REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION No. 238 OF 2017

IN THE MATTER OF AN APPLICATION BY THE NATIONAL SUPER ALLIANCE (NASA) FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATER OF AND/OR THE VIOLATION OF ARTICLES 10, 25, 38, 47, 50, 81 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF THE ELECTIONS ACT

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS, 2012

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORMS ACT, CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 3 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC.....APPLICANT

AND

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....RESPONDENT

EX PARTE: NATIONAL SUPER ALLIANCE

RULING

1. By a Notice of Motion dated 4th February, 2014, the *ex parte* applicant herein, **National Super Alliance**, otherwise known as NASA has moved this Court seeking leave to commence judicial review orders to *inter alia* quash the decision of the Respondent herein, the **Independent Electoral and Boundaries Commission** (hereinafter referred to as "the Commission") by which the Commission selected and deployed the Constituencies and Counties Returning Officers to oversee the 2017 general elections scheduled to take place on the 8th August, 2017.

2. When the matter came up for application for leave, **Mr Nyamodi**, learned counsel for the Commission raised a preliminary objection that the applicant herein lacks the capacity in law to institute these or any other legal proceedings. According to him, from the statement of facts filed by the applicant, the applicant is described as a coalition of parties representing a substantial number of Kenyans. He submitted that there exist a legislation regulating the registration and conduct of political parties and that is the ***Political Parties Act*** (hereinafter referred to as "the Act") and referred to sections 3, 4 and 10 thereof.

3. In his view, coalitions are by virtue of section 16 of the said Act, of a lesser status than the political parties forming them since unlike political parties they have no right to sue and be sued in their own names as coalitions are unincorporated entities. Learned counsel submitted that since the ability of an inanimate being to sue and be sued stems from the law, there is no power inherent in such entities to commence legal proceedings. He therefore prayed that these proceedings be dismissed with costs to the Commission.

4. In support of his submissions, **Mr Nyamodi** relied on **Football Kenya Federation vs. Kenya Premier League Limited & Others [2015] eKLR**, **Republic vs. Registrar of Societies ex parte Narok Muslim Welfare Association [2017] eKLR** and **Eritrea Orthodox Church vs. Wariwax Generation Limited [2007] eKLR**.

5. In opposition to the application, **Mr Willlis Otieno** submitted that the objection does not meet the threshold of a preliminary objection as enunciated in **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 of 1969 [1969] EA 696**. According to learned counsel since the Respondent's objection is premised on the statement of fact, the preliminary objection does not raise points of law but invites the Court to interrogate questions of fact yet a preliminary objection is restricted to matters of law. His view was that the moment the objection goes to facts, it ceases to be a preliminary objection.

6. Learned Counsel further relied on the Constitution of Kenya and submitted that the leave herein seeks to realise fundamental rights and the actualisation of the provisions of the Constitution through judicial review proceedings which is recognised in Article 23 of the Constitution. It was submitted that in terms of standing, Article 22 gives to every person the right to institute proceedings on constitutional matters including its principles and referred to Article 260 of the Constitution which defines a "person" to include unincorporated bodies hence political parties, being creatures of the law under section 10 of the Act, recognised and registered by the Registrar of Political Parties can enforce their rights within the coalition which is what the applicant seeks.

7. It was contended that section 16 of the Act does not apply since it only applies to political parties which the applicant is not.

8. Responding to the authorities cited, it was submitted that civil cases being private suits cannot be used as authorities in respect of legal standing in proceedings such as these which are public law oriented. In any case the said cases were decided before the promulgation of the current Constitution. In his view it was such decisions that informed the enactment of the current Constitution.

9. Mr Otieno referred to the fact that previously coalitions have been permitted to institute legal proceedings hence it would be an absurdity to disallow the applicant to bring these proceedings.

10. In his rejoinder, **Mr Nyamodi** submitted that the law does not exist in vacuum hence facts can be referred to where they are not, as in this case, disputed. While admitting that under Article 23 of the

Constitution the Court has the power to grant judicial review reliefs in order to enforce fundamental rights, it was submitted that a true reading of the pleadings herein disclose no allegation of violation of the same as what is before the Court is a purely judicial review application.

11. Learned counsel reiterated that since section 16 of the Act is inapplicable, the applicant has no capacity to undertake the actions permitted under the said section. It was his view that the mere fact that coalitions have in the past litigated does not render such proceedings proper.

