



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**

**MILIMANI COMMERCIAL COURTS**

**JR. NO. 11 OF 2017**

**(CORAM: R.E. ABURILI – J)**

**IN THE MATTER OF AN APPLICATION BY GREENBELT MOVEMENT, PAN AFRICAN CLIMATE JUSTICE ALLIANCE AND TRANSPARENCY INTERNATIONAL KENYA FOR FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION.**

**AND**

**IN THE MATTER OF AN APPLICATION UNDER ARTICLES 1, 2, 3, 10, 27, 56, 93, 94 AND 95 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 7 OF THE CLIMATE CHANGE ACT, NO. 11 OF 2016**

**AND**

**IN THE MATTER OF THE PUBLIC APPOINTMENTS (PARLIAMENTARY APPROVAL) ACT**

**AND**

**NATIOAL ASSEMBLY STANDING ORDER NO. 45(4)**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NATIONAL ASSEMBLY.....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY**

**MINISTRY OF ENVIRONMENT AND NATURAL RESOURCES....2<sup>ND</sup> RESPONDENT**

**ATTORTNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JOHN KIOLI .....1<sup>ST</sup> INTERESTED PARTY**

**CHARLES MWANGI..... 2<sup>ND</sup> INTERESTED PARTY**

**CYTHIA WECHABE..... 3<sup>RD</sup> INTERESTED PARTY**

THE GREENBELT MOVEMENT..... 1<sup>ST</sup> EXPARTE APPLICANT

PAN AFRICAN CLIMATE JUSTICE ALLIANCE..... 2<sup>ND</sup> EXPARTE APPLICANT

TRANSPARENCY INTERNATIONAL KENYA..... 3<sup>RD</sup> EXPARTE APPLICANT

### JUDGMENT

1. The Exparte applicants in this case are The Green Belt Movement; The Pan African climate Justice Alliance; and Transparency International Kenya. By a Notice of Motion dated 19<sup>th</sup> January 2017 pursuant to leave granted on 18<sup>th</sup> January 2017 to apply for Judicial Review Orders against the Respondents herein namely; The National Assembly (KNA) Cabinet Secretary, Ministry of Environment and National Resources; and the Hon. Attorney General, the Exparte applicants seek the following orders as per the amended Notice of Motion dated 8<sup>th</sup> May 2017:

*(1) Mandamus to compel the 2<sup>nd</sup> Respondent Cabinet Secretary to forward to the 1<sup>st</sup> Respondent (KNA) the name of Charles Mwangi; the second interested party herein for consideration and approval as a nominee of the Civil Society to the National Climate Change Council.*

*(1A) Certiorari to move into this court and quash the Gazette Notice No. 9227 dated 3<sup>rd</sup> October 2016 published in the Kenya Gazette Issue of 7<sup>th</sup> November 2016 appointing members to the National Climate Change Council.*

*(3) Certiorari to move into the court and quash the decision of the 1<sup>st</sup> Respondent of 20<sup>th</sup> December 2016 rejecting the name of Cynthia Wechabe as a nominee of the marginalized community to the membership of the National Climate Change Council (NCCC);*

*(4) Mandamus to compel the 1<sup>st</sup> Respondent to consider for approval the names of Mr. Charles Mwangi and Ms Cynthia Wechabe as nominees of the Civil Society and marginalized community respectively to the National Climate Change Council (NCCC);*

*(5) Prohibition directed at the 1<sup>st</sup> Respondent from forwarding the name of Joh Kioli, the 1<sup>st</sup> Interested Party herein, to his Excellency the President for appointment as member of the National Climate Change Council, representing the Civil Society;*

*(6) This court can be pleased to grant such other or further to relief as it may deem just and necessary in the circumstances;*

*(7) That costs of the application be provided for.*

2. The motion as presented and as amended on 8/5/2017 is predicated on the grounds on the face of the motion; the statutory statement and verifying affidavit sworn by Samuel Mbithi Kimeu on 27/3/2017.

3. The applicants by description claim that they are among the civil society organization working on climate change issues.

