



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**MISC. APPLICATION NO. 453 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF  
MANDAMUS**

**AND**

**IN THE MATTER OF CONSTITUTIONAL RIGHTS PURSUANT TO ARTICLES 1, 2, 3, 10,19,  
20, 21, 22, 23, 27, 28, 38, 47, 48, 81, 82, 83, 86, 87, 88, 249, 252 AND 258 OF THE CONSTITUTION  
OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 4, 25, 26 OF THE INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION ACT**

**AND**

**IN THE MATTER OF ELECTIONS ACT NO: 24 OF 2011 AND ELECTION OFFENCES ACT**

**AND**

**IN THE MATTER OF ELECTION (REGISTRATION OF VOTERS) REGULATIONS, 2012**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT, SECTION 8 AND 9 CAP LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION..... RESPONDENT**

**MOHAMED IBRAHIM ABDI.....1<sup>ST</sup> EX-PARTE APPLICANT**

ISMAIL ABUBAKAR HASSAN.....2<sup>ND</sup> EX-PARTE APPLICANT

ISMAIL AHMED OSMAN.....3<sup>RD</sup> EX-PARTE APPLICANT

NURIA TACHE HASSAN.....4<sup>TH</sup> EX-PARTE APPLICANT

ADAN ISSACK IBRAHIM.....5<sup>TH</sup> EX-PARTE APPLICANT

### JUDGEMENT

1. These proceedings are the subject of the Notice of Motion dated 20<sup>th</sup> July, 2017 by which the ex parte applicants herein, **Mohamed Ibrahim Abdi, Ismail Abubakar Hassan, Ismail Ahmed Osman, Nuria Tache Hassan** And **Adan Issack Ibrahim**, seek the following orders:

**1. THAT this Honourable Court be pleased and do hereby grant an Order of *Mandamus* to remove into this Honourable Court and compel the Respondent to effect the transfer of votes made by the Ex-parte Applicants and other 1,900 voters to specific Polling Stations in Mandera North Constituency in Mandera County.**

**2. THAT this Honourable Court be pleased and do hereby grant an Order of *Mandamus* to remove into this Honourable Court and compel the Respondent to rectify the Voters register for the following polling stations in Mandera North Constituency:-**

*i. Rhamu Day Secondary Polling Station.*

*ii. Al-Hidaya Primary School Polling Station.*

*iii. Sheekoley Farms Polling Station.*

*iv. Al-Furqan Primary School Polling Station.*

**3. Costs and further incidentals to this Application be provided for; and**

**4. Such further or other relief as the Honourable Court may deem just and expedient to grant.**

2. According to the applicants they are residents of Mandera County in the Republic of Kenya who alongside the other Applicants took part in the Respondent's second phase of the Mass Voter Registration Exercise that kicked-off on the 16<sup>th</sup> January, 2017 and ended on the 14<sup>th</sup> February, 2017.

3. They averred that early this year the Respondent gazetted 'New Polling Station Code' and as result some polling stations in Mandera North Constituency were affected thereby. As a result of the said changes, the Respondent moved voters from one polling station to another without their knowledge and consent. These changes mainly affected polling stations in Rhamu Ward in Mandera Constituency.

4. Based on legal advice the applicants contended that the decision of the Respondent to reverse the will of a section of Mandera County Voters without affording them the right to be heard (Article 50) and Right to Fair Administrative Action (Article 47) is in blatant violation of the their political rights as enshrined under Article 38 of the Constitution 2010.

5. It was the applicants' case that the said decision of the Respondent to arbitrary transfer voters from one polling station to another without their approval, consent and knowledge will cause confusion and pandemonium on the election day as affected polling stations are hundred Kilometers from each other, as a result many Voters will be deprived of their Constitutional Right to Vote as enshrined under Article 38 of the Constitution 2010.