Determinations

12. I have considered the issues raised herein.

13. This being a preliminary objection it is important to deal with circumstances under which preliminary objections can be entertained in order to determine whether or not the objection was properly taken in these proceedings. In NBI High Court (Civil Division) Civil Case No 102 of 2012 - **Cheraik Management Limited vs. National Social Security Services Fund Board of Trustees & Another** this Court expressed itself, *inter alia*, as follows:

> **"Ordinarily, a preliminary objection should be based on the presumption that the pleadings are correct. *It may also be based on agreed facts.* It, however, cannot be entertained where there is a dispute as to facts for example where it is alleged by the defendant and denied by the plaintiff that a condition precedent to the filing of the suit such as the giving of a statutory notice was not complied with, unless the fact of non-giving of the notice is admitted so that the only question remaining for determination is the legal consequence thereof. It may also not be entertained in cases where the Court has discretion whether or not to grant the orders sought for the simple reason that an exercise of judicial discretion depends largely on the facts of each particular case which facts must be established before a Court may exercise the discretion…In this case both parties have adopted the unusual mode of arguing the preliminary objection by filing affidavits in support and in opposition thereof respectively. Accordingly part of the Court's task would be to determine what are the agreed facts contained therein whether expressly or by legal implication."** [Emphasis added].

14. In arriving at that decision, the Court relied on the celebrated case of **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd.** (supra)in which case **Law, JA** was of the following view:

> **"A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."**

15. As for **Newbold, P**:

> **"A preliminary objection is in the nature of what used to be called a *demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct*. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop".** [Emphasis added].

16. Also cited was the decision in **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177** where it was held that:

> **"*The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of res judicata are pure points***

of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections…In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters…What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion **and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion."** [Emphasis added].

17. Dealing with the same issue, **Ojwang, J** (as he then was) in **Oraro vs. Mbaja [2005] 1 KLR 141** expressed himself as follows:

> **"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop… The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point…Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent's very detailed "affidavit in reply to an affidavit in support of preliminary objection", which replying affidavit was expressed to be "under protest"…The applicant's "notice of preliminary objection to representation" cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute."**

18. It is therefore clear that a preliminary objection is an objection based on law that is argued on the assumption that the facts as pleaded are correct. In other words, a person raising a preliminary objection must be prepared to argue the same on the premise that the facts as they appear on record are correct. As long as that is done, it is not objectionable for the party raising the objection to refer to the facts on record. What the Court does not permit is the attempt to reconcile factual disputes in a preliminary objection.

19. In this case the Respondent submits that going by the statement of facts filed herein, it appears therefrom that the applicant has no legal capacity to commence these proceedings. That clearly is what was in the mind of the Court in **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579;**

[2001] 1 EA 177 (supra) when the Court found that an objection as to the legal competence of the Plaintiffs to sue is a pure point of law which if determined in the favour of the Respondents would conclude the litigation and was accordingly well taken as preliminary objection. I agree with the Court that in determining that issue the Court is perfectly at liberty to look at the pleadings and other relevant matter in its record including as in this case, the statement of facts as long as in arguing the point the objector does not seek to contradict the said facts since to purport to determine, a point of preliminary objection on contested facts, is forbidden.

20. It is therefore my view that the preliminary objection was properly taken in these proceedings.

21. In this case the applicant contends that it is a coalition of several political parties representing a substantial number of the people of Kenya. Section 2 of the ***Political Parties Act*** defines a "***coalition***" as meaning "***an alliance of two or more political parties formed for the purpose of pursuing a common goal and is governed by a written agreement deposited with the Registrar***." ***Blacks Law Dictionary***, 9th Edition at page 87 defines an "**alliance**" as "***a bond or union between persons, families, states, or other parties***."

22. Section 10 of the Act which deals with coalitions provides as hereunder:

> *1.* ***Two or more political parties may form a coalition before or after an election and shall deposit the coalition agreement with the Registrar.***
>
> *2.* ***A coalition agreement entered into before an election shall be deposited with the Registrar at least three months before that election.***
>
> *3.* ***A coalition agreement entered into after an election shall be deposited with the Registrar within twenty-one days of the signing of the coalition agreement.***
>
> *4.* ***A coalition agreement shall set out the matters specified in the Third Schedule.***

23. Section 16(1) of the Act, on the other hand provides as hereunder:

> *1.* ***A political party which has been fully registered under this Act shall be a body corporate with perpetual succession and a common seal and shall be capable, in its own name, of—***
>
> *a.* ***acquiring and disposing of property;***
>
> *b.* ***suing and being sued; and***
>
> *c.* ***doing or performing all such acts and things as a body corporate may by law do or perform.***