4. The Exparte applicants' case is that they learnt vide **Gazette Notice No. 9227** dated 3/10/2016 published in the Kenya Gazette Issue of 7/11/2016, in which His Excellency, the President is said to have purported to appoint members to the NCCC, contrary to the provisions of **Section 7 of the Climate Change Act No. 11 of 2011** which stipulates that the names of the persons nominated for appointment to represent the private sector, civil society, marginalized communities and academia under **Sections 7(2)(g)(h) and (i) of the Act** shall be submitted to Parliament for approval.

5. It was therefore alleged by the Exparte applicants that after such purported appointment by the President is when the National Assembly called for submission of memoranda on the nomination of the members of the NCCC by a notice published in the Daily Nation Newspaper issue of Tuesday, the 6<sup>th</sup> December 2016 well after the said appointment by the President; which appointment could not have been done by the President before approval by National Parliament.

6. It is further claimed that the names of two persons purportedly appointed by the President were either not in the list submitted to parliament or had been rejected by parliament. The applicants further claim that the Climate Change Act (CCA) does not make provisions on the process of nomination to be undertaken by the Civil Society to identify their representative to the NCCC and that therefore the 2<sup>nd</sup> applicant did, on 15/7/2016 and on behalf of the Civil Society Working Group on Climate Change (CSWGCC) and related issues, inform the CS for Environment and Natural Resources of the intended meeting of 21/7/2016 to commence the process of developing a criteria for the selection of the civil society organizations representatives to the National Climate Change Council.

7. It was alleged that the civil society organizations held a consultative and participatory process meeting on 21/7/2016 and came up with a nominee to the NCCC. Further, that the said National Consultative Worskshop constituted an 11 member committee to develop a selection criteria and spearheaded the nomination process, guided by the constitution and **Section 7(2)(g) and (h) of the Climate Change Act No. 11 of 2016**. It is further claimed that the committee on National and Civil Society organizations also mapped and identified organizations working on climate change and related issues eligible to participate in the nomination process and held meetings on 26<sup>th</sup>, 28<sup>th</sup> July 2016 and 5<sup>th</sup> August 2016 wherein they finalized the nomination process of their 2 representatives to the NCCC namely; Mr. Charles Mwangi from the

Green Belt Movement to represent the Civil Society Organization in the Council in accordance with **Section 7(2)(g) of the Climate Change Act**; and Ms Cynthia Wechabe from the Indigenous Information Network (IIN) to represent the marginalized communities in accordance with **Section 7(2)(h) of the Climate Change Act**.

8. The Exparte applicants claim that on 5/8/2016, the Ministry of Environment and Natural Resources was duly notified of the deliberation leading to the 2 nominees. However, the applicants claim that the 2<sup>nd</sup> Respondent CS refused or omitted to forward the name of Charles Mwangi from Green Belt Movement as nominated by the Civil Society. Organization as their representative in the NCCC in accordance with **Section 7(2)(g) of the Climate Change Act**.

9. Further, it is alleged that on 6/12/2016 the National Assembly published in the Daily Nation newspaper calling for submissions of memoranda on nomination of the members of the NCCCs and that on the same day, the 3<sup>rd</sup> Applicant on behalf of Civil Society Organization informed the Clerk of the National Assembly that the names as published did not reflect the outcome of the deliberations and wishes of the Civil Society Organizations working on Climate Change issues in Kenya.

10. Further, that the publication in the *Daily Nation* newspaper did not indicate the process through which the person or nominees named were nominated, and that neither did the Notice indicate the process through which the Interested parties were nominees of the Civil Society Organizations.

11. The applicants further aver that the 1<sup>st</sup> Applicant wrote to the Clerks of the two Houses of Parliament - Senate and the National Assembly explaining to them the process through which they (Civil Society) GBM had identified their nominee for consideration and urging the two Houses of Parliament to reject Mr. John Kioli's nomination. However, that notwithstanding the above scenario, the 1<sup>st</sup> Respondent approved the names of nominees to the NCCC but rejected Ms Cynthia Wechabe because of an alleged flawed nomination process.

12. The Applicants assert that the 1<sup>st</sup> Applicant is the single most representative registered national umbrella Association of Civil Societies working on Climate Change including community based organizations and groups that deal in conservation activities and not the climate change working group which purportedly nominated Mr. John Kioli hence the action of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was contrary to the national values and principles of Governance stipulated in **Article 10 of the Constitution** on public participation inclusivity, non-discrimination, protection of the marginalized, transparency and accountability.