6. The Respondent was accused of having refused to process or effect transfers of the 1,900 Voters who transferred their votes from various Wards across the Republic to polling stations in Mandera North Constituency despite the said voters having followed the laid down procedure including filling FORM D (pursuant to Regulations 14 (4) of the ***Election (Registration of Voters) Regulations, 2012*** to effect transfer during the second phase of the Mass Voter Registration exercise. It was averred that the Respondent adamantly refused to effect transfer thus violating the said voters Constitutional Rights to vote in location or areas of their choice notwithstanding the fact that the Respondent stamped and approved the filled Form Ds. This inaction, it was averred was without reason or colour of law hence the applicants' forms are currently gathering dust at the Respondent's Returning Officer's Office in Mandera North Constituency in Mandera County.

7. It was therefore asserted that the applicants' constitutional Rights would continue being infringed. The applicants' maintained that this application is meritorious and has been brought without unreasonable delay.

8. In support of their cases the applicants submitted that the Ex-parte Applicants' case is premised on the provisions of Article 38 of the Constitution and that the right to vote is actualised or operationalized in Article 83(3) of the Constitution which provides that:

***(3) Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election.***

9. Based on **Njoya and Others vs. Attorney General and Others (2008) 2 KLR (EP) 658**, it was submitted that the Constitution as the supreme law is founded on the sovereignty of the people of Kenya and that:

**“This sovereignty is exercised through voting for representatives in the National and County governments who exercise delegated authority of the people in accordance with Article 2. It is beyond argument then that the right to vote is fundamental to our system of government... Apart from merely guaranteeing the right, the Constitution places upon the State and its agencies the positive responsibility to ensure that all the people of Kenya and particularly those who are marginalised or vulnerable are able to exercise this fundamental right.”**

10. It was submitted that it is also instructive to note that Article 20 (4) of the constitution enjoins this Honourable Court when interpreting the Bill of Rights to promote the values that underpin an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and object of the Bill of Rights. Article 259 (1) (a) (b) (c ) (d) and (3) require the Constitution to be interpreted in a manner that promotes its purposes, values and principles and advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and which permits the development of the law and contributes to good governance.

11. According to the applicants there are numerous International Human Rights instruments on the right to vote that was adopted by our Republic. These were accessed through Article 2 (5) and (6) of the Constitution. My Lord, Article 25 of the ***International Covenant on Civil and Political Rights (ICCPR)*** guarantees every citizen a right to vote first without distinction based on race, religion, political or other opinion and secondly, without unreasonable restrictions; Article 13 of the ***African Charter on Human and Peoples Rights*** guarantees every citizen a right to participate freely in the government of his country either directly or through freely chosen representatives in accordance with the provisions of the law.

12. In support of these submissions, the applicants relied on **Arnold Keith August and Another vs. Electoral Commission and Others CCT 8/99 [1999] ZACC 3**, where Sachs, J sitting at the Constitutional Court of South Africa underlined the importance of the right to vote in the following terms:

**“[universal adult suffrage on a common voter roll is one of the foundational values of our entire constitutional order...The universality of the franchise is important not only for**

**nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.”**

13. Further reliance was placed on Suave vs. Attorney General of Canada [2002] 3 SCR 519, in which the Supreme Court of Canada affirmed the right to vote and stated that:

**“[the right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features underpins the legitimacy of Canadian democracy and Parliament’s claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizen, jeopardizes its claim to representative democracy, and erodes the basis of its right to convict and punish lawbreakers.”**

14. In this case it was submitted that the Respondent (IEBC) has without consent, approval and knowledge of the Ex-parte Applicants and other voters moved over two thousand voters (2,000) from Rhamu Day Secondary Polling Station to Al-Hidaya Primary School Polling Station. Further, the Respondent has arbitrarily also moved over 2,000 voters from Al-Furqan Primary School Polling Station to Shakoley Farms Polling Station which ordinarily and according to Verification Register Generated on 31<sup>st</sup> March, 2017 had only 96 Voters. It was submitted that the preceding arbitral conduct of the Respondent violates the Ex-parte Applicants’ and other voters Constitutional Rights under Article 38 of the Constitution because the Respondent has arbitrarily imposed on the voters where they vote; that the polling stations where they have been transferred to, are outside their locality and in light of the hostile ugly clan politics and deadly clan clashes that traditionally suffices during elections, many of those voters will be deprived of their Constitutional Right to vote, as venturing into territory of another clan invites death or loss of limbs. It was contended that Mandera County is balkanized on clan lines and is a vast County, with a thin security personnel presence, the Respondent by arbitrarily transferring the votes of the Ex-parte Applicants and other voters to other polling stations, where they cannot access has violated their Constitutional Right as guaranteed under Article 38 of the Constitution and the provisions of the above cited International Instruments; that Mandera County geographically is a vast county and the affected Polling Stations are tens of kilometers from each other, and that with the time-honoured poor infrastructure, poor security bedeviling that region and harsh terrain, myriads of the voters who met the requirement of Article 83 of the Constitution and thus eligible to vote will be locked out on the election day, thus their Political Right as enshrined under article 38 of the Constitution will be grossly violated.

