



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION

MISC. APPLICATION NO. 584 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE

PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF ARTICLES 10, 38(3) (C), 47(2), 48, 50, 81, 90(2)

(C), 98(1) (C) & 99(2) OF THE CONSTITUTIONAL OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW

REFORM ACT (CAP 26) OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE

ACTION ACT NO. 6 OF 2015 LAWS OF KENYA

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS 2012

AND

IN THE MATTER OF KENYA GAZETTE NOTICE 8379 OF 2017

BETWEEN

SAMATAR MOHAMED ABDULAHI.....APPLICANT

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

WAFULA CHEBUKATI

CHAIRMAN OF THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....2ND RESPONDENT

VICTOR PRENGEI SITIENI.....1ST INTERESTED PARTY

MERCY CHEBENI.....2ND INTERESTED PARTY

ORANGE DEMOCRATIC MOVEMENT.....3RD INTERESTED PARTY

RULING

1. By a Chamber Summons dated 21st September, 2017, the applicant herein, **Samatar Mohamed Abdulahi**, seeks leave to apply for the following orders:

a. **An order of Certiorari to remove to this honourable court to be quashed the decision of Independent Electoral and Boundaries Commission on the 24th August vide a Gazette Notice 8379 of 2017 electing the 1st and 2nd Interested Party as Nominated Senators representing the youth.**

b. **An order of Mandamus to remove to this honourable court to compel the respondents to elect and subsequently gazette the applicant as the nominated Senator representing the youth.**

b) **The grant of leave herein does operate as a stay to the decision reached by the respondent and any further action precipitated by the said decision.**

c. **3. The 1st respondent herein be ordered to pay the applicant's costs of this application.**

2. According to the applicant, he is a duly registered member of the Orange Democratic Movement (ODM) (hereinafter referred to as "the Party").

3. According to him, Article 90 of the constitution that dictates that a Political Party should submit a list to the Independent Electoral and Boundaries Commission its preferred candidate to represent its interest to the National Assembly. Being a youth aged 29 years who is an active member of the Orange Democratic Movement Party advocating for the party's principle and ideologies he applied to be nominated as Senator in the National Assembly Senate representing the youth and having endured the rigorous process of application he emerged as the best candidate and was the party's first priority in the Party List for person to be nominated to the senate representing the youth.

4. It was averred that the 1st Respondent herein the Independent Electoral and Boundaries Commission (hereinafter referred to as "the Commission") published the party list of person eligible to be nominated to the Senate in two wide circulating newspaper and on its website. On the 8th day of August 2017 the General Elections were conducted by the Commission and having so done, the Commission, based on the proportionate representation on the strength and popularity of the political parties allocated the two seats in the senate representing the youth to the Jubilee Party and Orange Democratic.

5. However on the 24th August 2017 the Commission Gazetted **Mr. Victor Prengei** for Jubilee Party and **Mercy Chebeni** for Orange Democratic Movement as nominated senators representing the Youth in the Senate. Upon scrutiny of how the 1st respondent handled the nomination of **Mr. Prengei** and **Ms Chebeni**, the applicant discovered that both of them were not qualified to be nominated to the senate as

persons representing the youth. It was the applicant's case based on legal advice that Article 90(2)(c) dictates that the nomination from the party list must represent ethnic and regional diversity. However both **Mr. Prengei** and **Ms. Chebeni** hail from the same ethnic community thus not being qualified to be nominated and cannot represent the multi ethnic diversity of the electorate in the country in representing the dynamic issues that the youth are facing while ensuring the youth would be accorded fair treatment and more so fair representation in matters affecting the country.

6. The applicant, based on the same advice further believed that section 16 **Public Officer and Ethic Act** prohibits a Public Officer from engaging in political activity that compromises his political neutrality, the 1st interested party is a member of the Betting Control and Licensing Board whereas he is member of the Jubilee Party and its nominee to the senate. It was the applicant's contention that Article 99(2) of the Constitution provides that a person is disqualified from being an elected member of parliament if the person is public office.

7. The applicant asserted that section 34(6) of the **Elections Act** dictates a party list must be in accordance with its constitution and nomination rules and that the Orange Democratic Movement Nomination Rules provides that a person shall only be liable to be nominated in the party list if he or she is an active member. To the applicant, the 2nd interested party has only been a member 3 months prior to the application process.

8. The applicant's position was therefore that the decision to declare and gazette the 1st and 2nd interested parties as they duly elected nominee to the Senate representing the youth infringes his right to an administrative action that is lawful, reasonable and procedurally fair under Article 47 of the Constitution.

