REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 517 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI, MANDAMUS, PROHIBITION AND RELATED DECLARATIONS

AND

IN THE MATTER OF THE ELECTIONS ACT 2011

AND

IN THE MATTER OF THE LAW REFORM ACT (CAP 26)

AND

IN THE MATTER OF THE KENYA CONSTITUTION 2010

AND

IN THE MATTER OF AN APPLICATION BY THE INDEPENDENTS SOCIETY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS TO ENABLE THE NOMINATION OF INDEPENDENT MEMBERS TO THE NATIONAL ASSEMBLY, THE SENATE & THE 47 COUNTY ASSEMBLIES IN KENYA

BETWEEN

INDEPENDENTS SOCIETY.....
…….....APPLICANT

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .....1ST RESPONDENT

RULING

1. By a chamber summons dated 18th August 2017, the applicant seeks Leave to apply for the following Judicial Review orders:-

a. An Order of Prohibition *do issue directed at the Respondent not to consider, allow, accept or otherwise proceed with any nominations from the various political party nomination lists or elsewhere, for one (1) nominated members to the National Assembly, and the County Assembly seats set out in the schedule annexed hereto, which, after the recent General Elections, should be taken up and filed by nominees(s) made by the Applicant, arising from their scorecard I the General Election held on 8 August 2017.*

b. An Order of Mandamus *to issue directed at the Respondent to apply progressively sub-article* ***97 (1) (c),*** *with respect to the proportionate nominations to the National Assembly; sub-article* ***98 (1) (b)*** *with respect to the nominations to the Senate and sub-article* ***177 (1) (b)*** *and* ***(c), (2) & (3)*** *with respect to nominations to the County Assemblies, and ensure that the proportionate part allocable to the Applicants is observed, maintained and preserved and not utilized under any circumstances, by a less qualified party, to the exclusion of the Applicants.*

c. A Declaration *that sections (s) of the Elections Act 2011 and related statute law which would enable a political party to nominate their members into slots proportionately and meritoriously belonging to the Applicants/Independents, who do not belong to political parties, are in violation of articles in the constitution, on equal citizen rights, voter equality and none discrimination, more especially Article* ***27*** *of the constitution under Article* ***2 (4).***

d. That *the leave so granted to apply for the said orders do operate as a stay on nominations to the said National Assembly seat and the scheduled County Assembly seats, pending the hearing and determination of the substantive application and /or further orders of the Honourable Court.*

2. The crux of the applicants case as demonstrated in the grounds on the face of the application, the statement and supporting affidavits are:- ***(a)*** *that the Respondent intended to embark on the process of allowing political parties to nominate their members to the National Assembly without taking into account the proportionate part of the nominations which should be made by the applicants based on elective seats which they achieved in the general elections;* ***(b)*** *that the applicants entitlement should not be illegally and unconstitutionally appropriated and or encroached upon by political parties, and that* ***(c)*** *the Elections Act and related statute law which enables a political parties to nominate their members into slots proportionately and meritoriously belonging to the applicants/independent candidates violate their constitutional rights to freedom from discrimination hence null and void.*

3. The Respondents objection as I understood it is that since the persons nominated were gazetted, the petitioner can only challenge the nominations by way of an election petition.

Whether the application satisfies grounds for grant of leave

4. The importance of obtaining leave in a judicial review application was well captured in the words of **Waki J** (as he then was) in the case of *Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 others*[1] where he stated:-

> *" is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.."(Emphasis added)*

5. In *Meixner & Another vs A.G,*[2] it was held that the leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the

applicant has an arguable case.

6. In a recent decision of this court,[3] I had an opportunity to examine a similar position and the law on grant of leave in Judicial Review proceedings and I held *inter alia* that *"The leave stage is used to identify and filter out, at an early stage, claims which may be trivial or without merit. At the leave stage an applicant must show that:- **(i)** he/she has **'sufficient interest'** in[4]the matter otherwise known as locus standi; **(ii)** the applicant must demonstrate that he/she is affected in some way by the decision being challenged; **(iii)** An applicant must also show that he/she has an arguable case and that the case has a reasonable chance of success; **(iv)** the application must be concerned with a public law matter, i.e. the action must be based on some rule of public law; **(iv)** the decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function.*" And that ***"at the leave stage, the applicant has the burden of demonstrating that the decision is illegal, unfair and irrational***." [5]