24. This provision calls for what amounts to a suit. The ***Interpretation and General Provisions Act***, Cap 2 does not define what a "***suit***" is. It however defines "***action***" to mean "***any Civil proceedings in a court and includes any suit as defined in section 2 of the Civil Procedure Act (Cap. 21)***." It is therefore clear that a "suit" one form of an "action". According to ***Black's Law Dictionary***, 9th Edition page 1572, a "suit" is "any proceeding by a party or parties against another in a court of law" while a "lawsuit" is described as "to proceed against (an adversary) in a lawsuit; to sue." It is therefore clear that in a suit there must be two or more adversaries and this is typical of private law disputes. Public law disputes on the other hand do not necessarily connote the existence of adversaries as what may be in issue may be just a declaration of what the law is. It is in this context that I understand the holding in **The Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995 [1995-1998] 1 EA 1** where it was held that:

> **"S. 136 (1) and (2) of the [Government Proceedings Act], provides as follows: *"136 (1) All actions, unless brought on behalf of the Government, for anything done under this Act shall be commenced within one year after the cause of action arose and not afterwards. (2) Notice in writing of the action and the cause thereof shall be given to the defendant one month at least***

before the commencement of the action." **Neither the *Government Lands Act,* the *Government Proceedings Act,* nor the *Civil Procedure Act,* and Rules made thereunder, have a definition of the term "action". The term is defined under s.3 of the *Interpretation and General Provisions Act,* Cap 2 Laws of Kenya, thus: *"…..means any civil proceedings in a Court and includes any suit as defined in section 2 of the Civil Procedure Act."*…That definition without more does not tell us much. However, when looked at together with the provisions of s.8 of the *Law Reform Act,* Cap 26 Laws of Kenya, we are able to discern that an application for an Order of Certiorari or any of the prerogative orders is not an action. S.8(1), of that Act provides as follows: *"8(1) The High Court shall not, whether in the exercise of its Civil or Criminal jurisdiction, issue any of the prerogative Writs of Mandamus, prohibition or Certiorari."*…By virtue of the provisions of S.7 of the *Administration of Justice (Miscellaneous Provisions) Act*, 1938, of the United Kingdom, which is applicable in this country by reason of S.8 (2) of the *Law Reform Act,* prerogative writs were changed to be known as "Orders", except for the writ of habeas corpus. So S.8 (1) above denies the High Court the power to issue orders of mandamus, prohibition and certiorari while exercising Civil or Criminal jurisdiction. What that then means is that notwithstanding the wording of S.13A, above, which talks of proceedings, in exercising the power to issue or not to issue an order of certiorari the Court is neither exercising Civil nor Criminal jurisdiction. It would be exercising special jurisdiction which is outside the ambit of S. 136 (1) of the *Government Lands Act,* and also, S. 13 A of the *Government Proceedings Act,* which, had the matter under consideration been an action, would properly have been invoked to defeat the present matter. It should be noted that S. 13A, above, when read closely, its wording, clearly shows that a suit within the meaning of the term "Suit" in S. 2 of the Civil Procedure Act is envisaged."**

25. Borrowing from the same reasoning, it is my view and I hold that the suit contemplated under section 16 of the ***Political Parties Act*** does not encompass applications in the nature of judicial review which are public law remedies. This therefore puts paid to the application of decisions made in purely civil cases to judicial review applications where they are inapplicable though they express good law in civil cases. With respect to the case of **Republic vs. Registrar of Societies ex parte Narok Muslim Welfare Association** (supra), it would, respectfully, seem that the attention of the learned Judge was not drawn to the definition of "person" under Article 260 of the Constitution.

26. . What then is the status of the applicant herein with respect to capacity to institute legal proceedings? In my view, by the enactment of the current Constitution in particular Article 23 thereof, the demarcation between judicial review and constitutional petitions has been blurred so much so that in granting remedies in judicial review applications, constitutional principles clearly play a crucial part therein. In fact one of the grounds for granting judicial review relief is the violation of the provisions and principles of the Constitution since under Article 47 of the Constitution, the right to fair administrative action is now recognised. As was appreciated in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.

27. . This position was appreciated by the Constitutional Court of South Africa case of **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99,** in which **Chaskalson, P** expressed himself as follows:

"Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution…Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the

interim Constitution, the common law was "the main crucible" for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided in this case) the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control."