15. It was further submitted that the Respondent has adamantly refused to process or effect transfer of the 1,900 Vote transferred from various Wards across the Republic to polling stations in Mandera North Constituency despite the prescribed procedure having been followed.

16. To the applicants, despite the fact that the Respondent has approved the transfers the Respondents has nonetheless refused to effect the transfers. It was averred that the 1,900 affected voters are mainly people who returned with their families from various towns across the Country to settle in their ancestral County of Mandera hence the Ex-parte Applicants’ and other affected voters Constitutional Right to vote as guaranteed under article 38 of the Constitution and other International Instruments will be violated , because currently they hundreds of miles from their initial Polling Centers where they voted during 2013 elections.

17. It was submitted that the respondent (IEBC) is under constitutional obligation to ensure that ex-parte applicants and other affected voters realise their right to vote. To them, the Respondent is the body charged with the responsibility to register Ex-parte Applicants and others under Article 88(4)(a) as mirrored under section 4 of the ***Independent Electoral and Boundaries Commission Act (No. 9 of 2011)***, (“IEBC Act”) and is required under Article 83(3) to facilitate registration of voters. In addition to

this responsibility, as a State organ, the IEBC is bound by Article 10, which encapsulates the national values and principles of governance which include engendering human rights, equality, dignity, public participation among others. Article 21(1) imposes on the IEBC, as a State organ, to observe, respect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. To the applicants, these provisions read together do not permit the State to be a passive actor but require an activist sense in ensuring fundamental rights are promoted and fulfilled. In this respect the applicants relied on the case of **Jeffer Issak Kaur vs. Ministry of Justice, National Cohesion and Constitutional Affairs and Others Nairobi Petition No. 556 of 2012 (Unreported)** at para. 18, where **Lenaola, J** (as he then was) noted that:

**“The enshrinement of the right in a Constitution to vote not only puts a bulwark against any government action that infringes on that right but also necessarily places a positive obligation on the State to ensure that its citizens vote voluntarily.”**

18. They also relied on **Richter vs. Minister for Home Affairs and Others [2009] ZACC 3**, in which the Constitutional Court of South Africa noted that:

**“Unlike many other civil and political guarantees, as this Court has remarked on previous occasions, the right to vote imposes an obligation upon the state not merely to refrain from interfering with the exercise of the right, but to take positive steps to ensure that it can be exercised.”**

19. It was therefore submitted that in the view of the foregoing, the Respondent is under obligation to rectify the register of the affected polling stations in Mander North Constituency to enable affected persons to exercise their Constitution Right to Vote as enshrined under Article 38 of the Constitution without any hiccups or hindrance. They further averred that pursuant to Article 83(3) of the Constitution the Respondent is under obligation to effect the transfer of 1,900 votes as applied by the Ex-Applicants and other affected Voters.

20. The applicants therefore prayed for the orders sought herein.

### **Respondent’s Case**

21. The application was opposed by the Respondent Commission and in doing so averred that Notice of Motion application dated 20<sup>th</sup> July 2017 as being fatally defective, incurably incompetent, have no basis in law and should be struck out with costs on the grounds that:

**1) This Honourable Court lacks jurisdiction in this matter by virtue of section 12 of the Elections Act, 2011 and Regulations 17, 21 and 22 of the Elections (Registration of Voters) Regulations, 2012;**

**2) The application before the court is not an appeal as provided under the Elections Act, 2011 and there is no evidence of complaint being lodged with the Registration Officer as provided by the law.**

22. According to the Commission, the effect of the orders sought, if the Application is deemed to be meritorious, are that the Respondent would be compelled to transfer 1900 voters to specific polling stations and the rectification of the voters register in the stations set out in the Application.