7. It is clear that the purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration.[6] Permission will be granted only where the court is satisfied that the papers disclose that there is an arguable case that a ground in seeking judicial review exists which merits full investigation at a full hearing.[7]

8. The question now for consideration is whether or not the application for leave before me is hopeless, frivolous or vexatious and whether it raises case fit for consideration. This is the acid test this application must be subjected to at this stage.[8]

9. As was held in *Meixner & Another vs A.G,**[9]* leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case.

10. The core complaint in the intended application for Judicial Review is that Independent candidates who successfully contested in the August 8th 2017 general elections were left out when I.E.B.C allocated nomination slots to political parties as provided under Article **90** of the constitution.

11. Article **90** of the constitution provides that :-

> *(1) Elections for the seats in Parliament provided for under Articles **97(1) (c)** and **98 (1) (b), (c)** and **(d),** and for the members of county assemblies under **177 (1) (b)** and **(c),** shall be on the basis of proportional representation by use of **party lists**.*
>
> *(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause **(1)** and shall ensure that--*
>
> > *(a) **each political party** participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause **(1),**within the time prescribed by national legislation;*
> >
> > *(b) except in the case of the seats provided for under Article **98 (1) (b)**, **each party list** comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and*
> >
> > *(c) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.*
>
> *(3) The seats referred to in clause **(1)** shall be allocated to **political parties** in proportion to the total number of seats won by candidates of the political party at the general election.*

12. The Elections Act,[10] An Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes defines "party list" means a party list prepared by a political party and submitted to the Commission pursuant to and in accordance with Article **90** of the Constitution and sections **28, 34, 35, 36** and **37** of the Act.

13. Section **34** of the Elections Act[11]on Nomination of party lists members provides that:-

(1)The election of members for the National Assembly, Senate and county assemblies for party list seats specified under Articles 97(1)(c) and 98(1)(b)(c) and (d) and Article 177(1)(b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.

(2) A political party which nominates a candidate for election under Article 97(1)(a) and (b) shall submit to the Commission a party list in accordance with Article 97(1)(c) of the Constitution.

(3) A political party which nominates a candidate for election under Article 98(1)(a) shall submit to the Commission a party list in accordance with Article 98(1)(b) and (c) of the Constitution

(4) A political party which nominates a candidate for election under Article 177(1)(a) shall submit to the Commission a party list in accordance with Article 177(1)(b) and (c) of the Constitution.

(5) The party lists under subsections (2), (3) and (4) shall be submitted in order of priority. (6) The party lists submitted to the Commission under this section shall be in accordance with the constitution or nomination rules of the political party concerned.

(7) The party lists submitted to the Commission shall be valid for the term of Parliament.

(8) A person who is nominated by a political party under subsections (2), (3) and (4) shall be a person who is a member of the political party on the date of submission of the party list by the political party.

(9) The party list may contain a name of any Presidential or Deputy Presidential candidate nominated for an election under this Act.

(10) A party list submitted for purposes of subsections (2), (3), (4) and (5) shall not be amended during the term of Parliament or the county assembly, as the case may be, for which the candidates are elected.

14. Also relevant is section **35** and **36** of the Act which provides that:-

***35. (1)** A political party shall submit its party list to the Commission on the same day as the day designated for submission to the Commission by political parties of nominations of candidates for an election before the nomination of candidates under Articles **97(1)(a)** and **(b), 98(1)(a)** and **177(1)(a)** of the Constitution.*

Section **36** on Allocation of special seats provides that:-

(1) A party list submitted by a political party under—

(a) Article 97(1)(c) of the Constitution shall include twelve candidates;

(b) Article 98(1)(b) of the Constitution shall include sixteen candidates;

(c) Article 98(1)(c) of the Constitution shall include two candidates;

(d) Article 98(1)(d) of the Constitution shall include two candidates;

(e) Article 177(1)(b) of the Constitution shall include a list of the number of candidates reflecting the number of wards in the county;

*(f) Article **177(1)(c)** of the Constitution shall include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be person representing a marginalized group*

(2) A party list submitted under subsection (1)(a), (c), (d), (e) and (f) shall contain alternates between male and female candidates in the priority in which they are listed.

