



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW MISC. APPLICATION NO. 301 OF 2017**

**IN THE MATTER OF AN APPLICATION BY THE HON. WAVINYA NDETI FOR ORDERS OF CERTIORARI, PROHIBITION, AND MANDAMUS**

**AND**

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

**IN THE MATTER OF THE ELECTIONS ACT**

**AND**

**IN THE MATTER OF THE POLITICAL PARTIES ACT**

**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 53 OF THE CIVIL PROCEDURE RULES, 2010**

**BETWEEN**

**REPUBLIC ……..……. APPLICANT**

**AND**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION……...……. RESPONDENT**

**WIPER MOVEMENT POLITICAL PARTY.....1ST INTERESTED PARTY**

**REGISTRAR OF POLITICAL PARTIES.....2ND INTERESTED PARTY**

**KYALO PETER KYULI……..……..3RD INTERESTED PARTY**

**HON. WAVINYA NDETI…….……EX PARTE APPLICANT**

**JUDGEMENT**

**Introduction**

**1. Hon. Wavinya Ndeti**, the ex parte applicant herein, alleges in these proceedings that she is the **Wiper Movement Political Party** nominee for the position of Machakos gubernatorial elections scheduled to be held on the 8th August, 2017.

2. The Respondent herein, the **Independent Electoral and Boundaries Commission** (hereinafter referred to as "the Commission") on the other hand, is a Constitutional Commission established under Article 88(1) of the Constitution responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament. It is tasked with amongst others the responsibility to oversee fair, free, transparent and democratic elections to public office in the Republic of Kenya.

3. The 1st interested party herein, **Wiper Movement Political Party** (hereinafter referred to as "Wiper") is described as a registered political party within the Republic of Kenya and also the political party to which the ex parte applicant belong.

4. The 2nd interested party is the **Registrar of Political Parties** (hereinafter referred to as "the Registrar"), and according to the petition is vested with amongst others the statutory duty to register political parties and is also one of the custodians of membership of records of membership to political parties.

5. The 3rd interested party, **Kyalo Peter Kyuli**, is described as an adult male of sound mind who lodged a complaint against the ex parte applicant before the Respondent's Elections tribunal otherwise known the Independent Electoral and Boundaries Commission Resolution Committee (hereinafter referred to as "the Committee")

**Applicant's Case**

6. According to the ex parte applicant, she is the Wiper Movement Political Party nominee for the position of Machakos County gubernatorial elections scheduled to be held on the 8th August, 2017. The applicant averred that the Respondent in a decision made on the 8th June, 2017 wrongfully stated that the applicant belong to two political parties and hence cannot be a Wiper Movement Political Party nominee for Machakos gubernatorial elections.

7. According to the ex parte applicant, she was previously a member of **Chama Cha Uzalendo Political Party** and resigned from the said political party on the 5th April, 2017 and joined **Wiper Movement Political Party** when the **Chama Cha Uzalendo Political Party** (hereinafter referred to as CCU) entered into a coalition agreement with the Wiper Movement political party.

8. It was disclosed by the applicant that prior to the proceedings before the Respondent, there had been proceedings against the Registrar of Political Parties being JR No. 67 of 2017 in which the CCU party sought to compel the Registrar of Political Parties to gazette list of officials of the said political party and that she resigned before the said matter could be determined and that she is presently a registered member of the **Wiper Movement Political Party**, a fact confirmed by the records from the **Wiper Movement Political Party** and the **Registrar of Political Parties Offices**.

9. It was therefore averred by the ex parte applicant that it was erroneous for the Respondent to assert that she belong to two political parties when it is clear from all the records in place, that she was no longer a member of the Chama Cha Uzalendo Political Party but a member of the Wiper Movement Political Party.

10. It was therefore contended that the process leading to the impugned decision was illegal, procedurally unfair and violated the basic tenets of the rule of law, principles of natural justice and the right to a fair hearing.

11. She further averred based on information from her Counsel that her said Counsel was required to appear before the IEBC tribunal at 9 am at the same time he was appearing before the Court of Appeal in Civil Appeal No. 105 of 2017 and he requested that the Tribunal gives a time allocation for 12pm but the Tribunal refused that request and proceeded to hear the matter thereby hindering her right to a fair hearing.

12. According to the ex parte applicant, the Political Parties Disputes Tribunal (hereinafter referred to as "the PPDT" or "the Tribunal") in complaint No. 40 of 2017 did find that she was a bona fide member of the **Wiper Movement Political Party** which decision has never been appealed nor challenged and therefore for the Respondent to proceed to consider that question is contrary to the principle of *res judicata* and a breach of the ***Civil Procedure Act*** and the Constitution. It was therefore contended that in the circumstances of this case, the Respondent was wrong in misinterpreting and misconstruing the proceedings of the said Order in coming up with its decision.

13. According to the ex parte applicant the decision in Misc. Appl. No. 67 of 2017 did not in any way stop her from resigning from the CCU and in the event that the Registrar complied with the Order in JR No. 67 of 2017 and included the Ex Parte Applicant's name in the list of officials, the fact of the Ex parte Applicant having resigned from the CCU Party would be a basis for one to object to her registration as an official of the CCU.

14. It was the ex parte applicant's legitimate expectation that the Respondent shall at all times be guided by the laws of the Republic in executing its mandate and that it shall respect and uphold the principles enshrined under the constitution, statutory law and the Rule of Law. However the Respondent has in the present circumstances acted unreasonably, irrationally, arbitrarily and in blatant disregard of the law and the principles of the constitution which act constitutes a threat to the rights and freedoms of a substantial portion of the people of Machakos County to elect a leader of their choice in fee fair and democratic elections.

15. The ex parte applicant therefore asserted that the impugned decision ought to be quashed for being illegal, unreasonable and contrary to express provisions of the law and it aims to undermine the exercise of the free franchise of the voter in a free, fair and impartial manner that accord with democratic principles.

16. In response to the replying affidavits filed in opposition to her application, the ex parte applicant deposed that the issues raised in the 3rd Interested Party's Affidavit herein are issues that ought to have been canvassed and raised at the appropriate forum and not before this Court. In her view, the proceedings aforesaid in Misc App. 480 of 2015 do not in any way confer party membership status to the Applicant herein and they are not in any way a confirmation that the Applicant is a member of the CCU. Similarly, the issues in Election Petition No. 23 of 2017 does not in any way confer any party membership status to her and the same do not in any way address the question of her membership to any political party.

17. It was the ex parte applicant's case that the 3rd Interested Party cannot purport to challenge her nomination as a candidate for the Machakos Gubernatorial position in the present proceedings and as such the allegations in his affidavits are mere afterthoughts and are matters which have since been heard and determined by a Court of Competent jurisdiction. Accordingly, this Court was urged to strike out the frivolous and vexatious averments contained in the 3rd Interested Party's affidavit herein as the same are merely scandalous as the 3rd Interested Party is merely seeking to ventilate issues that he had an opportunity to canvass at the Political Parties Dispute Tribunal which opportunity he never utilized.

18. It was the ex parte applicant's case that the 3rd Interested Party is suppressing her lawful political

activities which action is contrary to section 14(8) of the ***Political Parties Act*** thus occasioning an infringement to her political rights as guaranteed under Article 38 of the Constitution.

19. Accordingly, this Court was urged to allow the Application herein and grant the orders sought.

20. In the submissions made on behalf of the applicant by **Mr Nzamba Kitonga**, learned senior counsel and **Mr Willis Otieno**, on behalf of the applicant, it was contended that since the decision under challenge in these proceedings is the decision of the IEBC, it is akin to challenging the decision of a court. To **Mr Nzamba Kitonga**, in most cases, such Tribunal do not respond to the applications because they have no interest in the outcome of the proceedings. In this case since the ex parte applicant is still a candidate and the IEBC is the umpire or arbiter, it would be perverse if the IEBC took an unduly antagonistic role as to make the applicant apprehensive of the IEBC's neutrality. The basis for this submission was that reference was made to material which was not produced before the Committee.

21. It was contended that since the matter before the Tribunal was not one dealing with nominations but membership of a political party the IEBC Committee had no jurisdiction to deal with the matter. It was submitted that if the 3rd interested party had an issue with the ex parte applicant's membership, he ought to have commenced the proceedings before the Party's Internal Dispute Resolution Mechanism instead of springing the issue for the first time before the Committee. It was this issue, according to learned counsel that makes the matter one for judicial review.

22. It was contended that the Respondent acted unreasonably and contrary to the provisions of the ***Political Parties Act*** on the question of membership to a political party; while exercising a quasi-judicial role the Respondent blatantly ignored the doctrine of res judicata and specifically the decisions of the Political Parties Dispute Tribunal contained in Complaint No. 40 of 2017.

23. It was in addition submitted that the impugned decision herein is irrational and unreasonable; made in bad faith and/or for an improper motive and purpose with an intention to undermine the Applicant's political rights and the free, fair and democratic electoral processes in Machakos County; and the decision was irrational as it was reached without according the Applicant a right to be represented by Counsel of his choice as his request for time allocation was ignored despite informing the Respondent that he was held up at the Court of Appeal in Civil Appeal No. 105 of 2017.

24. It was the applicant's submission that the Respondent while exercising a quasi-judicial role failed and acted illegally and unreasonably by failing to appreciate the doctrine of *res judicata*. The Respondent acted illegally and contrary to the law by purporting to sit and hear a matter that had already been heard and determined by a Court of competent jurisdiction being the Political Parties Dispute Tribunal. It is uncontested that the question of the membership of the Applicant was canvassed in Complaint No. 40 of 2017 wherein a Judgment was passed and the question was settled. It is also undisputed that that decision was never appealed against and neither has it until now been set aside and/or vacated. The Respondent therefore acted unreasonably and irrationally while opening a matter that had already been heard and determined and purporting to make a finding on the same issue.

25. By re-opening issues that had already been heard and determined, the Respondent subjected the Applicant to double jeopardy and condemned her which action amounted to an infringement of her right to access justice as guaranteed under Article 48 of the Constitution; the right to equal protection of the law as guaranteed under Article 27 (1) of the Constitution; and the right to a fair hearing as guaranteed under Article 50 of the Constitution.

26. It was submitted that the Complaints before the Political Parties Dispute Tribunal challenging the Applicant's nomination was not a private litigation suit but a public interest matter as it was a challenge to the nomination exercise conducted by the Party. As such, the law on res judicata as espoused under explanation (6) of section 7 of the ***Civil Procedure Act*** is to the effect that where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

27. It was therefore submitted that the issues that were raised before the Respondent fell within the issues before the Political Parties Dispute Tribunal as the same questioned the validity of the nomination of the Applicant herein and as such, the Respondent acted illegally; unreasonably and irrationally by blatantly ignoring the doctrine of *res judicata* as provided in section 7 of the ***Civil Procedure Act*** whose aim is to bar frivolous suits and vexatious and stale claims and reference was made to **Okiya Omtatah Okoiti vs. Communications Authority of Kenya & 14 Others, Petition No. 59 of 2015, wherein the Court expressed the view at paragraph that:**

> **"The rationale behind the provisions of Section 7 above entrenching the doctrine of *res judicata* is that if the controversy in issue is finally settled, determined or decided by a competent Court, it cannot be re-opened. The doctrine is therefore based on two principles; that there must be an end to litigation and that a party should not be vexed twice over the same cause."**

28. In was contended that it was absurd therefore for the 3rd Interested Party herein to assert in his replying affidavit that the Complaint No. 40 of 2017 was wrongly determined and that the same ought not to be relied upon since the same has never been challenged. As such the 3rd Interested Party cannot purport to sneak in an appeal and fault the Honourable Political Parties Dispute Tribunal's decision as a basis for challenging the Applicant's nomination. In this respect the applicant relied on **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** as was cited with approval in **Gideon Mwangangi Wambua vs. Independent Electoral And Boundaries Commission & 2 Others, Election Petition Number 4 of 2013.**

29. It was submitted that it is undisputed that the questions challenging the nomination of the Applicant was raised before the Tribunal and the issues that were raised touched on the whole nomination process. As such, the doctrine of *res judicata* also operates as a bar to prevent litigants from litigating in bits and pieces and the applicant relied on explanation (4) of section 7 of the ***Civil Procedure Act*** is to the effect that:

***Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit***.

30. It was submitted that the doctrine of *res judicata* has as well been upheld to bar parties from litigating in bits and running from one forum to another litigating and seeking the same remedy while giving their disputes a cosmetic uplift and the support for this position was sought in **Henry Wanyama Khaemba vs. Standard Chartered Bank of Kenya Limited, Civil Case 560 of 2006**, where it was stated thus:

> **"In my humble view parties must go to court with all their causes of action and must sue all the persons they ought to sue. The doctrine of res judicata prohibits parties by suing in bits and pieces or giving a subsequent case a legal face lift by removing parties who are part of the earlier dispute and/or case filed and determined…In any case the three other defendants left out in this suit are not essential to the determination of the suit. The important thing is that in both suits the plaintiff intends to stop and/or injunct the defendant from realization of the security. In HCCC 958 of 2001 Milimani Commercial Court Nairobi - George Omondi vs National Bank of Kenya Limited and 2 others Ringera J as he was then held; "I accept the submissions by counsel for the defendants that the doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalments". It is fundamental precedent to the plea of res judicata that the previous suit should have been heard and determined by a court of competent jurisdiction."**

31. The applicant's position was that the Respondent acted illegally, irrationally, and unreasonably by

holding that the Applicant is a member of two political parties. To her, section 14 of the ***Political Parties Act*** is clear on the question of when resignation from a political party takes effect.