13. Further, it was alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' actions violate **Articles 27 and 56 of the Constitution** on equal treatment and affirmative action to ensure representation of minorities and marginalized groups participate and are represented in governance and other spheres of life hence this application.

14. On the whole, the Exparte applicants maintain that the actions of the Respondents are illegal, unconstitutional and in violation of the law. They also aver that the conduct of the 1<sup>st</sup> Respondent is irrational and unreasonable as there was no prior written statement on oath by the Clerk, evidence of contesting the suitability of Ms Cynthia Wechabe to hold office that she had been nominated to hold.

15. It was further alleged that the 1<sup>st</sup> Respondent disregarded **Section 7 of the Public Appointments (Parliament and Approval) Act No. 33 of 2011** hence it was alleged that it was irrational and unreasonable for the applicants to be deprived of their duly nominated representatives to the NCCC after consultative process and following the criteria for nomination by several civil society organizations working on climate change.

16. Further that the nomination and appointment of John Kioli violated **Section 7(2)(g) of the Climate Change Act No. 11/2016** and the **Public Appointments (PA) Act No. 33/2011**; **Article 47 of the Constitution of Kenya** on the right to administrative action which is expeditious, efficient lawful, reasonable and procedurally fair.

17. The applicants claim that the Respondents' actions are capricious, arbitrary, oppressive and unfair and cannot be justified within the Rule of Law.

18. Finally, the applicants aver that the decision of the Respondents violate their legitimate expectations and those of the public that their nominees will be in accordance with the provisions of **Section 7(g) and (h) of the Climate Change Act** that the representative of the Civil Society shall be nominated by the most representative registered national umbrella association of Civil Societies working on climate change and that the Representative of the marginalized community shall have experience in matters relating to indigenous knowledge in accordance with the law has been and is being frustrated and denigrated; and that the legitimate expectation that their will shall be respected and the law respected was violated.

19. The 1<sup>st</sup> Respondent, the National Assembly (KNA) filed a replying affidavit opposing the applicant's motion. The affidavit sworn by Michael Sialai, the Clerk of the National Assembly sets out the functions/mandate of the Parliamentary Service Commission and deposes that on 29/11/2016, the KNA received a message from the President requesting Parliament to approve nominees to the National Climate Change Council namely; Mr. Suresh Patel, John Kioli, Cynthia Wechabe and Dr. Jane Mutheu Muture.

20. That the Speaker notified the KNA on the process of vetting and notified the Speaker of the Senate as well upon which a joint committee of both Houses was constituted to vet the nominees (Departmental Committee on Environment and Natural Resources and the standing committee on Land and Natural Resources of the KNA & Senate respectively).

21. That after the vetting process, only two nominees Suresh Patel and John Kioli were approved whereas Ms Cynthia Wechabe and Dr. Jane Mutheu Muture were rejected and all that process and decision was documented as shown by the copy of annexed Report and Hansard Report of 21/2/2017, and a notification made to the Speaker of the National Assembly and the Senate, of the decisions, which decision was communicated to the appointing Authority through the Chief of Staff and Head of Public Service.

22. It was contended that Parliament followed the due process of law as provided for in the Constitution, Parliamentary *Standing Orders* and the **Public Appointment (Parliamentary Approval Act, 2011**, considering the appointment of members of the National Climate Change Council.

23. It was further contended that the remedy of judicial review is concerned with reviewing of administrative decisions and not the merits of the decision of which the application for Judicial Review is made, but the decision making process itself and that the applicant has not shown that the process employed by Parliament was flawed. Further, that as the applicant is challenging the merits of the decisions, the applicants are interested in the merits of the decision and not the process thereof, hence they are agitating for protection of selfish personal interests as against the public interest.

24. In addition, it was contended that the decision sought to be quashed had not materialized at the time of institution of these proceedings as Parliament had not conveyed to the appointing authority the vetted names which were presented on 28/2/2017 whereas the applicants filed their JR application on 17/1/2017 hence the application was speculative, frivolous and an outright abuse of the court process thereby disentiing the applicants of the reliefs sought.

25. The 1<sup>st</sup> Respondent urged the court to dismiss the application and to refrain from examining the merits of the decision made by Parliament.

