REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 232 OF 2017

IN THE MATTER OF AN APPLICATION BY PETER MAKAU WAMBUA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF ARTICLES 10, 19, 21, 22, 23, 28, 38, 47, 48, 165 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL HIGH COURT PRACTICE AND PROCEDURE RULES 2006 AS READ WITH SECTION 19 OF THE TRANSITIONAL CLAUSES

AND

CONSEQUENTIAL PROVISIONS OF THE CONSTITUTION

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT 2011 LAWS OF KENYA

AND

IN THE MATER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015 LAWS OF KENYA

AND

IN THE MATTER OF THE PARTY CONSTITUTION OF WIPER DEMOCRATIC MOVEMENT KENYA 2016

AND

IN THE MATTER OF THE AMENDED PARTY ELECTION AND NOMINATION RULES 2ND MARCH 2017

AND

IN THE MATTER OF THE DOCTRINE OF ULTRA VIRES

AND

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION

BETWEEN

PETER MAKAU WAMBUA……….........……...………..………….APPLICANT

AND

THE POLITICAL PARTIES

DISPUTE TRIBUNAL……........………………..……...……….….1ST RESPONDENT

WIPER DEMOCRATIC MOVEMENT-KENYA...................2ND RESPONDENT

NATIONAL ELECTIONS BOARD OF WIPER

DEMOCRATIC MOVEMENT………………….......……........3RD RESPONDENT

HON. STEPHEN MUTINDA MULE……...........……....INTERESTED PARTY

RULING

Introduction

1. By a chamber summons dated 11th May, 2017 the applicant herein, **Peter Makau Wambua,** substantially seeks leave to commence judicial review proceedings in order to challenge the decision of the National Elections Board of Wiper Democratic Movement (hereinafter referred to as “the Board”), an order of prohibition directed to e Wiper Democratic Movement Kenya (hereinafter referred to as “the Party”) and mandamus compelling the Party to conduct fresh nominations for Matungulu Constituency and to compel the Party to include the applicant’s name as a contestant in the nomination process for the said Constituency.

2. The applicant also seeks an order that the leave do operate as a stay.

3. According to the applicant, he is a parliamentary aspirant of Matungulu Constituency of Machakos County. On 14th February 2017 he applied to participate in the nomination process of the said Party and paid a non-refundable fee of two Hundred Thousand Kenya Shillings and adhered to all requirements for nomination. Pursuant to the Party’s chairperson’s directions he proceeded to check and inquire if his nomination papers were all in order.

4. The applicant averred that on the 13th April 2017 he received an SMS message informing him to pick a document from Wiper Democratic Movement offices wherein he was issued with a letter by one **Roy Ombasa** stating that he had failed to meet the criteria for vetting of aspirants and the nomination of the interested party herein, the sitting Member of Parliament for the said Constituency was duly accepted. Vide a letter dated 18th April 2017, the applicant through his then advocates Kingoo-Wanjau & Co. Advocated expressed his grievance but to date has not received any response thereto. He then lodged a complaint in the Political Parties Dispute Tribunal established under Section 39 of the ***Political Parties Act 2011*** which is a quasi-judicial body mandated to hear disputes arising from political parties’ activities but his matter was disallowed.

5. Based on the applicant's legal counsel, he contended that where reasons have not been given in a decision, the tribunal has no option but to quash the decision made by the 3rd Respondent in order to prevent after event reconstruction of reasons. He therefore asserted that the manner in which the 1st Respondent arrived at its decision was flawed and lacks merit in law and that as a result thereof, his constituents and himself have been denied their political and democratic right to participate in a free, fair and democratic election enshrined in the Constitution of the republic of Kenya

6. I have considered the issues raised by the applicant in the Chamber Summons, the Statement, the Verifying Affidavit as well as the oral submissions presented by **Dr Khaminwa**, his learned counsel. Section 39(1) of the ***Political Parties Act*** (hereinafter referred to as "the Act") establishes the Political Parties Disputes Tribunal (hereinafter referred to as "the Tribunal") whose membership serve on a part-time basis. Section 40 of the Act deals with the jurisdiction of the said Tribunal and 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;***
>
> ***(fa) 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.***