32. In the applicant's view, a plain reading of the above cited provision is clear on the question of membership to political parties; resignation and the advancements of the interests of the common objectives of coalitions. It was submitted that the question of when a person is deemed to have resigned from a political party and when the resignation takes effect has been the subject of judicial pronouncement in several instances and the applicant relied on **Lenaola, J's** decision in **William Omondi vs. Independent Electoral & Boundaries Commission & 2 Others, Petition No. 288 of 2014, and submitted that the Registrar of Political Parties is to effect changes to the list of political parties once such notification of resignation has been placed before it and stated as follows:**

**33. To the applicant, the question of when resignation takes effect was as well addressed by the Court in Caroli Omondi vs. Registrar of Political Parties & Another, Petition No. 195 of 2017.**

**34. It was submitted that as a custodian of the list of the political parties, once the Registrar is notified of such resignation, she is under an obligation to effect the changes in the list of political parties and it is crystal clear that resignation takes effect upon receipt of such letter by the political party. In the circumstances of the present case, the Applicant resigned from the CCU on the 5th of April, 2017 and the same was received by the CCU on the 5th of April, 2017 which party acknowledged receiving the same vide a letter similarly dated 5th April, 2017. The resignation letter was further received by the Registrar of Political Parties on the 6th of April, 2017. It was noted that CCU subsequently served the Office of the Registrar of Political Parties with a Form PP.7 notifying it of the changes in the list of officials of the CCU, in which the Applicant was being removed as an official of the CCU. The said PP.7 Form was received by the office of the Registrar on the 24th of April, 2017. Accordingly, as per the search conducted on the portal of the members of political parties, it is clear that as at 6th April, 2017, the Applicant herein had duly resigned from the CCU and was a bona fide member of the Wiper Democratic Movement-Kenya.**

**35. The applicant contended that it cannot be said that her resignation has no effect based on the allegations that the Applicant was pushing for the interests of the CCU. To her the 3rd Interested Party's assertions that the Applicant resigned and joined Wiper in body but her mind and soul remained in CCU are misplaced and unfounded since section 14(6) makes it explicit that subsection (5)(d) and (e) do not apply to a member of a political party in relation to the common objective of a coalition. Based on the foregoing, it was submitted that the Respondent acted unreasonably and irrationally by purporting to hold that the Applicant is a member of two political parties.**

**36. With respect to the effect of the decision in JR No. 67 of 2017 - Chama Cha Uzalendo vs. Registrar of Political Parties, in which the Registrar of political parties was ordered and directed to gazette the list of proposed officials of the CCU, it was submitted that the mere fact that the Applicant was to be gazetted as an official of the party did not in any way confer her with the political party membership status of the CCU.**

**37. As regards the contention that** the present proceedings are incompetent as they seek not seeking judicial review but merits review and that the Applicant is merely not questioning the process that led to the impugned decision herein, it was submitted that the ambit of judicial review proceedings is broad and the applicant relied on **Republic vs. County Government of Kiambu Ex Parte Robert Gakuru & Another, Judicial Review Case No. 434 of 2015, Republic vs. Public Procurement Administrative Review Board & 3 Others Ex-Parte Olive Telecommunication Pvt Limited, Judicial Review Application No. 106 of 2014 and Republic vs. Director of Survey & 2 Others Ex-Parte Sayani Investments Limited, Miscellaneous Civil Application No. 313 of 2014, and submitted** that the Constitution grants this Honourable Court the powers to hear and determine disputes presented before it in accordance with the law and granting appropriate relief including judicial review orders. In the present cases, it will be noted that the Applicant is aggrieved by the administrative decision by the Respondent. The Applicant had a legitimate expectation that the Respondent shall accord him fair administrative

action under Article 47 of the Constitution and the ***Fair Administrative Action Act***.

38. It was submitted that the grounds of judicial review have been expanded in the above mentioned case where it was correctly pointed out that illegality as one of the grounds of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. In the instant case, the Applicant is aggrieved by the decision of the Respondent which was unlawful and unreasonable amongst others. The impugned decision herein is marred with illegality and as such the present suit is well before this Honourable Court for it to provide a check and a balance on the decision of the Respondent, being a public body. Additionally, the Applicant has a right pursuant to Article 50(1) of the Constitution to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

39. It was therefore the applicant's case that the present matter is well before this Honourable Court and the orders sought herein are appropriate. The Court was urged to consider the doctrine of proportionality and the fact that substantive justice dictates that the Court looks at the greater public interest and good than the use of technical and procedural aspects. To the applicant, it is in the greater interest of the people of Machakos County to have a candidate of their choice. The people are desirous to participate in a free and fair election and to choose a candidate of their choice.

40. There were other issues which were raised at the time of the oral highlights which as I will show elsewhere in this judgement were irrelevant as they were not the basis of the impugned decision.

41. The ex parte applicant therefore through her Notice of Motion dated 12th June, 2017 sought the following orders:

> **a) AN ORDER OF CERTIORARI do issue to remove and bring to this Honourable court for purposes of it being quashed the decision of the Respondent's Tribunal made on the 8th June 2017 in Complaint Number 79 of 2017.**
>
> **b) AN ORDER OF PROHIBITION do issue to prohibit the Respondent from implementing the impugned decision made on the 8th June 2017 in Complaint Number 79 of 2017.**
>
> **c) AN ORDER OF MANDAMUS do issue to compel the Respondent to include the name of the Ex Parte Applicant as the Wiper Movement Political Party nominee for Machakos County gubernatorial elections scheduled to be held on the 8th August 2017.**
>
> **d) SUCH OTHER ORDERS and reliefs as the Honourable Court may deem appropriate in the circumstances.**
>
> **e) COSTS of these proceedings be provided for.**

**Respondent's Case**

42. The application was opposed by the Respondent Commission.

43. According to the Commission, the decision by the respondents committee which is the subject of these proceedings was delivered on 8th June 2017.

44. It was averred that during the hearing by the Committee, the applicant herein was duly represented by her Advocate on record who duly proceeded with the hearing as evidenced by the proceedings referred to by the applicant thus it is not true as alleged by the applicant that her Advocate was denied a chance and or opportunity to be heard. T was the Commission's case that both the applicant herein and the 3rd interested party were given a chance where they ventilated their case and the committee upon consideration of the evidence on record came up with a sound decision which is devoid of any illegality,

prejudice and/or unconstitutionality as alleged by the applicant.

45. It was contended that in arriving at its decision, the respondent's committee considered all the material evidence and documents placed before it and that all the evidence adduced during the trial by the parties was considered and analysed as per the law by the respondents committee and the evidence clearly demonstrates that the applicant was at the time of her purported nomination by Wiper Party, a member of both Chama Cha Uzalendo Party and Wiper Democratic Movement Kenya Party and thus the respondents committee decision was well grounded upon the evidence on record.

46. In the Commission's view, the allegation by the applicant that the respondents committee dealt with a matter which is *res judicata* by virtue of the decision in The Political Parties Dispute Tribunal complaint number 40 of 2017 does not hold any water for the reasons which can be deduced from the respondents documents and in particular that the tribunal only dealt with the issue of the applicants membership in Wiper Party and not whether or not she belonged to two political parties at the time of her nomination and/or whether she had party hopped within the stipulated time.

47. It was further averred that on the 27th March, 2017 the Commission received from the Wiper Democratic Movement –Kenya a cover letter dated 27th March, 2017 together with a DVD disk containing the list of the members of the Wiper Democratic Movement- Kenya which list did not have the name of the Ex-parte Applicant.

It was submitted on behalf of the Respondent by **Mr Kimani Muhoro** and **Mr Nyamodi** that the applicant had not exhibited the record of the proceedings before the Committee as ought to have been their duty. It was submitted that had the full record been availed, it would have shown that there was nothing extraneous in the decision. As to the issue of the role of the IEBC in these proceedings, it was submitted that the decision being challenged is that of the IEBC Committee which is not an umpire. However the IEBC stands by the decision as there was no illegality and as the decision was rational, reasonable and met legitimate expectations.

49. It was contended that due to the ultimate objective, it behoves this Court to consider the applicant's statutory ability to contest or claim the nomination for the candidacy of Wiper Party. The Court was urged to bear in mind the complaint which was that the applicant had party-hopped. It was submitted that membership of political parties is governed by the parties' constitution while resignation therefrom is governed by statute in particular section 14 of the ***Political Parties Act***. The other issue is the law regulation party hopping in sections 28 and 31 of the ***Elections Act***. It was submitted that the two sections were meant to ensure that nominations were carried out from a closed list of members of political parties in order to eradicate party hopping. It was submitted that whereas section 28(1)(a) of the Elections Act allows nomination at least 120 days before theelection date, section 28(1)(b) which deals with nomination of independent candidates provides that such nominations be 45 days from election date.

50. It was submitted that the operating list for the purposes of nominations is the one submitted under section 28 and not the one in the custody of the Registrar of Political Parties and this is meant to give effect to a clear desire of ridding party hopping. Since under section 28(4)(d) IEBC is mandated to regulate the nomination process, it was submitted that the regulations extend the IEBC's ability to determine when a list under section 28(1)(a) is to be submitted by the political parties. In furtherance of that ability the IEBC vide Gazette Notice No. 2694 of 17th March, 2017 gazetted the date of submission of the list as 28th March, 2017.

51. With respect to the right to legal representation it was submitted that the record was clear that the applicant was represented throughout the proceedings therein hence this ground has no merit.

**52. Mr Nyamodi** then took the Court through what he called an odyssey of the ex parte applicant's journey towards her nomination and contended that the ex parte never lawfully resigned from the CCU Party and that if she did so she never lawfully became a member of Wiper Party.

53. With respect to *res judicata* and jurisdiction, it was contended that the issues were never taken up

before the **IEBC** are not issues that can be taken up before this Court these being judicial review proceedings. In any case the decision of the Committee was grounded on the findings by the PPDT that the ex parte applicant's membership of the Wiper Party was based on the coalition agreement which was dated 24th April, 2017 after the period for submitting party list and nominations had lapsed.

54. It was submitted that the most important issue which was however not determined by the Committee was the issue whether the applicant was guilty of party hopping which according to the Respondent was the case.

55. The Respondent therefore urged the Court to dismiss the application with costs.

**3rd Interested Party's Case**

56. The 3rd interested party herein, **Kyalo Peter Kyuli**, similarly opposed the application.

57. According to him, the ex parte Applicant did not terminate her membership with CCU by the time she allegedly defected to the 1st Interested Party. He averred that the Respondent was served with a Decree dated 9th March 2017 from the High Court at Nakuru (sic) in Miscellaneous Application No. 67 of 2017 directing the Registrar of Political Parties to gazette CCU party officials, the ex parte Applicant being one of the officials. Following the said order, the Commission's Chairman, **Hon. Chebukati**, on 26th May 2017 wrote to CCU party indicating the list of Commission's recognised officials, the ex parte Applicant being one of them. According to the 3rd the interested party, in so recognizing the CCU officials, **Hon. Chebukati** was not usurping the role of the Registrar of Political Parties but was relying on the Party list forwarded to Commission by CCU, **Hon. Chebukati** was also complying with several court orders served upon them and which orders are succinctly explained in the letter referred to above.