23. The Respondent reiterated that the Application is fatally defective, incurably incompetent, lacks any legal basis and is in clear contravention of both substantive and procedural law. In this respect the Respondent relied on Part II of the ***Elections Act, 2011*** which expressly provides that it deals with voter registration and determination of questions concerning registration. Section 5(1)(a) thereof was relied upon.

24. It was noted that amongst the prayers sought by the Applicants in the Notice of Motion is a prayer for

rectification of the voter register in various wards. This, the Respondent submitted cannot be granted for the reason that the time frame within which is being sought is prohibited by an express provision of the Act.

25. It was further contended that since it is a matter of public notoriety that a general election is scheduled to take place on the 8<sup>th</sup> August, 2017, which is in six (6) days' time, there is no doubt that in the event such an order is granted it would have far reaching repercussions and even disrupt and prevent the election from taking place. In the Respondent's view, the policy reason behind strict time limits for the voter registration and revision of the register as set out in the *Election Act, 2011* is to enable the Respondent execute its mandate of conducting elections within the timelines provided by the law. In this regard any extension of the time by the court through an order as sought by the Respondent, would have the effect of throwing the entire electoral process in jeopardy.

26. It was submitted that from January 2017 when the second mass voter registration opened and closed in February, 2017 the ex parte Applicants have had ample time to exercise the right granted to them by law, with regard to the register. They however waited until the very last minute, when they sought to move the court and in light of the fact that they slept on their rights, the present Application should not be entertained at all by the court.

27. It was however submitted that this court lacks both original and appellate jurisdiction. The basis of this assertion is that this court is the wrong forum before which the Ex parte Applicants' dispute with the Respondent is to be resolved. To the Respondent, the jurisdiction of this court is provided for by Article 165(3) of the Constitution of Kenya, 2010 and section 5 of the *High Court (Organization and Administration) Act, 2015*. In this case the Ex-parte applicants filed the Application before this court in contravention of procedural law in particular section 12(1) of the *Elections Act, 2011* and Regulation 17 of the *Elections (Regulations of Voters) Regulations, 2012* (hereinafter the "Regulations").

28. It was therefore submitted that the proper forum to deal with this dispute is before the registration officer and not this court. Further and in any event, the-Ex parte Applicants are time barred from making any such claim to the registration officer by dint of Regulation 17(2) of the Regulations as the ninety day period has since lapsed. To the Respondent, the *Elections (Registration of Voters) Regulations 2012* is clear beyond any shadow of doubt that it is the responsibility of the Registration Officer to prepare and maintain a register of voters for his or her polling station, ward and constituency in such form as the Commission may prescribe, see Regulation 6. Furthermore, Registration of Voters Regulation expressly empowers the Registration Officer to effect changes to the register as provided thereunder, which includes voter transfer and claims that may arise from the process. It is for this reason that the law empowers the Registration Officer to deal with questions related to registration, including voter transfers as the present matter herein. The first entity to approach and lodge a claim is with the Registration Officer, who is empowered to make a decision, within the specific timelines when the changes can be made. Under Regulation 15 an application for the transfer of voters cannot be effected due to the fact section 5 of the Act prohibits any such action to take place. With just six (6) days to an election, the prayer for mandamus to transfer voters and rectify the voters register cannot take place as it is contrary to the law.