26. The 1<sup>st</sup> interested party filed a replying affidavit sworn by himself and maintaining that he was procedurally nominated and that he was qualified to serve in the NCCC as shown by the academic and professional qualification certificates annexed to his affidavit. He maintained that the vetting process was above board.

27. The National Gender and Equality Commission was enjoined to the proceedings and it participated only by filing written submissions which were highlighted.

28. The participating parties' advocates filed written submissions which they highlighted only on 20/11/2017.

29. The Exparte applicants reiterated their pleadings and affidavit and relied on their exhibits and case law cited to support the application.

30. Mr. Appollo Mboya, Advocate for the Exparte applicants highlighted his client's submission relying on the amended notice of motion dated 8/5/2017. The written submissions filed on 6/6/2017 together with list of authorities were all adopted as canvassing the Notice of Motion, while reiterating the grounds and deposition of his clients as contained in the Chamber summons for leave and verifying affidavit and maintaining that the process of appointing the members of NCCC was flawed as it preceded the vetting by Parliament as shown by the Hansard Report hence the element of procedural impropriety was proved.

31. According to Mr. Appollo Mboya, if this court finds that the Gazette Notice was irregular, then the whole process is vitiated.

32. It was submitted by Mr. Omwenga for 1<sup>st</sup> Interested Party that the National Assembly in vetting the nominees has never been faulted and that no complaint had been raised against them, because the conduct was beyond reproach. Further, that the only issue raised against Cynthia Wechabe was the nomination criteria under **Section 7 of the Climate Change Act**.

33. It was however submitted in concession that the **Gazette Notice of 3/10/2016** was issued prior to the vetting of the nominees by joint Houses of Parliament hence it was irregular.

34. It was further submitted that there was a procedure under **Section 7(2)(g) of the Climate Change Act** for nominations and that the question of "**most representative national umbrella association**" is a matter of fact hence this court cannot reach a determinant on which is the association that should have nominated the persons for appointment. It was submitted that the Law does not envision several civil societies coming up to nominate suitable persons.

35. It was further submitted by Mr. Omwenga that his client is the most representative and that the Cabinet Secretary is the only one who was of the female gender whereas there are other members who are appointed by virtue of the offices that they hold hence, their gender should not be taken into account when calculating the gender ratio. The court was urged to dismiss the Exparte applicants' motion.

36. On behalf of the 1<sup>st</sup> Respondent, Mr. Mwendwa filed written submissions and a list of authorities contending that the process of vetting the nominees as members of the NCCC was carried out in accordance with the law and that the decision sought to be quashed had not materialized at the time the applicant filed the judicial review application, since the decision of Parliament was conveyed to the appointing authority on 28<sup>th</sup> February 2017 whereas the application was lodged in court on 17/1/2017 hence the application was speculative.

37. It was further submitted that the procedure adopted for vetting of the nominees who were either approved for appointment or rejected was fair and procedural and above board as reasons for approvals and the rejection of Cynthia Wechabe and Dr. Jane Mutune were cited as shown by the Hansard Report of 20<sup>th</sup> December 2016 of the National Assembly and 21/2/2017 by the Senate Standing Committee on Land and Natural Resources, which reports were submitted to the appointing authority, the President on 28/2/2017 by the Clerk of the National Assembly.

38. On the argument that judicial review is concerned with the decision making process and not the merits of the decision in respect of which the application for judicial review is made, reliance was placed on the case of **Municipal Council of Mombasa vs Republic and Umoja Consultants Ltd, CA 185 of 2001**. Counsel maintained that Parliament has the mandate and jurisdiction to conduct the vetting of persons seeking appointments in public offices especially as a council member to the National Climate Change Council as expressly provided for in **Section 7(4) of the Climate Change Act and Public Appointments (Parliamentary Approval) Act**.