58. According to the 3rd the interested party, the letter by **Hon. Chebukati** elicited several developments in the cases that were pending between the ex parte Applicant and a section of CCU party members as both sides were fighting for leadership and control of the CCU Party and on 5th May 2017, the CCU wrangling factions recorded consent in Misc. Application No. 480 of 2015 in which the ex parte Applicant eventually consented to relinquish her position in CCU. However, one side of CCU faction has since filed a Notice of Motion seeking stay of execution of the consent order dated 5th May 2017. To the 3rd the interested party, these developments show that the ex parte Applicant is still a member and party leader of CCU.

59. It was averred that the Coalition Agreement between Wiper Democratic Movement and CCU entered into on 24th April 2017 in which at Clause 3.2.4 the ex parte Applicant is clearly described as the Party leader of CCU. Other than the issues in Misc. Application No. 480 of 2015, the 3rd the interested party disclosed that he was aware of the fact that CCU's attempt to change its officials was frustrated until on 11th May 2017 when High Court ruling in **Chama Cha Uzalendo v Registrar of Political Parties Misc. App. No. 67 of 2017** sanctioned the change of CCU's officials by the Registrar of Political Parties and in compliance with High Court order in Misc. Application No. 23 of 2017, CCU on 2nd June 2017 eventually nominated new party signatories who were to take over from the ex parte Applicant.

60. It was therefore the 3rd the interested party's case that these developments show that the ex parte Applicant was still a member of CCU as late as 11th and/or 26th of May 2017 and while still a member of CCU, the ex parte Applicant purportedly defected to Wiper. It was averred that the search the 3rd the interested party conducted online with the Registrar of Political Parties showed the ex parte Applicant is a member of Wiper Party from 6th April 2017 yet the deadline of defection from one political party to another was 5th April 2017.

61. It was the 3rd the interested party's case that these electoral timelines are of great significance to democratization of our nation and are consistent with the spirit and intent of the Constitution in ensuring

preparation for a fair, free, credible, transparent and accountable elections and a purely ethical system of elections. According to the 3rd the interested party, since the ex parte Applicant allegedly defected to Wiper a day after the expiry of the deadline, her defection was irregular and that the ex parte Applicant remained a member of CCU even after the purported defection to Wiper. To him, the letter of resignation from CCU authored by the ex parte Applicant and relied upon by the Applicant is of no effect in the terms of section 14(5)(e) of the ***Political Parties Act, 2011*** which states.

62. It was averred that the ex parte Applicant allegedly resigned on 5th April 2017 but still involved herself in pushing for the agenda and interests of CCU in the coalition agreement CCU made with Wiper on 24th April 2017 in which agreement the 1st Interested Party was pushing for the presidential candidature of its leader, **Kalonzo Musyoka**, under the National Super Alliance Coalition while CCU's interest was to secure the Machakos gubernatorial nomination. It was contended that as per the terms of the coalition agreement, it was agreed the ex parte Applicant would be directly nominated for the position of Governor Machakos County in exchange for CCU's support for **Kalonzo Musyoka**. Accordingly, the ex parte Applicant was pushing for the interests of CCU under the coalition agreement yet she had allegedly resigned two weeks earlier.

63. It was therefore averred that the ex parte Applicant allegedly resigned and joined Wiper in body but her mind and soul remained in CCU as she overtly fought for CCU's interests in various ways. It was therefore contended that the conduct of the ex parte Applicant in relation to the coalition agreement means her resignation from CCU was ineffective in the terms of section 14(5)(e) of the ***Political Parties Act***, 2011 and that the ex parte Applicant's motive/plan/scheme was to spread her political risks in two political parties which is both unethical and undemocratic.

64. To the 3rd the interested party, the decision of Political Parties Disputes Tribunal in Complaint No. 40 of 2017 relied upon by the Applicant wrongly determined that the ex parte Applicant is a *bona fide* member of 1st Interested Party as the Tribunal relied not on statutory timelines but the contents of the Coalition Agreement. In his view, the terms of the agreement between the two political parties do not override statutory provisions and that the ex parte Applicant's membership of two political parties contravenes section 14(4) of the ***Political Parties Act***. He reiterated that the ex parte Applicant is not a *bona fide* member of the Wiper and is hence statutorily disqualified from seeking an elective political seat as she is a member of two political parties.

65. It was therefore his case that the decision of the Respondent to nullify the nomination of the ex parte Applicant on the basis of her dual-party membership was lawful, reasonable, rational, just, fair and proper and it was the Applicant's duty to ensure full compliance with the electoral laws while the Respondent has a duty to ensure that only qualified candidates are cleared to run for elections. The 3rd the interested party urged this court to be slow in interfering with decisions of the Respondent.

66. The 3rd the interested party disclosed that his complaint against the nomination of the ex parte Applicant by Wiper Party to the Respondent had two limbs, namely, one, her dual-party membership status and two, non-compliance with Wiper's Constitution and Nomination Rules. In these proceedings it was contended that the Applicant has not questioned or challenged the second limb of my complaint.

67. It was averred that whereas on 29th May 2017 the Political Parties Disputes Tribunal ordered Wiper to directly nominate a candidate for the position of Machakos Governor in accordance with its party nomination rules and constitution, the ex parte Applicant supposedly became a member of 1st Interested Party on the 6th of April 2017 contrary to Rule 17.3.1 of Wiper Party's Election and Nomination Rules provides in particular for qualification for candidates for Governor and that this position was supported by a member of the 1st Interested Party's National Executive Council, **Johnstone Muthama**, who swore an affidavit confirming that Wiper's National Executive Council has never met to exempt the ex parte Applicant from application of Rule 17.3.1 (iv) of the party nomination rules.

68. It was averred that the Coalition Agreement between CCU and Wiper Party which purported to award

direct nomination to the ex parte Applicant for the position in question was found to be unconscionable and was set aside by the PPDT in a judgment dated 5th May 2017. To the 3rd the interested party, following the invalidation of the clause in the coalition agreement that gave direct nomination to the ex parte Applicant by the PPDT, the 1st Interested Party had to observe its constitution and nomination rules in directly nominating a preferred candidate as was ordered by the PPDT and as the ex parte Applicant was disqualified by Rule 17.3.1 of the Wiper Democratic Movement Kenya Party Election and Nomination Rules she should not have been nominated by Wiper Party.

69. The 3rd the interested party's case was that the Applicant was questioning the merits of the complaint and not the process and that this matter is not a good candidate for judicial review.To him, there was overwhelming evidence produced in support of his case during the trial most of which have been reproduced here hence the decision was proper and reasonable. In his view, based on the contents of the letter written to the Registrar of Political Parties dated 2nd June 2017, among other pieces of evidence tendered at the PPDT, the Respondent was able to establish that the ex parte Applicant was still a member of CCU as late as 30th May 2017. He therefore asserted that the nullification of the nomination of the ex parte Applicant is constitutional as Article 24 of the Constitution allows for reasonable and justifiable limitation of political rights and that the Respondent has an obligation to revoke nominations of statutorily disqualified candidates.

70. It was therefore the 3rd the interested party's case that the Respondent considered only relevant materials put before it and directed itself properly in law and any sensible Tribunal or judicial body would have arrived at the decision and the questions of unreasonableness and irrationality are unfounded.

71. It was contended that the question of dual-party membership of the ex parte Applicant is not res judicata as the dispute before the PPDT where the question was first raised and the one that was before the Respondent herein involved different complainants and also the question before the PPDT was whether or not the ex parte Applicant was a member of 1st Interested Party while the question before the Respondent's Tribunal was on dual-party membership status of the ex parte Applicant. In any event, the decision of Political Parties Disputes Tribunal in Complaint No. 40 of 2017 relied upon by the Applicant was wrongly decided as the Tribunal relied not on statutory timelines but on the contents of the Coalition Agreement referred. The 3rd the interested party denied that the impugned decision was motivated by malice, dishonesty or bad faith as the Respondent was only determining a complaint it is mandated by law to address and the Respondent set up a Tribunal that handled the dispute and had nothing personal against the ex parte Applicant.

72. It was averred that **t**he decision of the Respondent did not interfere with the democratic rights of the people of Machakos County as the said voters can only validly elect qualified candidates.

73. To the 3rd the interested party, the Applicant was not condemned unheard as the Applicant's counsel had sent an advocate to hold his brief and which advocate indicated to court that he had instructions to proceed as can be seen in the proceedings and the said advocate fully and diligently represented the Applicant.It was contended that due time constraints the Respondent is faced with and that it had to expeditiously hear and determine complaints brought before it, section 74 of the ***Elections Act*** requires the Respondent to determine disputes within 10 days from date of lodgement and that the only way the Respondent could conclude cases without compromising candidates' time for campaigns is by declining unwarranted adjournments.

74. The 3rd the interested party asserted that the challenged decision is of greater importance to our political culture as it promotes party discipline and canons of democracy and cannot be said to be unreasonable and unacceptable in an open democratic society.

75. It was therefore averred that the Notice of Motion lacks merit as the Applicant has failed to demonstrate the grounds for judicial review and the Court was urged to dismiss the same with costs.

76. In his submissions, the the 3rd the interested party contended that pronouncement in the judgment in this Judicial Review application will impact greatly on the outcome of the general elections slated for 8th of August 2017 as it is estimated that 16,000 contestants have joined the fray to be elected to be the people's representatives in variously capacities and most, if not all of them who have been gazetted or/cleared have complied with the Constitution, ***Elections Act 2011*** and all other relevant laws that pertain to these elections. It was however contended that the ex parte applicant seeks in pith that she ought to be an exception to the requirement of the law. To the 3rd interested party, the likely consequence if the court were to agree with the ex parte applicant would be to re-open the race for all those that were validly rejected on similar grounds; who would probably run into hundreds and eventually affect the entire elections timelines and calendar! As we shall demonstrate in the preceding paragraphs, the overriding purpose of the ***Elections Act*** and other inter related laws is to guarantee the purity of the elections process and ultimately the expression of the will of the people.

77. According to the 3rd Interested Party, it was questioning the legality of the nomination of the ex parte Applicant based on three grounds:

a. that the ex parte Applicant belongs to two political parties contrary to section 14(4) of the ***Political Parties Act, 2011***.

b. the ex parte Applicant defected to the 1st Interested Party a day after the expiry of the deadline.

c. that the 1st Interested Party did not follow its Constitution and Nomination Rules in nominating the ex parte Applicant for the position of Governor Machakos County.

d.In a nutshell, the complaint was that the ex parte Applicant is statutorily disqualified from contesting the August 8 polls.

78.The complaint, it was averred was brought under Rule 9 of the ***Rules of Procedure on Settlement of Disputes*** (L.N 139/2012). To the 3rd Interested Party the decision was within the law, fair, rational and reasonable and that the Respondent was not motivated by malice but was carrying out its statutory duty to ensure that only qualified persons are cleared to run for elections. It was submitted that the ex parte Applicant's counsel was heard through an advocate as can be seen in the proceedings and that the question of unfair hearing does not arise.

79. He urged the Court to uphold principles of democracy, affirm the importance of party discipline and ethics in electoral system, particularly the rationale behind setting of electoral timelines and the need for political parties to adhere to their rules and to decide the matter in a way that maintains purity of elections.

80. It was submitted that in light of the conspicuous issues of merit raised by the applicant, the application is not a good candidate for judicial review and reliance was placed on **Republic vs. Business Premises Rent Tribunal & 3 Others Ex-Parte Christine Wangari Gachege [2014] eKLR and it was submitted that** that since the Applicant has brought out issues of errors made by the Respondent, specifically, misconstruction of a High Court decision and evidentiary mistakes – whether in regards to weight or principle – the Applicant is only asking the court to re-evaluate the evidence on record, a trap we urge this court not to fall for. It is this tactic, according to the 3rd interested party that forced it to reproduce some parts of the evidence in his Replying Affidavit.

81. Based on **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327** it was submitted that the Respondent did not err, in law or in fact. But if the Applicant thinks otherwise, their next recourse, should have been an appeal and not judicial review since the Respondent, being a statutory Tribunal, could decide a question wrongly or rightly, and an aggrieved person should appeal and not seek judicial review order of certiorari. He also relied on **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR and submitted that** the Applicant is creatively questioning the merits of the decision. To him, if the Applicant is

dissatisfied with the findings of the Tribunal, which essentially was whether or not the ex parte Applicant was a member of two parties – they ought to have appealed and in this respect relied on **M/S Master Power Systems Limited vs. Public Procurement Administrative Review Board & 2 others [2015] eKLR**.