29. To support this effect position, the Respondent relied on the case of *Speaker of the National Assembly vs Njenga Karume (2008) 1 KLR 425* where it was held as follows:

**"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."**

30. It was submitted that since this is an Application and not an appeal, this Court cannot exercise appellate jurisdiction over the same and relied on section 12(2) of the Act which reads as follows:

**(2) Subject to the Constitution, a claim under subsection (1) shall be determined by the registration officer in the prescribed manner, and an appeal shall lie in the prescribed manner, to the Principal Magistrates Court on matters of fact and law and to the High Court on matters**

*of law.*

31. It was submitted that since the appellate jurisdiction first rests with the Principal Magistrate Court on matters of fact and law, this Court cannot exercise jurisdiction that is the preserve of another court except if it is on matters of law only. In support of this position, the Respondent relied on the decision by the Supreme Court of Kenya in paragraph 50 (a) of its ruling in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** where it was held as follows:

**“The scope of appellate jurisdiction is clearly delimited by the legal source from which it derives its existence. A Court of Law cannot assume appellate jurisdiction where none has been specifically granted by the Constitution or statute...A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution.”**

32. It was therefore submitted that since the jurisdiction of this court has been exhaustively provided for, this court therefore cannot assume jurisdiction over this matter and the Court was urged to dismiss the application with costs.

#### **Interested Parties’ Case**

33. The application was similarly opposed by the interested parties.

34. According to them:

1) **THAT**, this Honourable Court does not have jurisdiction to entertain this Judicial Review application as Section 12 of the Elections Act provides that any complaint regarding the register of voters should first be lodged with Registration Officer.

2) **THAT**, Section 12 of the Elections Act mandates the Registration Officer to determine any claim for a name that has not been included in the Register. Section 12(1) provides that an appeal shall lie to the Principal Magistrates Court on matters of fact and law and to the High Court on matters of law.

3) **THAT**, the ex-parte Applicants did not lodge any claims within thirty (30) days stipulated under of Gazette Notice No. 4413 when the register of voters was available for verification pursuant to Regulation 17(1) and (2) of the Elections (Registration of Voters) Regulations

4) **THAT**, Regulation 17(1) and (2) of the Elections (Registration of Voters) Regulations provides that the complaints may be lodged at any time by registered voter but not within ninety (90) days to the date of the general election.

5) **THAT**, Section 9(2), (3) and (4) of the Fair Administrative Actions Act provides that the administrative body’s internal dispute resolution mechanism must first be exhausted before remedies of judicial review are sought.

6) **THAT**, Article 249 (3) of the Constitution and Section 26 of the IEBC Act and provides that the IEBC in performance of its functions shall not be subject to the direction or control of any person or authority.

7) **THAT**, the ex-parte Applicants and the purported 1900 voters applied to transfer their votes during the mass voter registration that took place between 16<sup>th</sup> January 2017 and 14<sup>th</sup>

February 2017. The judicial review application has been filed late in the day as the General Elections are scheduled for 8<sup>th</sup> August 2017. It would therefore be impractical for IEBC to comply with the orders of Mandamus prayed for.

8) **THAT**, the ex-parte Applicants have not given the details of the alleged 1900 voters affected and there is no documentary evidence to support the claims made by the ex-parte Applicants.

9) **THAT**, the ex-parte Applicants did not write to IEBC to either to verify, lodge a claim or seek clarification about the purported refusal to effect the transfer voters as claimed.

35. It was submitted on behalf of the interested parties that the Elections Act and particularly sections 11 and 12 vest the IEBC with the mandate to deal with issues of registration of voters and any claims arising from the process. In this respect the interested parties relied on **Samson Owimba Ojiayo vs. Independent Electoral and Boundaries Commission (IEBC) & another [2013] eKLR** where it was held as follows on the mandate of IEBC:

**“The IEBC is an independent body established under Article 248(2) (c) of the Constitution and as an independent Commission and as such, in the performance of its functions the Commission is not subject to control or direction from any person or authority, including the Court. Article 249(2) of the Constitution lays emphasis on this independence devoid of any direction or control from any other person. The IEBC must be given discretion to assess the situation and intervene when in a particular situation demands such intervention. It is not for this court to compel the independent Commission to flex its muscles and exercise discretionary powers and least of all dictate to it when and how it is to flex those muscles. Section 42 of the Elections Act and Regulation 94(4) of the Elections(General) Regulations specifically give the IEBC discretion in carrying out accreditation of election observers.”**

36. It was submitted that this Court does not have jurisdiction to entertain this Judicial Review application as section 12 of the ***Elections Act*** provides that any complaint regarding the register of voters should first be lodged with the Registration Officer.