39. It was submitted that all the nominees to the NCCC were accorded an opportunity to express themselves before the Departmental Committee and that the process of vetting is not a mere formality but a formal examination of the suitability of a candidate prior to approval.
40. It was submitted that nothing in the Public Appointments (Parliamentary Approval) Act 2011 prescribes that the National Assembly should approve the nominees presented to it as that would only serve to defeat the very purpose of vetting by the National Assembly hence the National Assembly had the power to question the procedure used in the nomination process which procedure did not violate any provisions by questioning the process of nomination of Ms Cynthia Wechabe.
41. It was further submitted that the Exparte applicants had failed to demonstrate that Parliament acted arbitrarily in vetting the nominees hence the application is purely selfish and an attempt to forcefully impose an unsuitable candidate(s) upon the people of Kenya.
42. The 1<sup>st</sup> Respondent urged the court to exercise restraint in granting the orders sought by the Exparte applicants, given the express provisions of the **Public Appointments (Parliamentary Approval) Act**.
43. According to the 1<sup>st</sup> Respondent, Parliamentary privilege which underpins the independence of the legislature does not allow for decision of either House or its Speaker to be questioned by any court and that therefore this Judicial Review application violates the provisions of **Article 117 of the Constitution** and the principles espoused by the Court of Appeal in **CA No. 157 of 2009. John Harun Mwau vs Dr. Andrew Mulei & Others** to the effect that Parliament's functions are, among others to debate and pass resolutions freely on subjects of its own choosing, this being one of the cornerstones for Parliamentary democracy. Further, that as a general principle, a person wronged by Parliamentary proceedings cannot apply for Judicial Review except where an Act of Parliament is unconstitutional. Consequently, statements made in Parliament may not be used to support a cause of action arising out of proceedings in Parliament (citing **Prebble vs Television New Zealand (1995) IAC 321**).
44. On whether the application by the Exparte applicants is meritorious, the 1<sup>st</sup> Respondent submitted that as regards Prayer No. 1 for Certiorari, the same cannot be granted because the process employed by the 1<sup>st</sup> Respondent leading to the decision sought to be quashed was proper and in accordance with the law hence, the Exparte applicants, it was contended, were guided by selfish interests at the expense of the people of Kenya.
45. It was further submitted that the decision sought to be quashed had not materialized at the time the applicant filed the application for judicial review, as the decision of parliament was conveyed to the appointing authority on 28<sup>th</sup> February 2017 whereas the applicant's application was filed on 17/4/2017 hence the application was based on speculation.
46. On whether the Prayer for prohibition directed at the 1<sup>st</sup> Respondent from forwarding the name of Mr. John Kioli, the 1<sup>st</sup> Interested Party herein to H.E Excellency the President for appointment as a member of NCCC is available, it was submitted that the said Prayer for prohibition had been overtaken by events as the names which had been approved by the Parliament were forwarded to the President on 28/2/2017 hence the granting of *Mandamus* would be in vain. Reliance was placed on the case of **R vs PS, Secretary to the Cabinet and Head of Public Service, OP & Another Exparte Stanley Kamanga Nga'nga' & Another [2006]eKLR** where Alnashir Visram, J (as he then was held that prohibition cannot quash a decision which has already been made but can only prevent making of a contemplated decision.
47. It was further submitted that Prayer No. ii for *Mandamus* to compel the 1<sup>st</sup> Respondent to consider for approval the names of Mr. Charles Mwangi and Ms Cynthia Wechabe cannot issue because the exercise had already been conducted by the 1<sup>st</sup> Respondent through a properly conducted process and that to grant such an order would result in wastage of public resources.
48. The court was urged to decline to interfere with the internal management of a House of Parliament since the applicants had not demonstrated any actual or threatened violation of the Constitution. Reliance was placed on **R vs National Assembly Committee of Privileges and 2 Others Exparte Ababu Namwamba (No citation); Speaker of Senate & Another Vs AG & 4 Others [2013]eKLR** where the Supreme Court explained circumstances that necessitate the intervention of the court in matters of Parliament. Further reliance was also placed on the US case of **Marbury vs Madison, 5 US 137 (1803) and HC Petition No. 227 of 2013 Okiya Omtatah Okoth & 3 Others vs AG & 5 Others [2014]eKLR** on the jurisdiction of the High Court as stipulated in **Article 165 of the Constitution** and urged the court not to invoke its jurisdiction to inquire into acts of the National Assembly pursuant to its powers and obligation under **Chapter Eight of the Constitution** as the applicant has not established that there was a violation or threatened violation of the Constitution. Counsel urged this court to dismiss the application with costs to the 1<sup>st</sup> Respondent.
49. In a brief oral rejoinder, Mr. Appollo Mboya, Counsel for the Exparte applicants submitted that the law donates authority to public officers to be exercised within the law and that in this case, the CS had no business removing names but that she should have returned all names with directions.
50. It was further submitted that the letter forwarding names from the National Assembly includes names of Suresh & Patel which the President had appointed hence Parliament could not purport to vet them.
51. It was submitted that the whole process was vitiated by failure to follow processes. In addition, Counsel for the Exparte applicants submitted that the most representative registered civil society was considered through 3 meetings to map out the most representative registered Civil society organizations in compliance with the law as per the minutes attached, showing the criteria adopted hence the application should be disallowed.