82. It was submitted that the decision made by the Respondent was not illegal and that in arriving at the impugned decision, the Respondent did not in any way directly contravene the ***Political Parties Act, 2011*** as alleged by the Applicant. On the contrary, it is evidently captured in the judgment of the Respondent that the ex parte Applicant was found to have contravened section 14(5) of the ***Political Parties Act, 2011*** hence the Respondent arrived at was a lawful decision as there was overwhelming evidence to demonstrate and prove that the ex parte Applicant belongs to two political parties and was promoting interests of **Chama Cha Uzalendo** which she allegedly resigned from. In the 3rd interested party's view among the pieces of evidence produced were:

a. The search conducted online with the Registrar of Political Parties shows the ex parte Applicant as a member of the 1st Interested Party.

b. The resignation letter allegedly written to CUU was not received by CCU yet section 14 (2) of the ***Political Parties Act, 2011*** says resignation takes effect only after the political party received notice of the same. Section 14 (3) places the duty of notifying the Registrar of Political Parties of the resignation not on the resigning party but the political party itself. CCU, as evidenced on the resignation letter produced, did not receive the resignation and did not communicate it to the Registrar of Political Parties.

c. The ex parte Applicant is still the recognised party leader of Chama Cha Uzalendo (CCU). This is evident by the letter authored by the IEBC Chairman, **Hon. Chebukati** on 26th May 2017 in which **Hon. Chebukati** confirmed that the ex parte Applicant is the party leader of Chama Cha Uzalendo, a registered political party.

d. Numerous court decisions produced in the 3rd Interested Party's Replying Affidavit which clearly shows that the ex parte Applicant was an official of CCU until 11th May 2017 when the High Court sanctioned recognition of new officials.

e. The on-going disputes regarding leadership and control of CCU as evidenced in the court proceedings annexed in the 3rd Interested Party's Replying Affidavit.

f. At clause 3.2.4 of the Coalition Agreement between Wiper Democratic Movement and Chama Cha Uzalendo entered into on 24th April 2017, the ex parte Applicant is clearly described as the Party leader of Chama Cha Uzalendo.

g. The High Court ruling **Chama Cha Uzalendo v Registrar of Political Parties [2017] eKLR** dated 11th May 2017 in which the Court eventually sanctioned change of Chama Cha Uzalendo's officials by the Registrar of Political Parties. This means that until 11th May 2017, the ex parte Applicant was still an official of Chama Cha Uzalendo while at the same time she was allegedly a member of the 1st Interested Party.

83. It was therefore submitted that it was wrong for the Applicant to allege that the Respondent made an illegal decision yet the Applicant has not pointed out the specific provisions allegedly contravened by the Respondent and the manner of contravention.

84. On the issue of *res judicata*, it was submitted that the matter before the Respondent was not *res judicata* because the dispute before the PPDT where the question was first raised and the one that was before the Respondent herein involved different complainants and the questions of fact and law were different. The question before the PPDT was whether or not the ex parte Applicant was a member of 1st

Interested Party while the question before the Respondent's Tribunal was on dual-party membership status of the ex parte Applicant. In any event, the decision of Political Parties Disputes Tribunal in Complaint No. 40 of 2017 relied upon by the Applicant was wrongly decided as the Tribunal relied not on statutory timelines but on the contents of the Coalition Agreement made between the 1st Interested Party and CCU.

85. According to the 3rd interested party, *res judicata* is not a ground for judicial review and reliance was placed on **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 4 which was cited in Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo [2015] eKLR**. It was therefore contended that the question of *res judicata* was wrongly before this court. If the Applicant was invoking the supervisory jurisdiction of this court, we submit that the same cannot be exercised in the Applicant's favour as the Applicant has not raised issues of abuse of court process.

86. It was contended that the decision was not made in bad faith since the Respondent is mandated under Article 88(4)(e) of the Constitution of Kenya, section 4(e) of the ***Independent Electoral and Boundaries Commission Act, 2011*** and section 74 of the ***Elections Act, 2011*** to solve disputes of this nature. Further the Respondent is tasked with the responsibility of ensuring that candidates cleared to contest for elections have fully complied with relevant laws. This is a duty imposed on the Respondent by Article 88(4)(k) of the Constitution of Kenya and section 4(k) of the ***Independent Electoral and Boundaries Commission Act***, 2011. Accordingly, the Respondent had a duty to address all complaints brought to its attention and reliance was placed on. This was confirmed in **Diana Kethi Kilonzo & another vs. Independent Electoral & Boundaries Commission & 10 others [2013] eKLR**.

87. It was therefore submitted that it is not right for the Applicant to say that the Respondent was motivated by bad faith against the people of Machakos only because the Respondent made a determination that did not favour the Applicant. The actual malice or bad faith has not been specifically pleaded and/or proved.

88. On the question of fair hearing, it was submitted that the Applicant was fully heard and the contention that the advocate who held the ex parte Applicant's counsel's brief was not fully representative of the Applicant is not true. According to the 3rd interested party, section 74(2) of the ***Elections Act, 2011*** requires the Respondent to determine disputes of this kind within 10 days. Therefore the Respondent had limited time within which to conclude the matter. Since the dispute was lodged with the Respondent at their office in Machakos on 1st June 2017, the Respondent had until 9th June 2017 to conclude the matter. Because of time constraints and the problem of backlog piling up at the Respondent's, the Respondent could not grant adjournment especially since there was an advocate who was able to proceed and was satisfied with the process. It was therefore submitted that the Respondent was working under tyranny of time and had to expeditiously decide the complaints and based on ***Ferdinand Waititu vs. Independent Electoral and Boundaries Commission, (IEBC) & Others,*** **Civil Appeal No. 137 of 2013, Evans Odhiambo Kidero & 4 others vs. Ferdinand Ndungu Waititu & 4 Others [2014] eKLR** and the decision of the Supreme Court of India in **Arikala Narasa Reddy vs. Venkata Ram Reddy Reddygari & Another Civil Appeal Nos. 5710-5711 of 2012,** it was submitted that the Respondent had strict timelines and could not grant adjournments as the complaint was heard on the last day of the sitting of the Respondent Tribunal. Moreover, the counsel who held the Applicant's counsel's brief, one **Mr. Ochieng Oginga**, continues to appear for the ex parte Applicant even in these judicial review proceedings.

89. With respect to the contention that the decision was unreasonable, the 3rd party relied on **Associated Provincial Pictures Ltd vs. Wednesbury Corporation [1948] 1 KB 223 and submitted** that the Respondent, as is evidenced in the decision, considered only the evidence that was before it as was relevant for proper determination of the issues and was guided only by the law. Accordingly, there was nothing irrelevant that was considered by the Respondent. Further the decision was neither absurd not irrational in the terms of **Council of Civil Service Unions v Minister for Civil Service [1984] 3AII ER 935.** According to the 3rd interested party, the decision was logical, based on law and is significant to democratization of our nation and promotion of party discipline and political ethics.

90.It was submitted by the 3rd interested party that the ex parte applicant was disqualified by Wiper Party Constitution and Nomination Rules. To him, the ex parte Applicant allegedly became a member of the 1st Interested party on 6th April 2017 and the nomination for the position of Governor Machakos County was conducted by the 2nd Respondent on 30th April 2017. This means the ex parte Applicant acquired membership of the 1st Interested Party only 24 days to the nomination and was, thus, not an active participant of the 1st Interested Party programs in the terms of Rule 17.3.1 quoted above. Though there is a proviso under the same Rule 17.3.1 which allows for exemption by the 1st Interested Party's National Executive Council, the exemption was neither sought nor obtained in favour of the ex parte Applicant.

91. It was submitted that since the ex parte Applicant did not resign from CCU, she remains a member of CCU. At the same time, she is a member of the 1st Interested Party and based on **Caroli Omondi vs. Registrar of Political Parties & Another [2017] eKLR,** it was submitted that the ex parte Applicant's dual-party membership was a scheme to play around with the law and manipulate democracy to her advantage.

92. This Court was urged to be cautious not rush to interfere with the decision of the Respondent. Whereas judicial review is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilized governance, by holding the public authority to the accountable limits defined by the law, it was submitted that this does not mean judicial review courts should go into the merits and re-evaluate evidence. To the 3rd interested party, this Court cannot substitute its opinion with that of the Respondent as it is the Respondent that is statutorily mandated to decide the question in issue and support for this position was sought from the position taken by the Court of Appeal in **Ethics And Anti-Corruption Commission vs. Horsebridge Networks Systems (Ea) Ltd & Another [2017] eKLR**.

93. It was submitted that the question of order of mandamus, is also not tenable since the Respondent having found that the ex parte Applicant is not qualified to contest elections, asking it to gazette an unqualified candidate is akin to ordering the Respondent to disobey the law. Such devices, according to him, were thwarted by the Court of Appeal in **National Social Security Fund Board Trustees & 2 Others vs. Central Organization of Trade Unions (K) [2015] eKLR** where the court concluded:

> **"Therefore, no order of mandamus could issue against the Cabinet Secretary because it would have compelled him to act contrary to the law."**

94. It was submitted that unless the nullification of the nomination of the ex parte Applicant who is statutorily disqualified is interfered with, the country will be faced with the similar question the Indian High Court had to grapple with in **Sri Mairembam Prithviraj @ Prithviraj Singh v Shri Pukhrem Sharatchandra Singh Civil Appeal No. 2649 of 2016** where the Supreme Court of India where the court remarked that:

> **"If it is found that the Appellant's nomination was improperly accepted, the result of his election stood automatically affected materially."**

95. To the 3rd interested party, this Court should go deep in its thoughts and not fall for the Applicant's trap that invites Your Lordship to interfere with the manner in which the Respondent conducts election processes as allowed by the Parliament. To this end he relied on the decision of the Supreme Court of England in **Sultan Brgum and 2 others vs. Returning Officer for London Borough of Towers Hamlets (2006) EWCA Civ 733** where it stated that:

> **"In my judgment, although judicial review does not lie, this is an area in which the courts should be extremely slow to interfere with the decision of a returning officer. No doubt where a returning officer has plainly acted unlawfully relief will lie. But ordinarily returning officers should be left to conduct election process as provided by Parliament."**

96. This Court was urged to save this country from the jurisprudential anarchy that will arise when the validity of the election of a statutorily disqualified person is questioned in court and dismiss the

application with costs.

**Determination**

97. I have considered the application, the cases of the various parties presented before me the submissions made and the authorities cited in support thereof and this is my view of the matter.