7. Section 41 of the Act which deals with determination of disputes provides as follows:

> ***(1) The Tribunal shall determine any dispute before it expeditiously, but in any case shall determine a dispute within a period of three months from the date the dispute is lodged.***
>
> ***(2) An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court.***
>
> ***(3) A decision of the Tribunal shall be enforced in the same manner as a decision of a Magistrates Court.***
>
> ***(3A) The Chief Justice may, in consultation with the Tribunal, prescribe regulations for determination of disputes under this section.***
>
> ***(4) The Tribunal shall apply the rules of evidence and procedure under the Evidence Act (Cap.80) and the Civil Procedure Act (Cap. 75), with the necessary modifications, while ensuring that its proceedings do not give undue regard to procedural technicalities.***

8. It is therefore clear that a person aggrieved by the decision made by the Tribunal is entitled to appeal to the High Court on both law and facts. In this case the applicant has opted to approach this Court by way of judicial review instead. His basis for doing so is that no reasons were given to him for barring him from contesting under the Party Ticket for the subject Constituency despite having fulfilled all the requirements.

9. In his submissions **Dr Khaminwa**, learned counsel for the applicant, while appreciating that the Chief Justice has set up a bench tasked with hearing and determination of matters arising from disputes relating to party primaries, nevertheless asserted that this Court has the powers conferred upon it by the Constitution to entertain this dispute.

10. The issue that this Court has to deal with arising from that submission is the scope of the powers exercisable by that particular panel of judges and whether this Court is barred from entertaining any disputes arising from party primaries.

11. This Court while dealing with the jurisdiction of the High Court in election petitions in **Gideon Mwangangi Wambua & Another vs. Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR** expressed itself *inter alia* as follows:

> **"There is no Court established under Article 165 of the Constitution known as "Election Court". The term "Election Court" however appears in section 2 of the Act under which the term "election court" is defined to mean the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163 (3) (*a*) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3) (*a*) of the Constitution… It therefore follows that even under the Act Election Court refers to the Supreme Court and the High Court exercising their jurisdiction under the Constitution respectively. In the absence of the limitation placed upon the High Court under Article 165 of the Constitution with respect to the handling of Election Petitions save for petitions arising from Presidential Election petitions, no limitation can be placed upon the jurisdiction of any High Court judge to hear and determine Election Petitions whose jurisdiction is conferred upon the High Court to determine. In my view the Gazettement of judges to hear election petitions is meant for administrative purposes and to ensure that election petitions are determined within the time stipulated within the Constitution. Whereas the hearing of an election petition by a Judge who is not gazetted may invite disciplinary action in my view the mere fact that a Judge who hears a petition is not gazetted to do so does not deprive him or her of the jurisdiction conferred upon him or her under the Constitution."**

12. In arriving at that decision the Court relied on the dissenting decision of **Ibrahim, J** (as he then was) in **Kinyanjui vs. Attorney General [2005] 2 KLR 454** in which he expressed himself as follows:

> **"In the absence of any other provisions under the Constitution other than section 65(2) and (3) which empowers the High Court to supervise civil and criminal proceedings before a subordinate court or Court Martial, there is only one High Court of Kenya which is constituted and manned by the Honourable Chief Justice and other judges (not less than 11) as may be prescribed by Parliament. There are no two or more High Courts and we can only have judgements, rulings, orders and other decisions given by a specific judge, or specific judges (Bench or Benches) if empanelled in accordance with the law. The High Court as an institution in an inanimate body that must be run, and activated, managed and controlled by animate organs authorised by law. There are judges who must of essence be human beings and according to the Constitution, the judges of the High court as must of necessity in law be of equal rank and standing. This is because the jurisdiction, authority and powers are conferred on the High Court as a Constitutional institution or body and not on the individual judge. It follows that when exercising and invoking the jurisdiction of the High Court under say section 60 of the Constitution or any other part or provisions of the Constitution or statute, all judges are of equal ranking and standing. Each decision under any provision of the Constitution, statute or other law have the same effect and force of law as it is not the personality, age, excellence or seniority in being appointed to the Bench or the number of judges sitting in a particular case that gives the decision the force of law but the jurisdiction of the High Court given under section 60 which establishes it in the first place. Section 60 is the mother of the High Court of Kenya.......It follows that it does not matter in what "type" of High Court, a judge is sitting when hearing a particular case, be it a (Constitutional Court" under section 84, a "civil" or "criminal court" under section 60 or specific statutes (other**