## **DETERMINATION**

52. This court has given serious consideration to the matters raised by the Exparte applicant, the 1<sup>st</sup> Respondent, 1<sup>st</sup> Interested Party and the Amicus Curie NGEC their submissions and legal provisions cited as well as case law referred to and in my humble view, the issues for

determination that flow from the dispute hereto are: -

- (1) *Whether the process leading to the nomination and approval of the members of the National Climate Change Council was legal or procedurally fair.*
- (2) *Whether the Exparte applicants are entitled to the Orders sought.*
- (3) *What Orders should this court make?*
- (4) *Who should bear costs of these proceedings?*

53. On whether the process leading to nomination and approval of the members to the National Climate Change Council was procedurally fair, the Exparte applicants allege that the President vide Gazette Notice dated 3/10/2016 published on 7/11/2016 purported to appoint members to the National Climate Change Council, contrary to the stipulated procedure set out in **Section 7(4) of the Climate Change Act No. 11 of 2011**. The said **Section 7(4) of the Climate Change Act** stipulates that the names of persons nominated to appointment to represent the private sector, civil society, marginalized communities and academic under **Section 7(2)(g)(h) and (i) of the Act** shall be submitted to Parliament for approval.

54. In the instance case, the Exparte applicant maintained that the above mandatory procedure for nomination and appointment of the representative or members to the National Climate Change Council was flawed and therefore illegal because the President first appointed the said members after which the National Assembly called for submission of the Memoranda on the nomination of the said members by way of notice published in the *Daily Nation* on Tuesday, 6<sup>th</sup> December 2016.

55. It was therefore claimed that the appointment and or purported approval by the National Assembly or Parliament of person already appointed by the President was unlawful.

56. The above position was not controverted by any party and in fact, the Respondents conceded that the President appointed the said members before their names were submitted to Parliament for consideration. In **Pastoli vs Kabale District Local Government Council and Others [2008] 2EA 300**, the court citing **Council of Civil Service Unions vs Minister for Civil Service [1985] AC 2** and an application by **Bukoba Gymkhana Club[1963] EA 478** held at p.479:

*“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety....illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra-vires, or contrary to the provisions of a law or its principles are instances of illegality.... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.*

*Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere to and observe Procedural Rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”*

57. On the consequences of failure to adhere to Procedural Rules, the case of **Resley vs The City Council of Nairobi [2006]2 EA 311** is relevant. In that case, the court made the following observations: -

*“In this case there is an apparent disregard of statutory provisions by the Respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid. The purpose of the court is to ensure that the decision making process is done fairly and firstly to all the parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the Respondent.*

*That the law must be followed is not a choice and the courts must ensure that it is so followed and the Respondents' statements that the court's role is only supervisory will not be accepted and neither will the view that the court will usurp the functions of the valuation court in the determining the matter. The court is the one with the inherent and unlimited jurisdiction and it is the duty of the court to ensure that the law is followed. If a local authority does not fulfill the requirements of the law, the court will see that it does fulfil them and it will not listen readily to suggestion of “chaos” and even if the chaos should result, still the law must be objected. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects public bodies and ministers must be compelled to observe the law; and it is essential that bureaucracy should be kept in its place.”*

58. However, a more moderate approach to the issues discussed in the above case was taken in the **Pastoli vs Kabale District Local Government Council and Others (supra)** at p.305 that:-

*“when Parliament prescribes the manner or form in which a duty is to be performed or power exercised, it*

*seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the Procedural Rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done (though in some cases it has been said that there must be “substantial compliance” with the statutory provision if the deviation is to be exercised as a mere irregularity. Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision of the appropriate category.*