98. The first issue is whether this Court ought to interfere with the Committee's decision made on the application on behalf of the ex parte applicant for adjournment. That the decision whether or not to grant an adjournment is an exercise of judicial discretion cannot be in doubt. When then do courts of law interfere with exercise of discretion? The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

99. However, where a discretion has been exercised, whether wrongly or rightly, it is my view that such exercise of discretion unless is shown to be illegal, irrational or unreasonable, goes to the merit of the decision and ought not to be made the subject of judicial review application since the effect of a judicial review court investigating such an exercise of discretion would be to find whether or not in the circumstances, the decision was merited and hence the judicial review court would be sitting on an appeal against the decision being challenged. Even on an appeal, the law is that the decision disallowing adjournment being within the Judge's discretion an Appellate Court would be slow to interfere unless the discretion was not exercised judicially. See **Mrima vs. Atlantic Building & General Contractor & Another [1991] KLR 609, Abdulrehman vs. Almaery [1985] KLR 287, Maxwell vs. Keen (1928) 1 KB 645 at 653.**

100. The circumstances under which an application for adjournment would be granted was considered by the Supreme Court of Uganda in **Famous Cycle Agencies Ltd & 4 Others vs. Masukhalal Ramji Karia SCCA No. 16 of 1994 [1995] IV KALR 100** where the Court expressed itself as follows:

> **"The High Court's discretion to adjourn a suit is provided for in Order 15, rule 1(1) of the Civil Procedure Rules, which states that the Court, may, if sufficient cause is shown, at any stage of the suit grant time to the parties, or to any of them, and may from time to time adjourn the hearing of the suit….Under this rule the granting of an adjournment to the party to a suit is thus left to the discretion of the court and the discretion is not subject to any definite rules, but should be exercised in a judicial and reasonable manner, and upon proper material. It should be exercised after considering the party's conduct in the case, the opportunity he had of getting ready and the truth, and sufficiency of the reason alleged by him for not being ready. But the discretion will be exercised in favour of the party applying for adjournment only if sufficient cause is shown. Sufficient cause refers to the acts or omissions of the applicant for adjournment. What is sufficient cause depends upon the circumstances of each case and generally speaking, where the necessity for the adjournment is not due to anything for which the party applying for it is responsible, or where there has been little or no negligence on his part an adjournment would not normally be refused. But where the party has been wanting in due diligence or is guilty of negligence an adjournment may be refused…..Under the corresponding rule of the Indian "*Code of Civil Procedure*" by Manohar and Ditaley, 10th Ed, page 543, circumstances which have been held to constitute sufficient cause for adjournment include where a party is not ready for hearing by reason of his having been taken by surprise; where he could not reasonably know of the date of the hearing in sufficient time to get ready for the same; where his witnesses fail to appear for the hearing owing to non-service of summons on them when such no service is not due to the fault on the party; where a party is not ready owing to his lawyer having withdrawn his**

**appearance in the case under circumstances which do not give the party sufficient time to engage another lawyer and enable him to get ready; and where the refusal of an adjournment to a party will enable the opposite party to successfully evade a previous interim order against him……The reasons given for adjournment did not justify one. First it is clear that the 2nd respondent's lack of interest in the suit was a matter of surprise to the applicant's when the suit came up for hearing on the material day. But from the correspondence it is shown that the 2nd respondent's position regarding the suit was known long before the hearing date and therefore instructions should have been sought before the hearing date. Secondly since the objective of the suit was to determine who the appellant's landlord was and not to determine any proprietary interest by the appellant in the suit property, and as the 2nd and the 3rd respondents disclaimed any interest over the suit property and it was clearly evident to the appellants that only the 1st respondent had claimed such interest in the suit property, it is not true that an adjournment of the suit property to enable the appellants' counsel obtain instructions from them was sufficient cause. Thirdly, all the appellants were themselves absent from the court when the suit was called for hearing and no explanation was offered for their absence. Their absence without an explanation leaves the impression that their learned counsel went to court with the expectation of being granted an adjournment as a matter of course and if that was so, it was too presumptuous on the part of those concerned for which the appellants only have themselves to blame"** See **Nitin Jayant Madhvani vs. East African Holdings Ltd & Others Civil Appeal No. 14 of 1993 (SCU)(UR).**

101. The Court of Appeal in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** held that:

**"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself…Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."**

102. In this case it is my view that the relevant statutory framework may be considered in deciding whether or not to grant an adjournment. In this case it is true the Committee had only ten days within which to determine the dispute. As was held *in* ***Ferdinand Waititu vs. Independent Electoral and Boundaries Commission, (IEBC) & Others*****, Civil Appeal No. 137 of 2013**:

***"These timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any Court for whatever reason. It is indeed the tyranny of time, if we may call it so. That means a trial Court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously…"***

103. I also agree with the opinion of the Supreme Court of India in **Arikala Narasa Reddy vs/ Venkata Ram Reddy Reddygari & Another Civil Appeal Nos. 5710-5711 of 2012** that:

**"It is a settled legal proposition that the statutory requirements relating to election law have to be strictly adhered to for the reason that an election dispute is a statutory proceeding unknown to the common law and thus, the doctrine of equity, etc. does not apply in such dispute. All the technicalities prescribed/mandated in election law have been provided to safeguard the purity of the election process and courts have a duty to enforce the same with all rigours and not to minimize their operation. A right to be elected is neither a fundamental right nor a common law right, though it may be very fundamental to a democratic set-up of governance. Therefore, answer to every question raised in election dispute is to be solved within the four corners of the statute."**

104. Having considered the foregoing, it is my view that whereas the applicant's complaints regarding the denial of adjournment may be a basis for an appeal, the said complaints do not warrant the grant of judicial review order of certiorari sought herein. The Committee in declining to grant the adjournment sought no doubt considered the effect of the delay of the proceedings before it and based thereon exercised its discretion as it was entitled to do.

105. The Court was urged to consider the doctrine of proportionality and the fact that substantive justice dictates that the Court looks at the greater public interest and good than the use of technical and procedural aspects. To the applicant, it is in the greater interest of the people of Machakos County to have a candidate of their choice. The people are desirous to participate in a free and fair election and to choose a candidate of their choice. However this Court held in **Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others Petition No. 229 of 2012** that:

> **"Kenyans were very clear in their intentions when they entrenched Chapter Six and Article 73 in the Constitution. They were singularly aware that the Constitution has other values such as the presumption of innocence until one is proved guilty. Yet, Kenyans were singularly desirous of cleaning up our *politics and governance structures* by insisting on high standards of personal integrity among those seeking to govern us or hold public office. They intended that Chapter Six and Article 73 will be enforced in the spirit in which they included them in the Constitution. The people of Kenya did not intend that these provisions on integrity and suitability for public offices be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations. Kenyans intended that the provisions on integrity and suitability for office for public and State offices should have substantive bite. In short, the people of Kenya intended that the provisions on integrity of our leaders and public officers will be enforced and implemented. They desired these collective commitments to ensure good governance in the Republic will be put into practice. It follows, therefore, that those organs and officials to whom the authority to select officials to certain State Organs and institutions are delegated have an obligation to ensure that the persons selected for the various positions meet the criteria set out in the Constitution and other legislation for those positions."**

106. This Court similarly held in Petition No. 102 and 145 of 2015 - **Godffrey Mwaki Kimathi & Others vs. Jubilee Alliance Party & Others** that:

> **"It is therefore my view and I hold that the issues of integrity, competence and suitability as required under Article 73 of the Constitution apply to both elective and appointive positions. In so deciding I am guided by the principle that in interpreting the provisions of the Constitution one must always keep in mind that the Constitution has to be given a generous, rather than a legalistic, interpretation aimed at fulfilling the purpose of the guarantee and securing the individual's full benefit of the instrument. Both the purpose and the effect of the legislation must be given effect to and this is the generous and purposive construction. See R vs. Big M Drug Mart Ltd (1986) LRC 332; Attorney General vs. Momoddon Jobo [1984] AC 689…In so doing however, while a liberal and not an overly legalistic approach should be taken to constitutional interpretation the charter should not be regarded as an empty vessel to be filled with whatever meaning the court might wish from time to time. The interpretation of the charter, as all constitutional documents, is constrained by the language structure and history of the constitutional text, by constitutional traditions and by the history, traditions and underlying philosophies of the society. See Karua vs. Radio Africa Limited T/A Kiss FM Station and Others Nairobi HCCC No. 288 of 2004 [2006] 2 EA 117; [2006] 2 KLR 375…In my view, the philosophies of the Kenyan society with respect to the Constitution of Kenya, 2010 was partly informed by the bad governance which characterised the previous systems of governance including but not limited to failure to inculcate issues of integrity into leadership. Therefore, the provisions of the Constitution must be treated as a whole and all provisions having a bearing on the subject matter in dispute must be considered together as an integrated whole: in my view, provisions relating to the national values and principles of governance in Article 10 of the Constitution must be given purposive and generous**

**interpretation in such a way as to secure the maximum fulfilment of those values and principles."**

107. One such principle as ordained under Article 10 of the Constitution is integrity a word which was defined in **Democratic Alliance vs. The President of the Republic of South Africa & 3 Others, (case no. 263/11) (2011) ZA SCA 241** in the following terms:

> **"An objective assessment of one's personal and professional life ought to reveal whether one has integrity. In The Shorter Oxford English Dictionary on Historical Principles (1988), inter alia, the following are the meanings attributed to the word 'integrity': 'Unimpaired or uncorrupted state; original perfect condition; soundness; innocence, sinlessness; soundness of moral principle; the character of uncorrupted virtue; uprightness; honesty, sincerity.' Collins' Thesaurus (2003) provides the following as words related to the word 'integrity': 'honesty, principle, honour, virtue, goodness, morality, purity, righteousness, probity, rectitude, truthfulness, trustworthiness, incorruptibility, uprightness, scrupulousness, reputability.' Under 'opposites' the following is noted: 'corruption, dishonesty, immorality, disrepute, deceit, duplicity.'… On the available evidence the President could in any event not have reached a conclusion favourable to Mr Simelane, as there were too many unresolved questions concerning his integrity and experience."**

108. It is my view that to belong to two political parties at the same time clearly amounts to dishonesty. Such dishonesty in my view is an antithesis to integrity. Therefore I do not buy the argument that such conduct should be disregarded simply because the electors should be allowed to elect a representative of their choice notwithstanding his or her integrity or lack thereof. In **Godffrey Mwaki Kimathi & Others vs. Jubilee Alliance Party & Others** (supra) this Court rejected the argument that since in the elections the voters have an opportunity to –re-vet the nominees as it were, the Court ought not to interfere by expressing itself as hereunder:

> **"In my view section 24(1)(b) of the Act is clear that it is the responsibility and obligation of the Commission to ensure that the nominees satisfy any educational, moral and ethical requirements prescribed by the Constitution and the Act. That is not the responsibility of the voters. Where the Commission unleashes on the public people who ought to be disqualified under section 24 aforesaid, it cannot evade this court's censure by simply saying that the voters do have a chance to re-vet the nominees. Once the nominees are cleared the voters are entitled to assume that they are duly qualified and the only issue for the voters decision is who amongst the candidates is better placed to serve and articulate their interests."**

109. I must emphasise that the issue of integrity is not the same as criminal liability. This Court appreciates the provisions of section 24(2) and (3) of the ***Elections Act*** which provide that:

> ***(2) A person is disqualified from being elected a member of Parliament if the person—***
>
> ***(a) is a State officer or other public officer, other than a member of Parliament;***
>
> ***(b) has, at any time within the five years immediately preceding the date of election, held office as a member of the Commission;***
>
> ***(c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;***
>
> ***(d) is a member of a county assembly;***
>
> ***(e) is of unsound mind;***
>
> ***(f) is an undischarged bankrupt;***

***(g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or***

***(h) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six of the Constitution.***

***(3) A person is not disqualified under subsection (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.***

110. However apart from section 24(2), for one to be cleared to vie for a parliamentary seat one must satisfy the provisions of section 24(1), one of which is that he/she has to satisfy the educational, moral and ethical requirements prescribed by the Constitution and the Act. As was held in **Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others** (supra):

**"To our mind, therefore, a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution. In our view, for purposes of the integrity test in our Constitution, there is no requirement that the behaviour, attribute or conduct in question has to rise to the threshold of criminality. It therefore follows that the fact that a person has not been convicted of a criminal offence is not dispositive of the inquiry whether they lack integrity or not. As the *Democratic Alliance case* held, it is enough if there are sufficient serious, plausible allegations which raise substantial unresolved questions about one's integrity."**

111. I therefore associate myself with the opinion expressed in **Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & 10 Others [2013] eKLR** where the court, while relying on the scholarly works of ***P.D.T Achary, Bharat's Law of Elections*** *1st Edition(2004) pages 56-57* observed that:

***"If the want of qualification of a candidate does not appear on the face of the nomination paper or of the electoral roll, but is a matter which could be established only by evidence, an enquiry at the stage of scrutiny of the nomination papers is required under the Act only if there is an objection to the nomination. The Returning Officer is then bound to make such enquiry as he thinks proper on the result of which he can either accept or reject the nomination..."***

112. In the submissions made on behalf of the applicant it was contended that the Respondent acted unreasonably and contrary to the provisions of the ***Political Parties Act*** on the question of membership to a political party; while exercising a quasi-judicial role the Respondent blatantly ignored the doctrine of *res judicata* and specifically the decisions of the Political Parties Dispute Tribunal contained in Complaint No. 40 of 2017. It was the applicant's submission that the Respondent while exercising a quasi-judicial role failed and acted illegally and unreasonably by failing to appreciate the doctrine of *res judicata*. The Respondent acted illegally and contrary to the law by purporting to sit and hear a matter that had already been heard and determined by a Court of competent jurisdiction being the Political Parties Dispute Tribunal.