law), or even an "Election Court" under section 44. It is the jurisdiction of the court as an institution under the Constitution or any other law that is paramount and not the attributes of the judge or judges constituting such a Court or type or nature of proceedings or case at hand at any given time. There is only one High Court under the Constitution with specific jurisdiction conferred on it by section 60(1) of the Constitution. There is no "other or another Court of co-ordinate jurisdiction". There are no two, three or more High Courts. There is only "a High Court" as singularly created and established by the said provision."

13. The above position was affirmed by the Court of Appeal in **Peter Nganga Muiruri vs. Credit Bank Limited & Another Civil Appeal No. 203 of 2006** where the Court expressed itself thus:

"The part of the Constitution which deals with the establishment and jurisdiction of courts in Kenya is headed "The Judicature" and section 60 of the Constitution establishes the High Court with "unlimited original jurisdiction in Civil and Criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law". Although the Constitution stipulates that the jurisdiction of the High court in criminal and civil matters is unlimited, it is circumscribed by rules of practice and procedure to enable the court to function side by side with courts and tribunals subordinate to it and to guide it in the manner of exercising its jurisdiction and powers...Section 64 of the Constitution establishes the Court of Appeal with such "…jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law". On the basis of this provision the Court of Appeal cannot directly entertain an appeal from any other Court other than the High Court...Sections 65 and 66 of the Constitution establish courts subordinate to the High Court which are Magistrate's Courts and Kadhis' Courts, and also Court Martial. Each of these courts exercises such jurisdiction and powers as "may be conferred on it by law"...There is no provision in the Constitution, which establishes what, is referred to as Constitutional Court. In Kenya we have a division of the High Court at Nairobi referred to as "Constitutional and Judicial Review" Division which is not an independent Court by merely a division of the High Court. The wording of section 67 of the Constitution which donates the power to the High Court to deal with questions of interpretation of sections of the Constitution or parts thereof does not talk about a Constitutional Court but talks about the High Court...With regard to the protective provisions section 84 of the Constitution, it does not in any of its sub-sections talk about the Constitutional Court but instead talks about an application being made to the High Court...The Hon. The Chief Justice must have been aware that no such Court is established under the Constitution and that would explain why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a constitutional court as opposed to creating a division of the High Court...Any single Judge of the High Court in this Country has the jurisdiction and power to handle a constitutional question. The fact that a Constitutional Division was established did not by such establishment create a court superior to a single Judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision, emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision, is at best a nullity. Jurisdiction is everything and without it, a court has no power to make one more step...courts must follow the law as it is currently...The appellant by filing the Originating Summons which was referred to the Chief Justice and also the motion before Nyamu J. was challenging the doctrine of finality. There is neither Constitutional nor Statutory authority to support that approach. Therefore, neither the Chief Justice, nor Nyamu J. had the jurisdiction to entertain the appellant's application to the extent that he was seeking to challenge a decision of a court of competent jurisdiction against which no Constitutional or Statutory right of appeal or review was available. This matter had been concluded a long time back and attempts to revive it can only have one outcome – failure".