*The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of the provision to the general object intended to be secured by the Act. In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute.*

*Although nullification is the natural and usual consequences of disobedience breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if a serious public inconvenience would be caused by holding them to be mandatory or if the court is for any reason disinclined to interfere with the act or decision that is impugned. In a nutshell, the above principles indicate that to determine whether the legislature intended a particular provision of statute to be mandatory, the court must consider the whole scope and purpose of the statute. Then to assess the importance of the impugned provision in relation to the general object intended to be achieved by the Act, court must consider the protection of the provision in relation to the rights of the individual and the effect of the decision that the provision is Mandatory.”*

59. In the instant case, it is clear that the Act stipulates the procedure for nomination and appointment of members of the NCCC. It is also clear that procedure was never followed when the CS presented names of nominees to H.E. the President instead of presenting to Parliament. Accordingly, the answer to the first issue is that the procedure for nomination to the NCCC was not followed by the Respondents.

60. The only question that this court must pose and answer is whether such failure to comply with the statutory procedure for nomination and the eventual appointment of members of the NCCC is fatal and therefore whether the whole process is void or voidable and or what are the consequences of such violation of the stipulated procedure.

61. The Exparte applicants in challenging the procedure adopted by the Respondents have sought several Judicial Review Orders. Therefore, this court must determine the question of whether the prayers sought by the Exparte applicants are available, in view of the procedural flaws identified above and in the totality of the circumstances of this case.

62. On the first prayer for *Mandamus* to compel the 2<sup>nd</sup> Respondent, Cabinet Secretary to forward to the 1<sup>st</sup> Respondent National Assembly the name of Charles Mwangi who is the 2<sup>nd</sup> Interested Party herein for consideration and approval as a nominee of the civil society to the NCCC, the Exparte applicants assert that the process of identification of Charles Mwangi for nominations to the NCCC was conducted in accordance with **Section 7(2)(g) and (h) of the Climate Change Act** by the committee on National and Civil Society Organizations who mapped and identified the organization working on Climate Change and related issues, eligible to participate in the nomination process, held meetings on 26<sup>th</sup>, 28<sup>th</sup> July 2016 and on August 2016 where they finalized the nomination process of 2 candidates - Charles Mwangi from the Green Belt Movement and Cynthia Wechabe from Indigenous Information Network to represent the marginalized communities in accordance with **Section 7(2)(g) and 7(2)(h) of the Climate Change Act**; and that the Ministry of Environment and Natural Resources was on 5/8/2016 notified of the process leading to the nominees.

63. The applicants claim that notwithstanding the stated process, the 2<sup>nd</sup> Respondent, CS refused to forward the 2 names to the National Assembly, but that after the applicants complaining to the Clerks of the 2 Houses of Parliament, the 1<sup>st</sup> Respondent nonetheless published names of nominees hence the whole nomination process was unknown and that despite submission of the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties, the 1<sup>st</sup> Respondent rejected and purportedly nominated the 1<sup>st</sup> Interested Party John Kioli.

64. It is alleged that the whole impugned process violates the principles of public participation stipulated in **Article 10 of the Constitution**, inclusivity, non-discrimination, protection of the marginalized, transparency, as well as accountability and **Article 27 of the Constitution** on equal treatment and affirmative action on representation of minorities and marginalized groups participation in governance and other spheres of life.

65. This court observes that this application was filed on 17/1/2017 whereas the decision by Parliament was conveyed to the President on 28<sup>th</sup> February 2017 by the Clerk of the National Assembly. However, the Respondents have not demonstrated to court the process by which the appointees were nominated and their names presented to Parliament for consideration and submission to the appointing authority.

66. Whereas this court is in agreement that Parliament has a constitutional mandate to vet the nominees and only approve those who satisfy the criteria for appointment to the NCCC, it is clear that Parliament itself being the maker of the **Climate Change Act** flouted the established procedure by accepting names from the President after appointment, for vetting, as opposed to receiving nominees, vetting them first before submitting their names to the appointing authority-the President. This court does not buy the argument by the KNA that Parliamentary decisions are by virtue of **Article 117 of the Constitution** and the **Parliamentary Appointment (PA) Act** immune from judicial disturbance, where such act or decision or proceeding is unconstitutional or illegal, and except when amending the existing Act, then such decision would be subject to Judicial Review by the court.