113. An issue that falls for determination is whether *res judicata* applies to judicial review proceedings. Whereas the holding in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 4** is to the effect that the doctrine does not apply to judicial review proceedings, this Court has however appreciated that it is not powerless where it is clear that by bringing proceedings a party is clearly abusing the court process. Whereas *res judicata* may not be invoked in judicial review the Court retains an inherent jurisdiction to terminate proceedings where the same amount to an abuse of its process. One of cardinal principles of law is that litigation must come to an end and where a court of competent jurisdiction has pronounced a final decision on a matter to bring fresh proceedings whether as judicial review proceedings or otherwise would amount to an abuse of the process of the court and would therefore not be entertained. The Court in terminating the same would be invoking its inherent jurisdiction which is not a jurisdiction conferred by

section 3A of the ***Civil Procedure Act*** as such but merely reserved thereunder. In **Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743** it was held:

> **"It is trite law that an *ex parte* order can be set aside by the judge who gave it or by any other judge. The Civil Procedure Rules provide for this. Our Constitution does assume the existence of supportive Civil Procedure regime in so far as the same is not inconsistent with the Constitution. There is nothing inconsistent with the Constitution in the act or principle of setting aside of *ex parte* orders for good reasons. If an order obtained in a Constitutional application is incompetent or improperly obtained there cannot be any valid reason why the court would not have the jurisdiction to set it aside. Setting aside would be properly justified on grounds of doing justice and fair play and good administration of justice and therefore in furtherance of public policy...Where there is no specific provision to set aside the courts power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. The need to administer justice in accordance with the Constitution occupies an even higher level due to the supremacy of the constitution and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. Therefore the Court does have the inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside *ex parte* orders, which by their very nature are provisional." See *The Reform of Civil Procedure Law and Other Essays in Civil Procedure (1982) By Sir Isaac J H Jacob*** and **WEA Records Limited vs. Visions Channel 4 Limited & Others (1983) 2 All ER 589; R vs. Land Registrar Kajiado & 2 Others Ex Parte John Kigunda HCMA No. 1183 of 2004.**

114. As was stated by **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009**:

> **"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".**

115. I associate myself with the holding in **Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235** that nothing can take away the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application and that baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process.

116. Accordingly the Court may in proper cases invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of its process and this may be done where the principles of *res judicata* would be applicable.

117. It was contended that the 3rd interested party ought to have lodged his complaint with the Party's Internal Dispute Resolution Mechanism first and as this was not done the Committee had no jurisdiction to entertain the matter. In my view the IEBC Committee exercises original jurisdiction under section 74 of the ***Elections Act*** unlike the Political Party Dispute Tribunal which exercises an appellate jurisdiction. Accordingly, in matters which purely fall within section 74 of the ***Elections Act*** and within the exclusive jurisdiction of the IEBC Committee, it is my view that the Committee is not deprived of jurisdiction by the mere fact that the complainant did not lodge his complaint with the Party's Internal Dispute Resolution Mechanism.

118. Whereas the PPDT and the IEBC have jurisdiction over electoral disputes, the Court must interpret their jurisdiction in a manner that does not render one statutory tribunal redundant. The Court must in such matters adopt a purposive interpretation of the respective electoral statutes. Therefore to interpret their jurisdiction in a manner that gives leeway to parties to either bypass one or ignore decisions made by the other would militate against the purpose for which the two Tribunals were set up.

119. It is now clear that the PPDT deals with disputes arising from party primaries and this is clear from its jurisdiction. The IEBC on the other hand, it is my view, deals with nomination disputes that do not fall within the jurisdiction of the PPDT since appeals from the PPDT do not lie to the IEBC but to the High Court. If it were the position that the IEBC Committee would be free to determine issues which had already been determined by the PPDT without an appeal being preferred to the High Court, that position would amount to elevating the IEBC to an appellate Tribunal over the decisions of the PPDT. That scenario would also imply that even where a decision of the PPDT has been the subject of the High Court's appellate jurisdiction, the IEBC might still be at liberty to entertain such a matter under the guise of resolving a nomination dispute. To my mind that would clearly be contrary to the principle of judicial hierarchy and would be incongruous to the statutory scheme and subversive of the true legislative intent. If it were so, the legislative intent would have been devoid of concept of purpose.

120. Where however the matter does not fall within the jurisdiction of the PPDT, the IEBC must be the first port of call as long as its jurisdiction is not excluded under section 74 of the ***Elections Act***. To that end the issue of double jeopardy would not arise.

121. In this case however, it is clear from the 3rd the interested party's own deposition that he lodged the complaint with the Committee not on the basis that his claim could not be dealt with by the Tribunal but because the decision of Political Parties Disputes Tribunal in Complaint No. 40 of 2017 wrongly determined that the ex parte Applicant is a *bona fide* member of Wiper as the Tribunal relied not on statutory timelines but the contents of the Coalition Agreement. It is therefore clear that the 3rd the interested party caught the wrong end of the stick when it set out to lodge his complaint on that basis. If that was the basis upon which his complaint was lodged before the Committee instead of the Tribunal, then he could not escape the bracket of the doctrine of *res judicata* as an aspect of abuse of the Court process.

122. Respondent herein involved different complainants and also the question before the PPDT was whether or not the ex parte Applicant was a member of 1st Interested Party while the question before the Respondent's Tribunal was on dual-party membership status of the ex parte Applicant. With respect to the former issue, the complainant before the Tribunal was **Bernard Muia Tom Kiala** and clearly that

was not the 3rd the interested party. It is not contended that the said person was a person through whom the 3rd interested party could lodge his claim. Accordingly, adopting a narrow interpretation of *res judicata*, the doctrine may not on the face of it apply.

123. However as regards the contention that the question before the PPDT was whether or not the ex parte Applicant was a member of Wiper Party while the question before the Respondent's Tribunal was on dual-party membership status of the ex parte Applicant, that in my view is a distinction without a difference. In my view the issues were substantially similar and if the Tribunal could deal with one there was no reason why it could not deal with the other issue.

*124. Res judicata* is intertwined with estoppel in particular what is known as issue estoppel which was dealt with by the Tanzanian Court of Appeal in **Issa Athumani Tojo vs. The Republic, Criminal Appeal No 54 of 1996** where while citing **Lawson, J** in **Regina vs. Hogan**, [1974] 1Q.B 398 at 401 the Court held that:

> **"Issue estoppel can be said to exist when there is a judicial establishment of a proposition of law or fact between parties to earlier litigation and when the same question a rises in a later litigation between the same parties. In the later litigation the established proposition is treated as conclusive between the same parties. It can also be described as a situation when, between the same parties to current litigation, there has been an issue or issues distinctly raised and found in earlier litigation between the same parties"**.

125. On the same issue ***Halsbury's Laws of England***, 4th edition Vol 16 at paragraph 1503 states that:

> **"Estoppel of record or quasi of record, also know as estoppel per *rem judicatam*, arises (1) where an issue of fact has been judicially determined in a final manner between parties by a tribunal having jurisdiction, concurrent or exclusive, in the matter, and the same issue comes directly in question in subsequent proceedings between the parties (this is sometimes known as cause of action estoppel); (2) where the first determination was by a court having exclusive jurisdiction, and the same issue comes incidentally in question in subsequent proceedings between the parties (this is sometimes known as issue estoppel); (3) in some cases where an issue of fact affecting the status of a person or thing has been necessarily determined in a final manner as a substantive part of a judgment in rem of a tribunal having jurisdiction to determine that status, and the same issue comes directly in question in subsequent civil or criminal proceedings between any parties whatever".**

126. In my view a distinction must be drawn between decisions which are *in personam* and those which are *in rem*. From the jurisdiction of the PPDT as prescribed in section 40(1) of the ***Political Parties Act,*** it would seem that the Tribunal has jurisdiction to make both types of decisions.

127. The general rule is that orders which are personal in nature, or orders *in personam* in legal parlance, do not affect third parties to the cause. See **Ernest Orwa Mwai vs. Abdul S Hashid & Another Civil Appeal No. 39 of 1995, Kotis Sandis vs. Ignacio Jose Macario Pedro De Silva Civil Appeal No. 38 of 1950 [1950] 1 EACA 95, The Town Council of Ol'kalou vs. Ng'ang'a General Store Civil Appeal No. 269 of 1997** and **Sakina Sote Kaitany and Anor. vs. Mary Wamaitha Civil Appeal No. 108 of 1995.**

128. Similarly, in **Gitau & 2 Others vs. Wandai & 5 Others [1989] KLR 231, Tanui, J** held that:

> **"The plaintiffs in this suit were not party to the suit in which the consent judgement was entered and consequently they are not bound by a compromise made between the advocate who acted for the second, third, fourth, fifth and sixth defendants on one part and the advocates for the first defendant on the other."**

129. However, there are other orders or judgements which bind the whole world as they determine the

state of affairs rather than the rights of the parties before the Court. In ***Conflict of Laws*** (7th Edn. 1974) at page 98 by **R H Graveson** it is stated:

> **"An action is said to be *in personam* when its object is to determine the rights and interests of the parties themselves in the subject-matter of the action, however the action may arise, and the effect of a judgement in such an action is merely to bind the parties to it. A normal action brought by one person against another for breach of contract is a common example of an action *in personam*."** See ***Black's Law Dictionary,*** 9th Edn. Page 862.

130. With respect to a decision *in rem* it was held in **Kamunyu and Others vs. Attorney General & Others [2007] 1 EA 116:**

> **"In a suit seeking judgement *in rem,* that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world."**

131. Therefore the mere fact that the 3rd interested party was neither a party to the proceedings before the Committee nor a party on whose behalf the complaint was instituted does not deprive him of the benefit of the said order as long as the same was a decision *in rem*. I further associate myself with the decision in **George William Kateregga vs. Commissioner for Land Registration & Others Kampala High Court Misc. Appl. No. 347 of 2013** in which the Court while citing the South African case of **Nicholas Francois Marteemns & Others vs. South African National Parks, Case No. 0117**, expressed itself as follows:

> **"Therefore, in the instant case even if the parties other than the Applicant crafted a consent judgement over the suit land which was sanctioned by the court, it necessarily became a judgement of the court. The effect was that the Applicant would be bound by it notwithstanding that he was not privy to the consent agreement or suit; which renders the judgement in that case a judgement *in rem*. A judgement *in rem* invariably denotes the status or condition of the property and operates directly on the property itself. It is judgement that affects not only the thing but all persons interested in the thing; as opposed to judgement *in personam* which only imposes personal liability on the defendant**."

132. Similarly in **Japheth Nzila Muangi vs. Kenya Safari Lodges & Hotels Ltd [2008] eKLR** it was held:

> **"It is trite law that ordinarily a judgement binds only the parties to it. This is known as Judgement *in personam*. A judgement may also be conclusive not only against the parties to it but also against all the world. This is known as a judgement *in rem*. This is a judgement which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally."**

133. I am also alive to the decision in **Pattni vs. Ali & Anor (Isle of Mann (Staff of Government Division) [2006] UKPC 51** in which reliance was sought from ***Jowitt's Dictionary of English Law*** (2nd Edn.) p. 1025-6 to the effect that:

> **"A judgement *in rem* is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is also declared by the adjudication...So a declaration of legitimacy is in effect a judgement *in rem*."**

134. In this case the decision of the PPDT was meant to define or otherwise determine the status of the ex

parte applicant vis-à-vis the Wiper Party. Therefore in so far as the issue in question revolves around the resolution of the issue whether the applicant was a member of Wiper or not, as the 3rd the interested party himself admits the PPDT resolved the status of the ex parte applicant. The 3rd the interested party's only contention is that the decision was wrong. If that was the position, the remedy lay in the appellate jurisdiction of the High Court and not in the original jurisdiction of the Commission. Such a decision is a decision *in rem* which are defined as final judgements or orders or decrees of competent courts which confer or take away from any person any legal character, or to be entitled to any specific thing, not as against any specific person but absolutely. See **Koech vs. African Highlands and Produce Limited and Another [2006] 2 EA 148**.