28. . This was the position adopted by the Supreme Court in **Communications Commission of Kenya & 5 Others vs. Royal Media Services & 5 Others [2014] eKLR** where it held that:

"…the Constitution of Kenya, 2010 has elevated the process of Judicial Review to a pedestal that transcends the technicalities of common law, and as a result all power of Judicial Review in Kenya is founded upon the Constitution, which requires Kenyan courts to go further than MARBURY v MADISON 5 U.S. 137 (1803) in exercising its judicial review jurisdiction."

29. With respect to Article 47, the Court of Appeal in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR,** Civil Appeal 52 of 2014 held that:

"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

30. Therefore judicial review remedies presently have a constitutional basis in Kenya by virtue of Articles 10, 25, 27, 47 and 50 of the Constitution. In my view since the Constitution is incremental in its language, what the current constitutional dispensation requires is that both the grounds and remedies in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity. It is within those prescriptions that judicial review is seen in our context.

31. In this case the applicant contends that the respondent in its action being challenged indicated persons who will be constituency and county returning officers in the coming general elections and that in arriving at the decision to select and post constituency and county returning officers, the respondent did not adhere to the principle of good governance set out in Article 10 of the Constitution, the principles of the electoral system set out in Article 81 of the Constitution and the provisions of Regulation 3 of the ***Elections (General Regulations, 2012*** contrary to the applicant's legitimate expectation that the respondent shall at all times be guided by the laws of the Republic in executing its mandates and that it shall at all-time be guided by the Constitution, its constitutive Act, the ***Fair Administrative Action Act***

and Regulations under these Statutes.

32. It was therefore the applicant's case that the import of the Respondent's decision is to undermine democratic free and fair electoral process and is an abuse of the law and violates the basic tenets and principles of the constitution and the ***Elections (General) Regulations 2012***. It asserted that it is in the interest of justice that the orders sought are granted so as to protect the constitutional foundations of the Bill of Rights, the constitutional principles of the electoral system, the ***Fair Administrative Action Act*** and the ***Elections (general) Regulations, 2012***. It is therefore clear that given a broad interpretation as required by Article 259 as read with Article 20(3) of the Constitution, it is clear that the applicant's case is hinged, at least from the grounds, on *inter alia* the interpretation and application of the Constitution.

33. Article 258 of the Constitution which provides as follows:

> ***(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.***
>
> ***(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***
>
> ***(a) a person acting on behalf of another person who cannot act in their own name;***
>
> ***(b) a person acting as a member of, or in the interest of, a group or class of persons;***
>
> ***(c) a person acting in the public interest; or***
>
> ***(d) an association acting in the interest of one or more of its members.***

34. Similarly under Article 22(2)(b) of the Constitution, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

35. Article 260 of the Constitution defines a "person" as including "***a company, association or other body of persons whether incorporated or unincorporated***." The same provision is clear that the word "includes" means "includes, but is not limited to." It is therefore clear that the a "person" for the purposes of the Constitution is not restricted to the examples given in Article 260 of the Constitution but the Court in interpreting the word casts its net wide.

36. On the issue of standing, I wish to quote the holding in **Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010**, in which the Court expressed itself as follows:

> **"over time, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach. They held that it would be a grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by an outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The strict rule of *locus standi* applicable to private litigation is relaxed and a broad rule is evolved which gives the right *locus standi* to any member of public acting *bona fide* and having sufficient interest in instituting an action for redressal of public wrong or public injury by a person who is not a mere busybody or a meddlesome interloper; since the dominant object of Public Interest Litigation is to ensure observation of the provision of the constitution or the law which can be best achieved to advance the cause of the Community or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, *bona fide* and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like *action popularis* of Roman Law whereby any citizen could bring such an action in respect of public delict.**

Standing will be granted on the basis of public interest litigation where the petition is *bona fide* and evidently for the public good and where the Court can provide an effective remedy… In Kenya the Court has emphatically stated that what gives *locus standi* is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. The court equally has recognised that organisations have rights similar to that of individual private member of the public. A new dawn was the ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of *locus standi* were broken and the law was liberalised and a purposeful approach took the driving seat in the area of Public Law. In human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. The court has vast powers under section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental rights, and broad public interest protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of *locus standi.* Accordingly in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not insist on such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception…"

37. The Court continued:

"In the interest of the realisation of effective and meaningful human rights, the common law position in regard to *locus standi* has to change in public interest litigation. Many people whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organisation being able to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to *locus standi* is required to fulfil the Constitutional court's mandate to uphold the Constitution as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled."

38. In **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others** Civil Appeal No. 290 of 2012 the Court of Appeal stated at page 16 as follows:

"Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution."