37. It was submitted that **Article 83(2)** of the **Constitution** provides that a citizen who qualifies for registration as a voter shall be registered at only one registration center.

38. While the interested parties appreciated that Article 83(3) of the Constitution provides that administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate and shall not deny an eligible citizen the right to vote or stand for election, they relied on the Court of Appeal in the case of **New Vision Kenya (Nvk Mageuzi) & 3 Others vs. Independent Electoral & Boundaries Commission & 5 Others [2014] eKLR** where it was held that:

**“We find, as did the learned trial judge, that Article 38(3) of the Constitution recognizes the right to vote. The said right is available without “unreasonable restriction.” In essence, all that this means is that reasonable restrictions on the right to vote are permissible. However, in order to determine what is meant by “reasonable restrictions”, one has to interrogate the meaning of the relevant Articles of the Constitution, particularly Articles 81, 82 and 83. vide Article 81, the right to vote is tied to an electoral system to facilitate the enjoyment of that right. Under Article 38, the right is guaranteed to every adult citizen. In the absence of any qualification of “every adult citizen” the target group has to be construed to mean every adult citizen who is both within and without Kenya. Those in the “without” include the appellants who are citizens in the Diaspora.”**

39. It was the interested parties’ case that the purported applications for transfer of voters were not supported by any documentation and that they allegedly were not issued with any acknowledgment slips or information that their applications were successful. This begs the question, on what basis do they

assume that the transfers were effected? No correspondence has also been attached showing any queries by any of the 1,900 voters to the IEBC regarding the purported refusal to effect the transfer of voter particulars. The 1,900 people have not been particularised and none of them has sworn an affidavit confirming the particulars as averred in the statutory statement and verifying affidavit.

40. The interested parties relied on section 6A of the *Elections Act* which provides as follows on the verification of biometric data:

**1) The Commission shall, not later than sixty days before the date of a general election, open the Register of Voters for verification of biometric data by members of the public at their respective polling stations for a period of thirty days.**

**2) The Commission shall, upon the expiry of the period for verification under subsection (1), revise the Register of Voters to take into account any changes in particulars arising out of the verification process.**

**3) The Commission shall, upon expiry of the period for verification specified under subsection (1) publish—**

**(a) A notice in the Gazette to the effect that the revision under subsection (2) has been completed; and**

**(b) The Register of Voters online and in such other manner as may be prescribed by regulations**

41. The Interested Parties submitted that the IEBC has the mandate to revise the Register of Voters effect any changes of particulars that arose during the verification of biometric data. The period advertised by IEBC for the process of verification of biometric data was 11<sup>th</sup> May 2017 to 9<sup>th</sup> June 2017. The IEBC complied with Section 6A (1) of the Elections Act as the period for verification was thirty (30) days and it was not later than sixty (60) days to the General Elections.

42. To them, a registered voter has an obligation to visit the polling station and verify that his or her particulars have been correctly captured in the KIEMS Kits. Thereafter, the IEBC shall effect changes, if any, arising out of the verification process. After expiry of the verification process, the IEBC shall publish the Register of Voters.

43. The IEBC by Gazette Notice Number 6397 dated 30<sup>th</sup> June 2017 published the Register of Voters. The Respondent also published online the number of polling stations and total number of voters per polling station. The KIEMS kits have already been loaded up with voter registration particulars and distributed to the various polling station across the country. The instant judicial review was filed too late in the day and we urge the court to exercise its discretion and dismiss the judicial review application as in any event the orders of mandamus sought is not the most efficacious remedy in the circumstance.

44. It was submitted that neither the ex-parte Applicants nor the purported 1,900 voters lodged any claim during the verification exercise that their registration particulars had not been properly captured in Register of Voters. The Register of Voters has already been published and therefore the order of Mandamus to compel IEBC to effect the changes in the voter register is not merited and should be rejected.