135. I therefore associate myself with the reasoning of **Pigeon, J** in **Emms vs. The Queen (1979) 102 DLR (3d) 193** that:

> **"If a formal declaration of invalidity of an administrative regulation is not considered effective towards all those who are subject thereto, it may mean that all other persons concerned with the application of the regulation, including subordinate administrative agencies, have to keep on giving effect to what has been declared a nullity. It is obviously for the purpose of avoiding this undesirable consequence that, in municipal law, the quashing of a by-law is held to be effective in rem."**

136. It therefore follows that the Committee ought to have considered the decision of the PPDT with respect to the membership of the ex parte applicant of Wiper and once it found that the issue was determined by the PPDT give effect to it. It was however contended that that was not the determination of the PPDT. The Tribunal however issued *inter alia* the following order:

> **A declaration be and is hereby issued that the 2nd Respondent [read Hon Wavinya Ndeti] was a *bona fide* member of the 1st Respondent [read Wiper Democratic Movement – Kenya]as at 30th April, 2017 when the impugned gubernatorial nominations were held by the 1st Respondent in Machakos County.**

137. It is therefore clear that whether rightly or wrongly, the PPDT had made determination that the ex parte applicant herein was a *bona fide* member of Wiper Democratic Movement, the 1st interested party herein. Both the PPDT and the IEBC Dispute Resolution Committee are pursuant to Article 169(1) of the Constitution subordinate courts with no jurisdiction to overrule the other. Consequently, the Committee had no power to arrive at a decision whose effect would nullify the decision of the PPDT. In other words it cannot now be contended that the ex parte applicant has never validly been a member of Wiper.

138. It was contended that since the issue of jurisdiction was not raised before the Committee, it cannot be competently raised before this Court. Whereas it is the procedure that issues of jurisdiction ought to be raised before the Tribunal of first instance, the mere fact that it is not raised does not clothe the Tribunal with jurisdiction if it has none since want of jurisdiction renders a decision a nullity. This was the position of the East African Court of Appeal in **Assanand & Sons (Uganda) Limited vs. East African Records Limited [1959] EA 360** where it was held that if the court has no jurisdiction, any judgement which it gives is a nullity and as was held in **Macfoy vs. United Africa Co. Ltd [1961] 2 All ER 1169** at **1172** where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance thereof must therefore break down once the superstructure upon which it is based is removed; since you cannot put something on nothing and expect it to stay there as it will collapse.

139. Regarding whether an issue of jurisdiction can be raised at any stage of the proceedings, the East African Court of Appeal in **Sultan Sir Saleh Bin Ghaleb And Others vs. Saif Bin Sultan Hussain Al Quaiti And Others [1957] EA 55** affirmed that an objection to the jurisdiction of the court may properly be taken for the first time on appeal. See also Bagwasi Nyangau vs. Omosa Nyakwara Civil Appeal No. 83 of 1984 [1986] KLR 712; [1976-1985] EA 443 (CAK) [1982-88] 1 KAR 805 and **Kenya Commercial**

**Bank vs. Osebe (1982-88) 1 KAR 48; [1976-1985] EA 205.**

140. In determining this application it is important to find out the nature of the exact dispute before the Committee since this Court being a judicial review court cannot turn itself into an appellate Court and re-evaluate the evidence presented before the Committee and arrive at its decision. This Court's duty is simply restricted to examining the decision made by the Committee and the basis thereof in order to find out whether it was legal, procedural, reasonable or tainted with any other recognised impropriety that would render it unsustainable. That the parties herein were tempted to introduce fresh evidence that was not before the Committee was readily conceded by the 3rd interested party who however justified that course on what he termed as the tactics employed by the ex parte applicant.

141. From the decision exhibited by the ex parte applicant herein, it is clear from the Committee's decision that the complaint that was before it was that the ex parte applicant was a member of **Wiper Democratic Movement** and **Chama Cha Uzalendo**. Apart from that it was the 3rd the interested party's case that the ex parte applicant was not a member of Wiper previously and only became a member on 6th April, 2017 and thus was not as per the requirements by the Commission qualified to participate in the Wiper's nominations having not been a member of Wiper by 5th April, 2017 which was the last day allowed for party defections invariably referred to as "party hopping".

142. That was the case that was, according to the Committee's decision presented before it. Although serious submissions were made on behalf of the Commission as to whether the ex parte applicant was in fact a member of the Wiper subsequent to 6th April, 2017, the Committee as an impartial arbiter could only deal with what was presented before it. If it intended to raise other issues, then it ought to have put up such a case to the ex parte applicant to deal with. This was the position of the Court of Appeal in **Chalicha F C S Ltd vs. Odhiambo & 9 Others [1987] KLR 181** where it was held that:

> **"Since there was no counterclaim, however sympathetic the Judge may be towards the defendants, no order can be made (unless by consent) outside the pleading. The object of pleadings is to secure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given. Cases must be decided on the issues on record, and if it is desired to raise other issues they must be placed on the record by amendment. A judge is not entitled to decide a case on an issue raised by himself without amending the pleadings."**

143. This rule of pleadings, in my view is a rule of fairness as opposed to merely a rule of procedure. In my view its application enhances the requirement of Article 47 of the Constitution and this is what section 4(3) of the ***Fair Administrative Action Act*** requires. This was the position adopted in **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR** where it was held that:

> **"20. Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including "*(c) responsive, prompt, effective, impartial and equitable provision of services*" and "*(f) transparency and provision to the public of timely, accurate information.*"**
>
> **...**
>
> **28. As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board* [2005] 4 IR 217). Hilary Delany in his book, *Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272,* notes that, "*Even where no***

***actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision."***

**29. Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in *TV3 v Independent Radio and Television Commission* [1994] 2 IR 439).**

**30. In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (*See Charkaoui v Canada* [2007] SCC 9, *Alberta Workers' Compensation Board v Alberta Appeals Commission (*2005) 258 DLR (4th), 29, 55 and *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750)."***

144. In my view a process by which an administrative body goes on a frolic of its own and turns the proceedings in which it is expected to be impartial arbiter into one in which it becomes the complainant, the witness and the judge at the same time cannot be said to meet the standard of fairness as such proceedings would clearly be biased.

145. It is therefore not surprising that the Committee restricted itself to what in its view was the issue before it as opposed to what ought to have been the issue before it. In these proceedings parties have made lengthy submissions on what ought to have been the issue before the Committee. In proceedings of this nature as opposed to appellate proceedings, the Court does not go on a fishing rendezvous by looking at issues which the Tribunal whose decision is being challenged ought to have looked for. By parity of reasoning where for example in judicial review proceedings the Court finds that a party who ought to have been heard was not heard, it is not for the Court to proceed and determine whether a hearing would have changed the decision. Once it is found that the party was not heard that is the end of the matter and the decision must be set aside. See **Onyango Oloo vs. Attorney General [1986-1989] EA 456, General Medical Council vs. Spackman [1943] 2 All ER 337, R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** and **Ridge vs. Baldwin [1963] 2 All ER 66.**

146. Similarly, it is my view that it is not for this Court to investigate whether there existed other material on the basis of which an otherwise untenable decision could be sustained.

147. In this case, what I can get from the rather short decision of the Committee, it found that the claim before it hinged on the provisions of section 14(5) of the ***Political Parties Act*** which provides as follows:

***A person who, while being a member of a political party—***

***(a) forms another political party;***

***(b) joins in the formation of another political party;***

***(c) joins another political party;***

***(d) in any way or manner, publicly advocates for the formation of another political party; or***

***(e) promotes the ideology, interests or policies of another political party, shall, notwithstanding the provisions of subsection (1) or the provisions of any other written law, be deemed to have resigned from the previous political party.***

148. If I understand the Committee correctly, its understanding of the claim before it was that as the ex parte applicant was promoting the ideology, interests or policies of CCU she was deemed to still belong to CCU. In fact in what it termed as its analysis of the case before it, heavy weather was made of the decision of this Court in Miscellaneous Application No. 67 of 2017 though incorrectly stated as proceedings in Nakuru High Court as its basis for finding in favour of the 3rd interested party that the ex parte applicant belonged to two political parties. In its so called analysis this was the only issue the Committee dealt with before it proceeded to arrive at its conclusion in which it found that the ex parte applicant at the time of her nomination was a member of two political parties.

149. It is therefore clear that in its so called analysis, the Committee did not purport to analyse the Coalition Agreement between Wiper and CCU which according to its learned counsel would have been the basis for finding that the ex parte applicant had not resigned from CCU and even if she had resigned that she never became a member of Wiper.

150 . This Court in its decision delivered on 14th June, 2017 herein clarified that the said decision did not confer upon the ex parte applicant herein the membership status of CCU. Accordingly to the extent that the Committee relied on the said decision as its sole basis for finding that the ex parte applicant belonged to two political parties, it clearly took into account irrelevant material. As was held in **Minister for Aboriginal Affairs vs. Peko-Wallsend Ltd (1986) 162 CLR 24 at 39-40 and 55:**

> **"A decision-maker will err by failing to take into account a relevant consideration or taking an irrelevant consideration into account. These grounds will only be made out if a decision-maker fails to take into account a consideration which the decision-maker is bound to take into account in making the decision or takes into account a consideration which the decision-maker is bound to ignore. The considerations that a decision-maker is bound to consider or bound to ignore in making the decision are determined by construction of the statute conferring the discretion. Statutes might expressly state the considerations that need to be taken into account or ignored. Otherwise, they must be determined by implication from the subject matter, scope and purpose of the statute"**

151. In **Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others[2013] eKLR** this Court expressed itself as hereunder:

> **"Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration."**

152. The holding in the *locus classicus* of **Associated Provincial Picture Limited vs. Wednesbury Corporation [1947] 2 All ER 680; [1948] 1 KB 223** best summarizes this principle particularly in the words of **Lord Greene MR** at pages 681-682 thus*:*

> **"If, in the statute conferring discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question; they must disregard these matters...Unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that has all been referred to as being matters which are relevant for consideration...For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from consideration matters which are irrelevant to the matter that he has to consider. If it does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably"…Similarly, you may have something so absurd that no sensible person could ever dream that it would lay within the powers of the authority..."**

153. It is therefore clear that the only basis upon which the Committee allowed the 3rd the interested party's complaint was that the ex parte applicant was promoting the ideology, interests or policies of CCU by virtue of the ex parte applicant's name being in the list that was sent to the Registrar of Political Parties for gazettement. That ground was clearly irrational.

154. If there were other grounds for allowing the complaint, they do not appear in the decision of the Committee and this Court cannot surmise as to those other reasons and the weight and impact the Committee would have attached to them had they been considered. That is a jurisdiction that is reserved to an appellate court since this Court does not substitute its discretion for that of a Tribunal. That parties cannot raise issues, other than those which were raised before the IEBC Committee, before this Court was appreciated by learned counsel for the Respondent who urged the Court to ignore issues of *res judicata* and jurisdiction as the same were not issues which were raised before the Committee. I have however found elsewhere in this judgement that an issue going to jurisdiction can be raised at any stage of the proceedings even on appeal. Similarly issues revolving around the Coalition Agreement and the journey narrated by **Mr Nyamodi** cannot be the basis of this Court's determination.

**155. Mr Nyamodi** appreciated that the most important issue which was however not dealt with by the IEBC Committee was the issue of party hopping. In my view, if as it is alleged the issue of party hopping was not dealt with by the Committee even if it was raised before it, that issue may be presumed to have been dealt with pursuant to explanation 5 to section 7 of the ***Civil Procedure Act***, which provides that:

> ***Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.***

156. To my mind, if there were other issues which were placed before the Committee, it was incumbent upon the Committee to identify the same and deal with each one of them. By failing to deal with the same when the matter was before it, the Commission cannot purport to now justify the decision of the Committee in these proceedings based on the grounds upon which its decision was not based.