14. This Court therefore held that:

> **"Article 165(3)(d)(i) of the Constitution confers upon the High Court the power to determine the question whether any law is inconsistent with or in contravention of this Constitution. That provision has no distinction between the High Court in the exercise of its jurisdiction in election disputes and in other cases. It follows that this Court is properly entitled to hear and determine the Constitutionality of a provision of an Act of Parliament."**

15. Therefore since the ***Political Parties Act*** simply confers upon the High Court the power to hear appeals arising from the decision of the Tribunal, it cannot be argued that only the Judges appointed by the Chief Justice are seized of the jurisdiction to hear and determine such disputes. Under Article 165(3) of the Constitution the Supreme Law of the land the High Court has unlimited original jurisdiction in criminal and civil matters and this jurisdiction is only subject to Article 165(5) of the Constitution which limits the High Court's jurisdiction in matters reserved for the exclusive jurisdiction of the Supreme Court under the Constitution or matters falling within the jurisdiction of the Employment and Labour Relations Court and the Environment and Land Court as contemplated under Article 162(2) of the Constitution. In other words the jurisdiction of the High Court can only be conferred or limited by or under the Constitution and the ***High Court (Organisation and Administration) Act, 2015,*** as its preamble states is just ***An Act of Parliament to give effect to Article 165(1) (a) and (b) of the Constitution; to provide for the organization and administration of the High Court of Kenya and for connected purposes.*** It is not the legal instrument that confers jurisdiction on the High Court.

16. However section 11(1) of the ***High Court (Organisation and Administration) Act, 2015***, provides as follows:

> ***For purposes of promoting effectiveness and efficiency in the administration of justice and promoting judicial performance, the Chief Justice may, where the workload and the number of judges in a station permit, establish any of the following divisions—***
>
> ***(a) the Family and Children Division;***
>
> ***(b) the Commercial Division;***
>
> ***(c) the Admiralty Division;***
>
> ***(d) the Civil Division;***
>
> ***(e) the Criminal Division;***
>
> ***(f) the Constitutional and Human Rights Division;***
>
> ***(g) the Judicial Review Division; and***
>
> ***(h) any other division as the Chief Justice may, on the advice of the Principal Judge determine.***

17. This provision is in tandem with section 5(2)(c) of the ***Judicial Service Act*** which empowers the Chief Justice to exercise general direction and control over the Judiciary. It is therefore my view that it is not objectionable for the Chief Justice to deploy particular judges to deal with urgent matters such as matters relating to electoral process whose timelines are strict in order to promote ***<u>effectiveness and efficiency in the administration of justice and judicial performance</u>*** as dictated under section 11(1) of the ***High Court (Organisation and Administration) Act, 2015.*** That power is however purely administrative and does not restrict the power of a High Court Judge in the exercise of his jurisdiction conferred by and under the Constitution. To paraphrase this Court's decision in **<u>Gideon Mwangangi Wambua & Another vs. Independent Electoral And Boundaries Commission & 2 Others</u>** (supra) in the absence of the limitation placed upon the High Court under Article 165 of the Constitution as read with section 41(2) of the ***Political Parties Act*** with respect to the handling of party primaries disputes, no limitation can be placed upon the jurisdiction of any High Court judge to hear and determine such disputes whose jurisdiction is conferred upon the High Court to determine. In my view the empanelling of

judges to hear such disputes is meant for administrative purposes and to ensure that the resolution of such disputes which by their very nature are time bound are determined within the time stipulated within the law. Whereas it may well be, and I am not making a decision on this point, that the hearing of such disputes by a Judge who is not administratively mandated to hear the same in stations where there in fact exist judges so mandated, may arguably invite disciplinary action, in my view the mere fact that a Judge who hears such a dispute is not so administratively mandated to do so does not deprive him or her of the jurisdiction conferred upon him or her under the Constitution and his or her decision cannot be faulted simply because of the transgression of the administrative directive.

18. It is therefore my view that this Court is properly seized of the jurisdiction to hear and determine the matter herein.