9. He disclosed that the Director of Orange Democratic Movement wrote a letter to the Chairman and Chief Executive Officer of the 1st Respondent seeking explanation on the method or formula it used to nominate the 1st and 2nd interested parties but no response was forthcoming. It was contended that the Commission made a unilateral decision to elect the 1st priority for Jubilee in the Senate Party list representing both the youth and persons with disability without consulting the ODM Party whereas it made a similar decision in 2013. The applicant's contention was that this trend indicates a formula that the 1st respondent is using, nonetheless the said formula has not been published by the 1st Respondent nor has here been consultation with the various political parties.

10. The applicant therefore asserted that the 1st respondent violated his legitimate expectation that while allocating the nominee in the party list it shall do it in accordance with constitution and all relevant statues. Based on legal advice, he was of the view that Article 88(4) as read together with Article 90(2) of the constitution imposes a constitutional obligation on the 1st respondent to conduct and supervise the election for the special seat by ensuring the spirit and letter of the constitution is met. However, the 1st respondent failed to protect his constitutional right and subverted the will of electorate as it failed to ensure qualified persons are nominated to the senate.

11. Before the leave sought herein could be granted, the respondents on 3rd October, 2017 filed a notice of preliminary objections in which the following issues were raised:

i. That this court does not have jurisdiction to hear and determine this application and the intended substantive application for judicial review in view of the Provisions of Article 105 of the Constitution of Kenya 2010. The application is frivolous vexatious and an abuse of the court process as the provisions for the removal of a member of parliament has not been invoked by the applicant which is through an Election Petition and not Judicial Review.

ii. That the ex parte applicant has not utilized the 1st respondent's Dispute Resolution Mechanism as provided for under Article 88(4) (e) of the Constitution, Section 74(1) of the Elections Act 2011 and Section 4(e) of the Independent Electoral and Boundaries Commission Act.

iii. **That for the foregoing reasons the application by the applicant dated 21/9/2017 is incompetent and legally untenable and ought to be dismissed with costs.**

12. In prosecuting the said objections, the respondents filed submissions in which they relied on **David Muriuki Ndwiga vs. Robert Mutemi Mutua & 3 Others [2016] eKLR** and **Moses Mwigigi & 14 Others vs. Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR**.

13. It was the Respondent's case that in order for this Honourable Court to make a decision that is just and fair on whether or not the orders as prayed by the Applicant should be granted, the main issue that ought to be determined is whether or not this Court has jurisdiction to hear and determine the application by the Applicant and if this question is answered in the negative, then the matter will stand disposed of. In support of this contention the Respondents relied on **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Ltd [1989] KLR 1** and **Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others Civil Application No. 2 of 2011**.

14. It was submitted that it is a requirement of both Article 88(4)(e) of the Constitution and section 74(1) of the ***Elections Act 2011*** that in the event of a dispute relating to or arising out from nominations, the first port of call is the Independent Electoral and Boundaries Commission (the 1st Respondent herein) and in this respect the Respondents relied on the holding in **Isaiah Gichu Ndirangu & 2 Others vs. Independent Electoral and Boundaries Commission & 4 Others [2016] eKLR**:

"My understanding of the laws that I have cited above is that the Legislature intended to enact legislation to govern electoral matters and the resolution of any related disputes therein. Section 74 (1) of the Elections Act and Section 4 of the Independent Electoral and Boundaries Commission Act as reproduced above makes it explicit that the Commission shall be responsible for settling disputes arising from or relating to nominations. It therefore follows that where any person has a dispute relating to or arising from any nominations, the first port of call is ideally the Commission. The next question then that begs for an answer is whether the Petitioners utilized the Commission's dispute resolution port as required of them before approaching this Court. Based on their pleadings and submissions before this Court, their argument was that the instant Petition has been filed not as an election dispute but rather that the jurisdiction being invoked herein is the one under Articles 165 and 258 of the Constitution and no more."

15. It was submitted that the Applicant did not exhaust the dispute resolution mechanism provided for under Article 88(4) (e) of the Constitution and section 74(1) of the ***Elections Act 2011***. In addition, the nature of the case before the Court is that of an election dispute wherein the applicant is challenging the validity of the "election" of the 1st and 2nd Interested Parties as is evident from Prayers 1(a) and 1(b) of the Applicant's Chamber Summons Application wherein the applicant prays for leave to apply for the Orders of Certiorari quashing the election of the 1st and 2nd Interested Parties and Mandamus to compel the 1st and 2nd Respondent to declare the Applicant as the duly "elected" Senator representing the youth. To the Respondents, for all intents and purpose the prayer by the Applicant is one that touches on the validity of the election of a Member of Parliament. It was therefore submitted that in determining the validity of the election of a member of parliament, the provision of Article 105 of the Constitution applies. According to the Respondents, any question with regard to the validity of the election of a Member of Parliament can only be addressed in an Election Court and through an election petition.