39. Long before the promulgation of the current Constitution, it was held on 11th March, 1970, in Shah Vershi Devji & Co. Ltd vs. The Transport Licencing Board **[1970 EA 631; [1971] EA 289** that:

"Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later sections of Chapter V. The word "person" is defined in section 123 as including "any body of persons corporate or unincorporated. Thus, a company is a "person" within the meaning of Chapter V of the constitution which is headed "Protection of Fundamental Rights and Freedoms of the Individual" and would be entitled to all the rights and freedoms given to a "person" which it is capable of enjoying. The word "individual" can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a "person" and is, from its nature, capable of being enjoyed by a "corporation" then a "corporation" can claim it although it is included in the list of rights and freedoms of the individual". The word "individual" like the word "person", does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word "individual". "Individual" seems to be any legal person who is not the general public."

40. The issue of standing was also dealt with by **Nyamu, J** (as he then was) in **Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** as follows:

"The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others……"

41. The Court proceeded to hold that:

"Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be

given a hearing by a court of law…The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue….Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase "person aggrieved" was treated as a question of fact – "grievances are not to be measured in pounds and pence"……..Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest…In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them…The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are "persons directly affected". I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan."

42. The applicant herein being a coalition of parties is pursuant to section 2 of the ***Political Parties Act*** as read with ***Blacks Law Dictionary*** is an alliance bonding or uniting two or more political parties formed for the purpose of pursuing a common goal and is governed by a written agreement deposited with the Registrar. In my view such entity though unincorporated is what the framers of the Constitution had in mind when they defined a person to include unincorporated entities. In my view a person would include any identifiable entity in pursuit of common goals and interest for the purposes of the matter before the Court whether acting singularly or in plurality.

43. As was held in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998,**

"Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them."

44. Therefore based both on authority and the Constitution, the Applicant, being a person who claims that

it is aggrieved by the decision of the Respondent clearly has standing pursuant to Article 3 of the Constitution a constitutional duty to agitate both its rights before this Court and also to uphold and defend the Constitution. Thus, **Ringera, J,** as he then was in **Njoya & 6 Others vs. AG Misc Application 82 of 2004 (OS)**, adopting the decisions of this court in **Ruturi & Another vs. Minister of Finance & Another (2001) 1 EA 253** stated *inter alia*:

> **"…we are persuaded by the second school of thought for reasons that in our view the court's first role should be to uphold constitutionalism and the sanctity of the constitution. We think such a role cannot be well performed by shutting the door of the court on the face of persons who seek to uphold the constitution on the ground that such persons have no peculiarly personal stake in a matter which belongs to all."**

45. In **Republic vs. The Minister for Lands and Settlement Ex Parte Narankaik & Another [1988] KLR 693, Tunoi, J** (as he then was) held that Certiorari lies, on the application of a person aggrieved, to bring the proceedings of an inferior tribunal before the High Court for review so that the court can determine whether they should be quashed, or to quash such proceedings. The phrase "a person aggrieved" was defined in **Yusuf vs. Nokrach [1971] EA 104,** as a person who has suffered legal grievance. In **Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi And Another [2008] 2 EA 311, Rawal, J** (as she then was) expressed herself as follows:

> **"In Kenya, the functions and remedies of orders of *certiorari, mandamus* and prohibition by way of judicial review found roots in 1956 by the enactment of the Law Reform Act (Chapter 26 Laws of Kenya) and thereafter by the Constitution of Kenya itself. Simply stated, these remedies are in our judicial system to uphold and protect and defend the rule of law, that is, to supervise the acts of government powers and authorities which affect the right or duties or liberty of any person. The affected person may always resort to the Courts of law and if the legal pedigree is not found to be perfectly in order the court will invalidate the act which can be safely disregarded. The government is a government of laws and not of mess and will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."**

46. In **R. vs. Liverpool Corporation Ex Parte Liverpool Taxi Fleet Operators Association [1972] 2 All ER 589; [1972] 2 QB 299 Denning, J** stated:

> **"…the writs of prohibition and certiorari lie on behalf of any person who is a "person aggrieved" and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him; but it does include any person who has a genuine grievance because something has been done or may be done which affects him."**

47. **De Smith's *Judicial Review*** 6th Ed. At para 2-057 states:

> **"In accord with the developments which were taking place on applications for Judicial Review there was clearly discernible trend away from the restrictive and highly technical approach to who is a person aggrieved."**

48. In the premises the preliminary objection fails and is dismissed with costs.

49. It is so ordered.

Dated at Nairobi this 22nd day of May, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Orero for the Applicant

Miss Ndong for the Respondent

CA Gitonga