45. It was further contended that Remedies in judicial review are discretionary and are not guaranteed. The ex-parte Applicants have not provided any documentary evidence regarding the purported 1,900 voters whose transfers were not effected. The court cannot make blanket orders and in absence of particulars, the Judicial Review application should be dismissed. Further, the ex-parte Applicants have sought for orders of mandamus to compel the IEBC to effect the transfer of voters to specific Polling Stations in Mandera North Constituency in Mandera County and to compel the IEBC to change the Register of voters in Rhamu Day Secondary Polling Station, Al-Hidaya Primary School Polling Station,

Sheekoley Farm Polling Stations and Al- Furqan Primary School Polling Station.

46. In the interested parties' views, the court has to consider whether an orders of mandamus is the most efficacious remedy in the circumstances of a particular case. In the circumstances of this case as demonstrated in the grounds of opposition and submissions, the orders of judicial review are not deserving and we urge the court to dismiss the judicial review application.

47. The Court was further urged to consider whether any of the orders sought are merited in the public interest. It is in the public interest that the orders for judicial review are not issued as the register of voters for the General Elections scheduled for 8<sup>th</sup> August 2017 has already been published. It was contended that on the timelines, the purported 1900 voters applied to transfer their votes during the mass voter registration that took place between 16<sup>th</sup> January 2017 and 14<sup>th</sup> February 2017. The judicial review application has been filed late in the day as the General Elections are scheduled for 8<sup>th</sup> August 2017. It would therefore be impractical for IEBC to comply with the orders of Mandamus prayed for. In this respect they relied on **Baseline Architects Limited & 2 Others vs. National Hospital Insurance Fund Board Management [2008] eKLR** where the court held as follows:

**'It is, I think a principle which commands general acceptance that there are circumstances in which the public interests must be dominant over the interest of a private individual. To the safety or the well being of the general public, the claims of a private litigant motivated by profit may have to be subservient. It is therefore vital to protect the public from private interest peril – i.e. interests of a litigant must give way to that of the general public.'**

48. The Interested Parties prayed that this Court dismisses the Notice of Motion application dated 18<sup>th</sup> July 2017 with costs.

### **Determinations**

49. I have considered the issues raised in this application.

50. Section 5(1)(a) of the ***Elections Act*** expressly bars registration of voters and revision of the register of voters in the case of a general election between the date of commencement of the sixty day period immediately before the election and the date of such election.

51. It was noted that amongst the prayers sought by the Applicants in the Notice of Motion is a prayer for rectification of the voter register in various wards. This, the Respondent submitted cannot be granted for the reason that the time frame within which this is being sought is prohibited by an express provision of the Act.

52. The scope of those remedy was the subject of **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR** where it was held by the Court of Appeal that:

**"The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried**

out in a specific way...These principles mean that an order of mandamus compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...”

53. From section 5(1) of the *Elections Act* it is clear that taking into account the time remaining to the elections, the law expressly bars the Respondent from revising the register. To compel the Respondent to exercise its powers in the manner sought would amount to compelling the Respondent to act illegally. *Mandamus* being a discretionary order cannot in my respectful view issue if its effect is to compel the carrying out of a duty which is expressly barred by the law since *mandamus* only compels the exercise of a duty imposed by the law and not contrary to the law.

54. It is in this light that I understand the decision in *Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543* where it was held, inter alia, as follows:

**“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment.”**

55. Apart from that section 12(1) of the *Elections Act, 2011* provides as follows:

***“A person who has duly applied to be registered and whose name is not included in the register of voters may submit a claim for the name to be included in the register to the registration officer in the prescribed form and manner and within the prescribed time.”***

56. It is therefore clear that the first port of call where a person’s name does not appear in the register is to make a claim before the registration officer. Such a claim is required to be made in accordance with Regulation 17 of the *Elections (Regulations of Voters) Regulations, 2012* (hereinafter the “**Regulations**”) which provides as follows:

***“(1) A claim to a registration officer under section 12 of the Act in respect of an application under these Regulations shall be made at any time by the registered voter.***

***(2) A claim under subregulation (1) shall not be made within ninety days to the date of a general election or referendum or within sixty days to the date of a by-election.”***

57. It is therefore clear that the applicants herein clearly had a remedy had they sought timely legal advice. As was held by this Court in *Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE* Judicial Review Case No. 441 of 2013:

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

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

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

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

**“Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure....In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”**

60. As was stated by Nyamu, J (as he then was) in Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:

**“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief...”**

61. It is now a ‘cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy

or the decision of the court is likely to affect 3<sup>rd</sup> parties without affording such parties a hearing. In **Re Preston [1985] AC 835 at 825D** Lord Scarman was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort. That was also the position in the English case of **R (Regina)vs. Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J.** said -

***"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. "***

62. In **Ex parte Waldron [1986] 1QB 824 at 825G-825H, Glidewell LJ** observed that the court should always interrogate relevant factors to be considered when deciding whether the alternative remedy would resolve the question at issue fully and directly. The issue of the effect of the orders sought on third parties was considered in **Birmingham City Council –v- Qasim [2009] EWCA Civ 1080; [2010] BGLR 253.**

63. Section 9(2), (3) and (4) of the *Fair Administrative Action Act*, No. 4 of 2015 provides:

***(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***

***(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***

***(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

64. It is however my view that the onus is upon the applicant to satisfy the Court that the ought to be exempted from resorting to the available remedies.

65. As the period remaining to the general election is less than ninety days, the applicants are now barred from applying to the registration officer for the inclusion of their names in the register. I agree with the Respondent that the applicant ought to have moved with speed to rectify the problem had they verified their particulars as invited to do so by the Respondent. In my view a party who sleeps on his rights cannot invoke the jurisdiction of the Court on the basis that the alternative remedy is no longer available. As is stated in *Halsbury's Laws of England* 4<sup>th</sup> Edn. Vol. 1(1) para 12 page 270:

***"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of***

**good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’** [Emphasis added].

66. In the circumstances of this case the general elections are due in a few days’ time. To direct the Respondent to revise the voters register at this stage has the potential of interfering with the preparations put in place by the Respondent. This position was similarly appreciated in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between Vania Investments Pool Limited and Capital Markets Authority & Others* where the learned Judge pronounced himself as hereunder:

***“The issue of failure to invoke alternative remedies is intricately linked with the issue of delay. Applications seeking leave to commence judicial review proceedings must be made promptly as soon as grounds giving rise to the need for judicial review become known. Undue and inordinate delay in applying for judicial review is a major factor for consideration. Lord Hope of Craighead in Regina v London Borough of Hammersmith and***

***Fulham (Respondents) and Other Exparte Burkett &***

***Another (FC) (Appellants) [2002] UKHL 23 noted the need for the applicant to move the court promptly when he observed that,***

***“[64] On the other hand it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in O’Reilly v Mackman [1983] 2 AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision...But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in Swan v Secretary of State for Scotland 1998 SC 479, 487: “It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass.”***

67. I also agree that whereas the orders sought herein makes reference to 1900 voters, their particulars have not been disclosed. It is my view that without the disclosure of their particulars he orders sought herein cannot be granted in the manner sought herein.

68. In my view taking into account all the circumstances of this case including public interests, this Court ought not to grant the orders sought in this application. This is not a case where the applicants are completely locked out from participating in the forthcoming elections but whether it is convenient for them to do so. This Court appreciates the fact that Article 83(3) of the Constitution requires that administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election.

69. In my view to direct the Respondent to rectify the voter register in various wards it this stage would be a recipe for chaos. It would in the circumstances to put the rights of the over 19 million Kenyans in jeopardy in order to accommodate the applicants who in any event have not been completely disenfranchised and who as I have said had they moved with speed would have had their grievances resolved in other more convenient, beneficial and effectual forums. This position was reiterated by this Court in **Jocinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR** where it was held that:

**“... it must always be remembered that judicial review orders being discretionary are not**

guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. The would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance.”

70. In the premises I decline to grant the orders sought herein and dismiss the application but with no order as to costs.

71. It is so ordered

**Dated at Nairobi this 3<sup>rd</sup> day of August, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Makokha for Prof. Ojienda for the applicants**

**Mr Wetangula for the Respondent**

**Miss Mugo for the interested parties**

**CA Mwangi**