157. It is however not difficult to understand why the Committee could not have found that the ex parte applicant did not cease to be a member of CCU. Based on the evidence presented before it unless the Committee decided to go behind the same and investigate whether they were genuine or not, which it did not purport to do, the Committee could not reasonably find that the ex parte applicant had not resigned from CCU Party. This is based on the provisions of section 14 of the ***Political Parties Act*** which provides thus:

> ***(1) A member of a political party who intends to resign from the political party shall give a written notice prior to his resignation to-***
>
> ***(a) The political party;***
>
> ***(b) The clerk of the relevant House of Parliament, if the member is a member of Parliament; or***
>
> ***(c) The clerk of a county assembly, if the member is a member of a county assembly.***
>
> ***(2) The resignation of the member of the political party shall take effect upon receipt of such notice by the political party or clerk of the relevant House or county assembly.***
>
> ***(3) The political party of which the person is a member, the member, or the clerk of the relevant House of Parliament or of a county assembly of which the person is a member shall notify the Registrar of such resignation within three days of the resignation.***
>
> ***(4) A person shall not be a member of more than one political party at the same time.***
>
> ***(5) A person who, while being a member of a political party-***

***(a) Forms another political party;***

***(b) Joins in the formation of another political party;***

***(c) Joins another political party;***

***(d) In any way or manner, publicly advocates for the formation of another political party; or***

***(e) Promotes the ideology, interests or policies of another political party shall, notwithstanding the provisions of subsection (1) or the provisions of any other written law, be deemed to have resigned from the previous political party.***

***(6) Subsection (5) (d) and (e) shall not apply to a member of a political party in relation to the common objective of a coalition.***

158. This provision was the subject of the decision of **Lenaola, J (as he then was)** in **William Omondi vs. Independent Electoral & Boundaries Commission & 2 Others, Petition No. 288 of 2014, where he opined:**

**"[21] In my view, this provision is clear and requires no more than a literal interpretation. Section 14(3) in effect demands a member of a political party who intends to resign from the Political Party must, and is obliged, to give a written notice of his resignation to his Political Party, and if he is a sitting member of Parliament, to give the written notice to the Clerk of the relevant house (The Senate or The National Assembly) and if he is a member of the County Assembly, to the Clerk of the County Assembly. That resignation according to the provisions of Section 14(2) takes effects upon the same being received by the Political Party or the Clerk of the relevant House. Upon receiving that notice, the Political Party or the Clerk of the relevant House shall then notify the Registrar within three days of the receipt of the resignation.**

**[25] To my mind therefore and reading at the provisions of Section 14(3) of the Political Parties Act, while section 33 of the Elections Act and Article 85 of the Constitution together, section 14 deal with resignation of a member of a political party from his party; Section 33 of the Elections Act and Article 85 of the Constitution deals with the eligibility of any person as an independent candidate in an election. The question that then arises is, when does time start running for purposes of both Article 85 and Section 33 aforesaid?**

**[26] To answer that question, I recall that Section 14(2) of the Political Parties Act provides that resignation from a political party takes effect upon a written notice being served on the political party. But what is the meaning of "taking effect"? The Blacks Law Dictionary, *8th Edition* defines 'take effect' as follows; *"To become operative or executed. To be in force, to go into operation"*…Applying that definition in the context of this Petition, it means that the decision to resign from a political party comes into force and becomes operational the minute the Political Party receives the written notice of resignation**."

159. The learned Judge further held that:

**"[27] From a reading of the pleadings and submissions before me, none of the Parties took any issue with that provision and Mr. Omino infact pointed out the fact that Section 14(3) is superfluous in the face of Section 14(2). For avoidance of doubt Section 14(3) reads thus; *"(3) The political party to which the person is a member, the member or the clerk of the relevant House of Parliament or of a county assembly of which the person is a member shall notify the Registrar of such resignation within three days of the resignation."***

**In view of the Petitioner's arguments, the issue now is what purpose was that provision**

**intended to serve?**

**[28] To paraphrase the above question, what really is the object of Section 14(3) of the Political Parties Act? I have already stated elsewhere above that Parliament does not legislate in a vacuum but within an overall framework and a provision in a statute intends to achieve a certain objective. From submissions by Mr. Mukele, Section 14(3) is intended to safeguard the integrity of the list of members of a political party and to ensure that no person becomes a member of more than one political party. The Registrar, under Section 34 of the Political parties Act therefore has several functions,** *inter alia* **as follows;**

***"The functions of the Registrar shall be to—***

***(a) register, regulate, monitor, investigate and supervise political parties to ensure compliance with this Act;***

***(b) administer the Fund;***

***(c) ensure publication of audited annual accounts of political parties;***

***(d) verify and make publicly available the list of all members of political parties;***

***(e) maintain a register of political parties and the symbols of the political parties;***

***(f) ensure and verify that no person is a member of more than one political party and notify the Commission of his findings;***

***(g) investigate complaints received under this Act; and***

***(h) perform such other functions as may be conferred by this Act or any other written law."***

**As can be seen from the above, the IEBC, under Section 34(f) acts on the report or findings of the Registrar in determining whether a person or a political party has complied with the requirements of the Political Parties Act as the Registrar is the custodian of the list of members of political parties and keeps and updates the register of all political parties in Kenya. It is therefore important for the Registrar to be notified of the changes of the list of members of political parties within a reasonable time and the three days given after the resignation has been said to be sufficient time and in fact no Party took issue with that period even after I enquired on the reasoning behind it**."

160. I also associate myself with the decision of **Mativo, J** in **Caroli Omondi vs. Registrar of Political Parties & Another, Petition No. 195 of 2017 thus:**

**"My understanding of section 14 (3) cited above is that upon receipt of the resignation in question, the Orange Democratic Movement was required to notify the Registrar of political parties of such resignation within seven days from the date of the resignation and upon receiving the notification prescribed under subsection (3), the Registrar was required under the law to cause the name of the petitioner to be removed from the membership of the Orange Democratic Movement. Interestingly, this important and clear provisions of the law were not addressed at all by both the petitioners' and first Respondents counsel…In my view, the above provisions are clear and require no more than a literal interpretation. Section 14(3) in effect demands a member of a political party who intends to resign from the Political Party must, and is obliged, to give a written notice of his resignation to his Political Party. That resignation according to the provisions of Section 14(2) takes effects upon the same being received by the Political Party. Upon receiving that notice, the Political Party shall then notify the Registrar within seven days of the receipt of the resignation**."

161. From the foregoing decisions the ex parte applicant's resignation from CCU was effective from 5th April, 2017. As to whether she lawfully joined Wiper was not an issue that was addressed by the Committee. In any case that issue had been dealt with by the PPDT which found that as at 30th April, 2017, the ex parte applicant was a *bona fide* member of Wiper. Similarly, as to whether she could by the virtue of being such a member be validly nominated by Wiper was not dealt with by the Committee and no decision was made by the Committee.

162. Since these are not some of the grounds upon which the present application is based I am barred from dealing with the same as new issues since Order 53 rule 4(1) of the ***Civil Procedure Rules*** provides that:

> ***Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.***

163. In my view if an applicant who has moved this Court is disentitled from a relief set out in the statement and barred from relying on any ground not set out therein, the Court cannot in dismissing the matter similarly rely on a ground that was not placed before it and especially if the body whose decision is being challenged did not make a determination on the matter save for where the matter was a jurisdictional one.

164. It was contended that the ex parte applicant did not place before this Court all the material that was placed before the Commission and that had the same been placed before this Court, it would have revealed that there were more issues than the ones which the applicant purported to have been before the Committee. Whereas I cannot fault the Respondent for responding to these proceedings as the blame was placed on its doorstep, however what Order 53 rule 7(1) of the ***Civil Procedure Rules*** provides is that:

> ***In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.***

165. Therefore the only mandatory requirement is that the applicant lodges the order, warrant, commitment, conviction, inquisition or record sought to be quashed. In this case, the applicant seeks to quash the decision of the Respondent made on 8th June, 2017 which decision has been lodged. In this case the proceedings which the Respondent alleges are missing are its own proceedings. With due respect there is some level of dishonesty in the position taken by the Commission. If it genuinely and honestly felt that apart from the decision sought to be quashed there were other material which would have assisted the Court in arriving at a just decision nothing would have barred it from lodging the same. It is noteworthy that the Commission instead decided to lodge, and I daresay so, inappropriately, an electronic document allegedly containing the list of members of the Wiper Party which was not even part of the record of the proceedings before it while omitting what was in its view crucial material which was placed before it.

166. As a judicial Tribunal, the Respondent's Tribunal is expected pursuant to the national values and principles of governance in Article 10 of the Constitution to be transparent and accountable in its dealings with candidates and the Court. It is therefore improper for it to keep its own record from the Court and contend that there was some material that was placed before it that is omitted from the record before the Court. In my view as a judicial organ, the Respondent's Tribunal owes a much higher duty of disclosure than the ex parte applicant when it comes to administration of justice taking into account its role not only in electoral disputes but in the electoral system as a whole.

167. The 3rd interested party contended that the likely consequence if the court were to agree with the

applicant would be to re-open the race for all those that were validly rejected on similar grounds; who would probably run into hundreds and eventually affect the entire elections timelines and calendar. I however wish to associate myself with **Jacqueline Resley vs. City Council of Nairobi [2006] eKLR** where it was held that:

> "**The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties…That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's 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 determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed…If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of "chaos" and even if the chaos should result, still the law must be obeyed. 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."**

168. In my view what the Court was saying is not that the public interest plays no part in enforcing the law, but that the Courts will not shirk from their constitutional mandate of ensuring that the law is followed. It is now trite that contravention of the Constitution or a Statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute as held in **Republic vs. County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR**:

> **"There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision."**

169. I associate myself with the position adopted in **Masalu and Others vs. Attorney General [2005] 2 EA 165** that:

> **"The Constitution has to be given a generous, rather than a legalistic, interpretation aimed at fulfilling the purpose of the guarantee and securing the individual's the full benefit of the instrument. Both the purpose and the effect of the legislation must be given effect to and this is the generous and purpose construction... A Judge has to pass between the Government and the man whom the Government is prosecuting; between the most powerful individual in the community and the poorest and the most unpopular. It is of the last importance, that in the exercise of these duties he should observe the utmost fairness. The judicial department comes home in its effects to every man's side; it passes on his property, his reputation, his life, his all. It is to the last degree important that he should be rendered perfectly and completely independent with nothing to influence or control him but God and his conscience. The greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent Judiciary."**

170. To the foregoing I would add a timid and spineless judiciary.

171. In **Liverside vs. Anderson [1942] AC 206 at 244**, Lord Atkin held that:

> **"In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting,**

**that the judges are no respecters of persons and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law."**

172. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

173. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

174. In this case however the issue of floodgates being opened by this decision does not arise since the only ground upon which the 3rd interested party's complaint was allowed, being the existence of the order in Miscellaneous Application No. 67 of 2017 cannot be said to be common in those other proceedings alluded to by the 3rd interested party.

175. In this case the Court has found that the other issues raised before this Court as the basis for justification of the Committee's decision were not the grounds upon which the Committee made its decision. The ground upon which it did so was as a result of the consideration of an irrelevant factor hence its decision was irrational or as usually put Wednesbury unreasonable. It may well be that had the Committee based its decision on the issues now raised before me a different outcome might have been reached but that is not the matter before me and I cannot speculate on the same.

176. I therefore do not see how the outcome of this application will affect any other matter as alleged by the 3rd interested party which matters this Court is in any case not privy to.

177. It is however my view and I find that the only basis upon which the Independent Electoral and Boundaries Commission's Dispute Resolution Committee arrived at its decision of 8th June, 2017 cannot stand legal scrutiny. It was with due respect hopelessly unreasonable.

178. In the premises the Motion dated 12th June, 2017 succeeds.

**Order**

179. Consequently I hereby issue the following orders:

**(1) <u>AN ORDER OF CERTIORARI</u> removing into this Court for purposes of it being quashed the decision of the Respondent's Tribunal made on the 8th June 2017 in Complaint Number 79 of 2017 which decision is hereby quashed.**

**(2) <u>AN ORDER OF PROHIBITION</u> prohibiting the Respondent from implementing the said decision made on the 8th June 2017 in Complaint Number 79 of 2017.**

**(3) <u>AN ORDER OF MANDAMUS</u> compelling the Respondent to include the name of the Ex Parte Applicant as the Wiper Movement Political Party nominee for Machakos County gubernatorial elections scheduled to be held on the 8th August 2017.**

180. I have agonised whether in the circumstances of this case I ought to award costs. As submitted by **Mr Nzamba Kitonga, SC**, the Respondent herein still has the mandate of presiding over the elections in which the ex parte applicant intends to be a candidate. On the other hand the 3rd interested party herein has maintained that he is a member of the vehicle the ex parte applicant has boarded towards her political destination. In the spirit of promoting reconciliation it is my view and I direct that each party will bear own costs of these proceedings.

181. It is so ordered.

**Dated at Nairobi this 21st day of June, 2017**

**G V ODUNGA**

**<u>JUDGE</u>**

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

**Mr Nzamb Kitonga for the ex parte applicant**

**Miss Orero holding brief for Mr Otieno for the applicant**

**Mr Kimani Muhoro and Mr Nyamodi for the Respondent**

**Mr Sore for the 1st interested party**

**Mr Bosire for the 2nd interested party**

**Mr Ombati for Mr Ngatia for the 3rd interested party**

**CA Mwangi**