19. It is however, one thing to contend that the Court has no jurisdiction and another to say that the procedure invoked by the supplicant for the orders in question is incorrect. It is trite law that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. That position is nolonger just a policy issue but has acquired statutory underpinning. Section 9(2) of the ***Fair Administrative Action Act***, No. 4 of 2015 on the other hand provides:

> ***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.***

20. Subsection (3) thereof provides:

> ***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).***

21. In this case the applicant has an appellate remedy to the High Court both on points of law and fact. In this case, it is contended that there was failure on the part of the Respondents to furnish the applicant with the reasons for its decision. The requirement to furnish a party adversely affected by a decision is both Constitutional and statutory pursuant to Article 47 of the Constitution as well as the ***Fair Administrative Action Act***. It is therefore both a legal and factual matter that may well be dealt with by an appellate tribunal. In **International Centre for Policy and Conflict and 5 Others -vs- The Hon. Attorney-General & 4 others [2013] eKLR** the Court recognized the need to let relevant statutory bodies deal with matters within their mandate fully before interfering in manner sought in these proceedings by holding that a Court of law:

> **"…must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act...Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted…"**

22. In my view for the purposes of an appeal from the decision of the Political Parties Dispute Tribunal, the appellate Tribunal is the High Court. In **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013 it was held that:

> **"…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."

23. 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.

24. It bears repetition that it is now a cardinal principle, a principle underpinned by statute, vide the provisions of section 9 of the ***Fair Administrative Action Act,*** that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy. See **Re Preston [1985] AC 835 at 825D** and **R (Regina) vs. Dudsheath**, *ex parte*, **Meredith [1950] 2 ALL E.R. 741.**

25. I am also mindful of the decision of this Court in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

"**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

26. Therefore where a party sets out to challenge a decision but ignores the procedure set out for doing so, notwithstanding the fact the Court has jurisdiction to determine the matter, the court may properly decline entertain the same since to do so would amount to abetting abuse of the process of the Court. As was held in **Chelashaw vs. Attorney General & Another [2005] 1 EA 33,** without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law.

27. This Court however appreciates that under subsection (4) of section 9 of the ***Fair Administrative Action Act***, it is provided that:

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.

28. This Court however expressed itself on that provision in **Republic vs. Non-Governmental Organisations Co-Ordinations Board & 4 Others Ex Parte International NGO Safety Organisation (INSO) [2016] eKLR** as hereunder:

"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."

29. In this case there is no averment that the appellate procedure provided under the Act is less convenient, less beneficial or otherwise less appropriate. In my view that procedure is more beneficial since its ambit is wider than judicial review proceedings.

30. The requirement for leave was explained by a three judge bench comprising **Bosire, Mbogholi-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321, Nyamu, J** (as he then was) held that 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 and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**

31. **Waki, J** (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

> **"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived… Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".**

32. This position was confirmed by the Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

33. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

> **"If he [the Applicant] fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers…"**

34. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, the Court stated:

> **"Application for leave to apply for orders of judicial review are normally *ex parte* and such an application does restrict the Court to threshold issues namely whether the applicant has an**

arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him…. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of *John vs. Rees [1970] Ch 345 at 402.* In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."

35. *This position was appreciated by **Majanja, J** in Judicial Review Misc. Civil Appl. No. 139 of 2014 between **Vania Investments Pool Limited and Capital Markets Authority & Others** in which the learned Judge expressed himself as follows:*

"I do not read the Court of Appeal to be saying that the Court should not have regard the facts of the case or have at best a cursory glance at the arguments. As I stated in Oceanfreight Transport Company Ltd vs. Purity Gathoni and Another Nairobi HC Misc. Appl JR No. 249 of 2011 [2014] eKLR, "In my view, the reference to an "arguable case" in W'Njuguna's Case is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view." The duty of the court to consider the facts is not lessened by the mere conclusion that the case if frivolous, or that leave is underserved by examining the facts...Indeed, if leave was to be considered a matter of right then the purpose for which leave is required would be rendered otiose."

36. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. The grant of leave being an exercise of discretion the conduct of the applicant must also be considered. Also the fact that the applicant has not exhausted alternative legal remedies which are more convenient, appropriate and effective must be considered.

37. In my view, a *prima facie* case cannot be said to have been established where the applicant is guilty of procedural missteps by not seeking the available alternative remedies. Therefore whereas I hold that this Court has jurisdiction to entertain challenges to decisions of the Political Parties Disputes Tribunal, I hold that the failure to resort to the available appellate process renders this application incompetent.

38. In the premises the application is struck out but with no order as to costs.

Dated at Nairobi this 16th day of May, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Dr Khaminwa for the Applicant