> **43. In my view, having regard to the doctrine of separation of powers under our constitutional order, this test would be the appropriate test to apply. Intervention would only be appropriate if an applicant can show that there would be no effective remedy available to him or her once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of the process. The applicant must show that the resultant harm will be material and irreversible. Such an approach takes account of the proper role of the courts in our constitutional order: While duty-bound to safeguard the Constitution, they are also required not to encroach on the powers of the executive and legislature. This is a formidable burden facing the applicant.**
>
> **44. We were referred to the decision in *Trinidad and Tobago Civil Rights Association v The Attorney-General of Trinidad and Tobago*, in which the High Court did intervene to prevent the enactment of a Bill. The impugned Bill proposed to abolish the jurisdiction of the court to consider public interest applications for judicial review. The High Court in that case held that the legislation would have impaired the rights of the public to challenge legislation, causing immediate prejudice and affecting the powers of the judiciary. The circumstances were thus, according to the High Court, sufficiently exceptional to warrant interference by the courts.**
>
> **45. On appeal, however, the Court of Appeal of Trinidad and Tobago agreed with the views expressed in the Privy Council decisions that courts should as far as possible avoid interfering with pre-enactment legislative process. The test it formulated is whether it has been shown that, if a Bill is enacted, an applicant will not be able to access relief because the Bill's object would have been achieved. It held that if the Bill in question were enacted, the courts would have the power to declare it void if it offended the constitution. The High Court had erred in holding this was an exceptional case because it had not been shown that irreversible consequences, damage or prejudice would result.**
>
> **46. Cases that would warrant intervention on this approach will be extremely rare. As acknowledged in an Australian case, *Cormack v Cope*, it is not the introduction of a Bill that affects rights; it is the making of a law that does that. Thus, before the law has been enacted, it would be extremely unusual to be able to demonstrate harm. In my view, it is not necessary in this case to attempt to identify with precision what would constitute "exceptional circumstances" or to formulate in advance in what circumstances they may arise. The question whether exceptional circumstances exist depends on the facts of each case and is a matter to be considered on a case-by-case basis. In this particular case, for the reasons given below, it is not appropriate for the judiciary to intervene."**

95. It is therefore clear that the decision whether the Court ought to intervene in an ongoing Parliamentary process must depend on the facts of each case and preferably after the cases for both sides are heard. That is my understanding of the holding in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 eKLR** where it was held that:

> **"It makes practical sense that the scope for the Court's intervention in the course of a running legislative process, should be left to the discretion of the Court, exercised on the basis of *the exigency of each case*. The relevant considerations may be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid**

statute; the prospects of securing remedy, where invalidity is the outcome; the risk that may attend a possible violation of the Constitution. It emerges that Kenya's legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that the Constitution vests the legislative authority of the Republic in Parliament. Such authority is derived from the people. This position is embodied in Article 94(1) thereof. The said Article also imposes upon Parliament the duty to protect the Constitution and to promote the democratic governance of the Republic. Article 93(2) provides that the national Assembly and the Senate shall perform their respective functions in accordance with the Constitution. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of the Constitution. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of the Constitution. It cannot operate besides or outside the four corners of the Constitution. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another. However, where a question arises as to the interpretation of the Constitution, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution…Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a resolution in plebiscite, is only the Courts and, ultimately, the Supreme Court."

96. In this case as the parties have not been heard it is inappropriate and premature at this stage to make such a determination. Whereas the Court may well arrive at a decision after hearing the parties that these proceedings ought not to have been commenced before this Court at this stage, based on the material before me it is highly inappropriate to do so when not all the facts have been placed before this Court and when the window for filing further documents has not yet been closed.

97. In my view in matters where a violation or threatened violation of the Constitution are alleged the Court ought to be slow to summarily terminate such proceedings unless it is clear beyond paradventure that the matter is beyond resuscitation. I do not think that is the position in these proceedings.

98. Having considered the issues raised before me in this matter it is my view and I hold that it is not appropriate to reverse the decision of **Mativo, J** at this stage. Let the parties expedite the hearing of the Motion so that the matter can be heard and determined on its merits.

99. Consequently, the Chamber Summons dated 4th January, 2018 and the preliminary objection dated 4th January, 2018 fail and are both dismissed with costs to the *ex parte* applicants.

100. Orders accordingly.

Dated at Nairobi this 26th day of February, 2018

G V ODUNGA

<u>JUDGE</u>

<u>Delivered in the presence of</u>

Mr Gesicho for Mr Waluke for the 1st, 2nd, 3rd and 4th Applicants

Mr Mungatana for the 1st and 2nd Respondents

Mr Njoroge for the 3rd Respondents

CA Ooko