(3) The party list referred to under subsection (1)(f) shall prioritise a person with disability, the youth and any other candidate representing a marginalized group.

(4) Within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.

(5) The allocation of seats by the Commission under Article 97(1)(c) of the Constitution will be proportional to the number of seats won by the party under Article 97(1)(a) and (b) of the Constitution.

(6) The allocation of seats by the Commission under Article 98(1)(b), (c) and (d) of the Constitution shall be proportional to the number of seats won by the party under Article 98(1)(a) of the Constitution.

(7) For purposes of Article 177(1)(b) of the Constitution, the Commission shall draw from the list under subsection (1)(e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.

(8) For purposes of Article 177(1)(c) of the Constitution, the Commission shall draw from the list under subsection (1)(f) four special seat members in the order given by the party.

(9) The allocation of seats by the Commission under Article 177(1)(b) and (c) of the Constitution shall be proportional to the number of seats won by the party under Article 177(1)(a) of the Constitution.

15. The constitutional and statutory provisions cited above only mention party lists. They do not mention independent candidates. It is clear that the scheme and architect of the constitution of Kenya 2010, clearly stipulated that nomination slots shall be shared among political parties. The Elections Act[12] only gives effect to the provisions of the constitution which is the supreme law o the land.

16. The above being the clear constitutional position, I pose the question, Are the provisions of the Elections Act[13]the, the applicant seeks leave of this court to challenge unconstitutional?.

17. I am aware, a constitution cannot be unconstitutional for lack of another constitution against which the alleged unconstitutionality must be construed. Yes, the constitution guarantees freedom from discrimination in article **27** cited by counsel for the applicant. Yes, the same constitution contains Article **90** discussed above provides for allocation of party lists.

18. I must assert that some constitutional clauses cannot be said to be superior to others. The fallacy lies in the question whether or not compliance with a constitutional provision can result in "unconstitutionality." I do not think so. The provisions in the Elections Act[14] cited above are in total conformity with the relevant provisions of the constitution.

19. The Constitution of Kenya, 2010, as all other constitutions, affirms its place as the supreme law of the land[15] and in Article 2(3) it states:- "The validity or legality of this Constitution is not subject to challenge by or before any court or other state organ".

20. Therefore, even if anyone felt that a clause of the constitution is somewhat unconstitutional or illegal, there would be no forum before which to challenge it, and nobody to make that declaration of unconstitutionality.

21. The above position is very well illustrated by the case of *Rwanyarare and Haj Badru Wegulo vs. Attorney General.**[16]*** The petitioners had moved to court alleging that certain articles of the Constitution of Uganda were inconsistent with other articles of the same Constitution, and constituted threats and infringements to the inherent rights and freedoms therein. The petitioners sought to have the offending clauses declared unconstitutional.

22. The petition was dismissed as incompetent, with the court holding that it did not have jurisdiction to construe parts of the Constitution as against the rest of the Constitution. Justice Kato said: *"This court has no power to declare one article of the Constitution inconsistent with another, but could deal with the question as to whether or not correct procedure was followed when the (amendment) Act was passed."*

23. In *Paul Ssemogerere and Others vs. The Attorney General**[17]*** for instance, it was held that "it is a cardinal rule in constitutional interpretation that provisions of a constitution concerned with the same subject should, as much as possible, be construed as complementing, and not contradicting one another. The constitution must be read as an integrated and cohesive whole."

24. Likewise in the case of *Smith Dakota vs. North Carolina**[18]*** the Supreme Court of the United States pronounced itself thus: "It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument."

25. From the foregoing, no constitutional clause is superior or inferior to another. Constitutional clauses are complementary. Thus, the Elections Act[19]in conformity with the dictates of the constitution provide for submission of party lists in the provisions cited above. To me, the said provisions conform with the constitution, and the nominations done pursuant to the said provisions cannot be said to be unconstitutional.

26. From the above, it is clear that legality of the allocation of the nomination slots cannot be questioned. Thus, the applicant has not demonstrated that the decision it seeks to challenge is illegal. On this ground alone, the application for leave to institute Judicial Review proceedings must fail.