16. It was therefore the Respondents' case that this Court has no jurisdiction to hear and determine the applicant's application dated 21st September 2017 as it relates to the validity of the Election of a Member of Parliament and that the proper forum for the determination of such a dispute is an Election Court. It therefore follows my Lord that this court has no option but to down its tools in this case.

17. On the part of the applicant, it was submitted that the matter before the Court touches on the constitutionality and the legality of the discretion of the Respondents to designate from each party lists persons to represent the youth in the Senate under section 36(4) of the Elections Act. In the applicant's

view, Article 165(3)(d)(ii) of the Constitution confers on this Court the jurisdiction to hear and determine any question respecting the interpretation of the Constitution including a question whether anything said to be done under the authority of the Constitution or of any law is in compliance with the Constitution. It was thus submitted that this Court is properly charged with the supervision of administrative bodies and officials and can adjudicate on the issues raised by the applicant.

18. It was the applicant's case that the action of the Respondents was biased and illegal.

19. In support of his submissions the applicant relied on Republic vs. Kenya Roads Board exparte John Harun Mwau, Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR, National Gender and Equality Commission vs. IEBC & Another [2013] eKLR and Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000.

20. Rule 3 of the *Elections (Parliamentary and County Election) Petitions Rules, 2017* provides:

These Rules shall apply to petitions in respect of—

(a) the election of members of Parliament;

(b) the election of county governors; and

(c) the election of members of county assemblies.

21. Rule 4 of the same Rules on the other hand provides that:

(1) . The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions.

(2) An election court shall, in the exercise of its powers under the Constitution and the Act, or in the interpretation of any of the provisions in these Rules, seek to give effect to the objective specified in sub-rule (1).

22. In Suleiman Said Shahbal vs. The Independent Electoral and Boundaries Commission of Kenya and Others Nairobi High Court Constitutional Petition No. 162 of 2013, Mumbi Ngugi, J expressed herself as follows:

“Counsel for the petitioner maintains that this is a petition for vindication of the constitutional rights of the petitioner, but it is clear that what is before me is essentially a petition the ultimate goal of which is to nullify the election of the 4th respondent as Governor of Mombasa County. The only order that the petitioner seeks that can be said to be connected with violation of constitutional rights *strictu sensu* is prayer (f) which seeks compensation under Article 23(e) of the Constitution. In my view therefore, two issues arise for consideration in determining the preliminary objections raised by the respondents: *i. Is there a procedure provided by law for lodging of election petitions? ii. If there is, can such procedure be circumvented by way of a petition alleging violation of constitutional rights? ...*In considering this issue, I am alive to the fact that the Constitution has provided within its Articles not only for protection of fundamental rights, but also for the manner in which various aspects of social and political relations, and the disputes arising therefrom, are to be resolved... Article 87 provides for the manner in which electoral disputes are to be resolved...Despite Counsel for the petitioner maintaining strenuously that this is a Petition alleging violation of fundamental rights, what we have before this court is a Petition challenging the election of the County Governor of Mombasa. It has been filed as a constitutional petition alleging violation of the petitioner's rights under the Bill of Rights, rather than as an election petition that complies with all the provisions of the Constitution, the Elections Act and the Elections Rules pertaining to the filing, hearing and determination of election petitions...I believe that while the law on elections may have changed in keeping with the new constitutional dispensation,

the logic of the law has not. There were, and continue to be, cogent reasons for insisting that where there is a specific procedure or remedy provided by law, that procedure must be followed. To hold otherwise would lead to chaos in the administration of justice, for parties would be at liberty to allege violation of constitutional rights even where no such violations exist, and pick and choose which laws and rules to follow and which to disregard. There is great public interest in the expeditious resolution of election disputes, and the Elections Act and the Elections Rules are intended to achieve this. Perhaps, as the 1st respondent submitted, there is an interface between violation of constitutional rights and acts which may form grounds for annulling the results of an election. However, the framers of the Constitution and the people of Kenya, who overwhelmingly voted for the Constitution at the referendum held on August 4th 2010, thought it best that disputes relating to elections should be resolved as provided under Article 87, through legislation enacted by Parliament...Consequently, for a party to be properly before the court while challenging the results of elections under the new constitutional dispensation and the resultant statutory regime, he or she must abide by the provisions of the Constitution, the Elections Act and the Elections Rules as contained in the Elections (Parliamentary and County Elections) Petition Rules 2013 contained in Legal Notice No 54 of 2013 which constitute the constitutionally underpinned code for handling election disputes. A party cannot disregard the clear provisions of the Constitution and legislation enacted pursuant to such constitutional provisions and expect relief from the court by alleging violation of constitutional rights”

23. In arriving at her decision the Learned Judge relied on the decision of the Supreme Court of India in **N P Ponnuswami vs. Returning Officer of Namakkal Constituency and Others** where the Court observed as follows:

"The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extra ordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded) and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, which, as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any court."