67. This court nonetheless does accept the argument that *Certiorari* only quashes a decision that is made prior to the application being made and not after. Only prohibition can prohibit a decision which is made after. In addition, *mandamus* cannot compel performance of a non

existent legal duty.

68. The decision sought to be quashed had indeed not been made at the time the application was filed in court on 17/1/2017 hence *Certiorari* cannot lie. However, **Section 7(2)(a)(i)(ii) and (iii) of the FAA Act, 2015** is clear that a court or tribunal may review an administrative action or decision if the person who made the decision was not authorized to do so by the empowering provision, acted in excess of jurisdiction or power conferred under any written law; or acted pursuant to delegated power in contravention of any law prohibiting such delegation.

69. The Act empowers this court to make any other order.

70. Even assuming that *Certiorari* would be available in terms of prayer 1A of the Amended Notice of Motion pursuant to leave granted on 18/1/2017, this court observes that no leave was sought and obtained to apply for the additional prayer 1A of *Certiorari* to quash the Gazette Notice No. 9227 dated 3<sup>rd</sup> October 2016 published in the Kenya Gazette issue of 7<sup>th</sup> November, 2016. This is so because the chamber summons dated 16/1/2017 does not contain any prayer for leave subject of Prayer No. 1A of the amended Notice of Motion.

71. On whether *Mandamus* to compel the CS to submit to the National Assembly the name of Charles Mwangi for consideration is available, the court observes that the process of nomination of candidates by Civil Society (most representative civil society) is not stated in **Climate Change Act** and as to what is the “most representative” of the civil society is not defined or stipulated. In the absence of a criteria to determine who the “most representative” civil society is, and as that was not an issue for this court’s determination as it is a merit issue, this court is unable to find that the CS was under any statutory duty to forward to the National Assembly the name of Charles Mwangi for nomination, vetting and eventual appointment by H.E. the President as a member of the NCCC.

72. On whether *Certiorari* can issue to quash the 1<sup>st</sup> Respondent’s decision to reject the name of Cynthia Wechabe for nominated as a member of the NCCC, I note that the National Assembly is not bound to approve names of persons submitted to it for vetting. The reasons given by the National Assembly for rejecting Cynthia Wechabe are merit issues and not procedural impropriety issues and therefore this court cannot review an administrative merit decision of the National Assembly, as the National Assembly is not a mere rubber stamp in matters vetting and approval for appointment.

73. In the same vein, this court is unable to find that the National Assembly was under any statutory or constitutional duty to consider and approve the names of Cynthia Wechabe and Charles Mwangi as nominees of the civil society and marginalized community to the NCC.

74. On Prayer No. 5, that prohibition do issue directed at the National Assembly prohibiting it from forwarding the name of John Kioli the 1<sup>st</sup> Interested party herein to H.E. the President for appointment as member of the National Climate Change Council representing the civil society, I find that this prayer was overtaken by events as the 1<sup>st</sup> Interested party was appointed by the President after his vetting and approval by the Parliament. As prohibition cannot issue to undo that which has already been done, the prayer is not available to the *Ex parte* applicants.

75. There is then the question of gender representation in the NCCC as articulated by the *Amicus curie*, NGEC. Regrettably there were no substantive prayers for declaring the composition of NCCC unconstitutional. In the premises, this court would be acting on its own motion and without sufficient material placed before it if it made such a declaration without any substantive application or prayer being sought in the pleadings. The arguments by the *Amicus curie* which were merely brought in by way of submissions and not affidavit evidence are therefore overruled. NGEC is at liberty to lodge an independent application seeking specific declaration orders from the court, for consideration on merit.

76. On the whole, albeit I find that the procedure for nomination, approval and appointment of members of the NCCC to have been violated, I decline to grant the Judicial Review Orders sought. **The Motion as filed is accordingly declined and dismissed with an order that each party shall bear their own costs of these proceedings which were initiated by public spirited organizations and in the public interest.**

***Dated, Signed and Delivered at NAIROBI this 27<sup>th</sup> day of September 2018.***

**R.E. ABURILI**

**JUDGE**