27. Professor Githu Muigai, Kenya's Attorney-General, in highlighting the challenges of interpreting the Constitution, has observed that the Constitution being a political charter and a legal document, makes its interpretation a matter of great political significance, and sometimes controversy. He writes:-[20]

> *"The constitution contains conflicting or inconsistent provisions that the courts are called upon to reconcile, and at other times the Constitution implicitly creates a hierarchy of institutions or values and the courts are called upon to establish the order of importance. At times, the Constitution is vague or imprecise or has glaring lacuna and the courts are called upon to provide the unwritten part…"*

28. It is acknowledged that, while a Constitution may have (and always has) its imperfections, there will be clauses that do not seem in tandem with the "norms" or principles underpinning the Constitution, and no one is really saying otherwise. However, to construe those imperfections as amounting to unconstitutionality is jurisprudentially unsound and only creates needless confusion. The above being the clear provisions of the constitution leaves one possible and viable legal option, that is, the provisions of the Elections Act[21] which the applicant seeks leave to challenge are inconformity with the constitution

and nominations arising there from cannot and do not discriminate Independent Candidates. On this ground alone, I find that the application for leave does not meet the threshold laid down in the above authorities, hence, the leave sought cannot be granted because the intended Judicial Review application has no merits.

29. Even though the above ground disposes this application as enumerated above, it is also important to mention that the nominated persons were Gazetted and have since taken up their positions. They are now members of either the National Assembly, the Senate or the County Assemblies. That being the case, can their nominations be questioned by way of a Judicial Review process as per prayers one and two of the application?.

30. The law on this point in this country has been reiterated time without a number in a catena of authorities. The Supreme court of Kenya decision in the case of *Moses Mwicigi & 14 Others vs I.E.B.C & 5 Others**[22]** correctly captures the law on this point. The Apex court of Kenya pronounced itself as follows:-*

> *"…It is plain to us that the Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazettement of the nominees' names by the IEBC, as an integral part of the election process.*
>
> ***[106]*** *The Gazette Notice in this case, signifies the completion of the "election through nomination", and finalizes the process of constituting the Assembly in question. On the other hand, an "election by registered voters", as was held in the* ***Joho Case,*** *is in principle, completed by the issuance of Form 38, which terminates the returning officer's mandate, and shifts any issue as to the validity of results from the IEBC to the Election Court.*
>
> ***[107]*** *It is therefore clear that the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the Election Courts. The Gazette Notice also serves to notify the public of those who have been "elected" to serve as nominated members of a County Assembly.*

31. The above position being the law, it follows that the applicant has no arguable case, and does not deserve the leave sought. On this ground alone, the applicants application for leave to institute judicial proceedings premised on the facts discussed above fails. The Supreme court of Kenya decision in the case of *Moses Mwicigi & 14 Others vs I.E.B.C & 5 Others**[23]** cited above is very clear on this question.*

32. Applying the principles laid down in the authorities cited above, and guided by my determination of the issues and analysis of the law as enumerated above, the conclusion becomes irresistible that the applicant has not satisfied the threshold to be granted the leave sought.

33. Accordingly, the upshot is that the applicants application dated 18th August 2017 is hereby dismissed with no orders as to costs.

Orders accordingly.

Dated at Nairobi this **26th** day of **September** 2017

John M. Mativo

Judge

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[1] Mombasa HCMISC APP No 384 of 1996

[2]{2005} 1 KLR 189

[3] Judicial Review Misc Ap No 533 of 2017

[4] See R vs Panl for Takeovers and Mergers ex p Datafin {1987}I Q B 815

[5] See note 3 above

[6] Ibid

[7] R vs Legal Aid Board Ex p Hughes {1992} Adm. L. Rep. 623}

[8] Supra Note 3

[9]Supra

[10] Chapter 7, Laws of Kenya

[11] Ibid

[12] Supra

[13] Ibid

[14] Supra

[15] See Article 2 (1)

[16] Constitutional Petition No. 5 of 1999[unreported])

[17] Constitutional Appeal no. 1 of 2002) [2004] UGSC10)

[18] 192 US 268(1940)

[19] Supra

[20] *https://abacus.co.ke/newsfeed/a-constitution-cannot-be-unconstitutional/*

[21] sUPRA

[22] Supra

[23] Supra