24. The Judge therefore concluded that:

"The Constitution and the Elections Act, as well as the Rules made thereunder, are very clear with regard to how, before which forum, and at what stage, election results can be challenged. It is not by way of a petition alleging violation of constitutional rights but by way of an election petition that complies with all the provisions of the law governing election petitions. For the above reasons, this petition is hereby struck out with costs to the respondents."

25. On my part I associate myself with the findings of my learned sister **Mumbi Ngugi** in the above matter. A party ought not to trans-mutate an election petition into a judicial review with a view to avoiding the procedures provided under the legal regime dealing with election petitions for the convenience of the party.

26. It may be argued that since the matter before the Court revolves around the nomination of the Members of Parliament as opposed to an election, this Court has jurisdiction to deal with the matter. The Supreme Court put this issue beyond doubt where it held in **Moses Mwigigi & 14 Others vs. Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR** that:

"It is plain to us that the Constitution and the electoral law envisage the entire process of nomination for special seats, including the act of gazettment of the nominees' names by the

IEBC, as an integral part of the election process. The Gazette Notice in this case, signifies the completion of the “election through nomination”, and finalises the process of constituting the Assembly in question. On the other hand, an “election by registered voters”, as was held in *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. 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.”

27. This position was buttressed by the Court of Appeal in *Rose Wairimu Kamau and 3 Others -vs- IEBC, C.A. NO. 169 of 2013* where in addressing that very issue the Court stated as follows:-

“...In reaching the conclusion, we are alive to the fact that once nominees to Parliament and County Assemblies under Articles 97(1C) and 177(2) respectively have been gazetted...they are deemed elected members of Parliament and the County Assemblies and any challenge to their membership has to be by way of election petitions under Article 105 of the Constitution or Part VIII of the Elections Act as the case may be.”

28. In *Jaldesa Tuke Dabelo vs. Independent Electoral & Boundaries Commission & Another [2015] eKLR* the Court of Appeal held that:

“The appellant in his application for judicial review sought to invoke the supervisory jurisdiction of the High Court in election matters. We are of the considered view that the jurisdiction of the High Court in electoral matters is a special jurisdiction governed by the *Constitution* and the *Elections Act*. The supervisory jurisdiction of the High Court is inapplicable to electoral matters for the reason that the procedure to follow is set out...In the instant case, the *Elections Act* stipulates that the procedure to challenge membership to the County Assembly is by way of Petition. The appellant having chosen the wrong procedure cannot turn around and rely on *Article 159 of the Constitution*. *Article 159* was neither aimed at conferring jurisdiction where none exists nor intended to derogate from express statutory procedures for initiating a cause of action before courts. The statutory procedure stipulated for determining the question of membership to the...Assembly is by way of petition...A judicial review application cannot be allowed to circumvent the statutory procedure of instituting an election petition to determine the question of membership to a County Assembly; this strategy, we observe, constitutes a mischief that this Court should forestall to prevent a party from using an institutional detour to litigate an issue by seeking a remedy from the High Court in the first instance (which is a different and improper forum) rather than through the Resident Magistrate’s Court which is the designated forum under *Section 75 (1A) of the Elections Act*. It is our considered view that the jurisdictional competence of a court and the statutory procedure for commencing a cause of action are aimed at facilitating and enabling a party to be heard. A litigant cannot ignore the jurisdictional competence of a court or the procedure for commencing a cause of action and then aver that he has not been heard. *Article 159 of the Constitution* or the Overriding Objective principles are not blanket provisions that shelter a party who disregards the proper forum or jurisdictional competence of a court or fails to follow the procedure for commencing a cause of action. In totality, we find that this appeal has no merit and is hereby dismissed with costs to the respondents.”

29. It follows that by bringing these proceedings which in effect challenge the gazetting of a Member of Parliament couched as judicial review, the applicant fell foul of the procedural requirements which are designed for the expeditious and orderly conduct of disputes arising from elections. As was held in *Esso Petroleum Co. Ltd vs. Southport Corpn. [1956] AC at 241*, if reliance upon the rules of procedure is to be treated “as pedantry or mere formalism it cannot be seen what part they have to play in our trial system”. The rules of procedure, it has been held, carry into effect two objectives; the first to translate into practice the rules of Natural Justice, so that there are fair trial; and second, procedural arrangements

whereby steps of a trial are carried out in good order and within a reasonable time. In other words rules of procedure are aimed at safeguarding the rules of natural justice and equality of hearing. It was with this in mind that the Court of Appeal in **Mohammed Sheikh Abubakar vs. Zacharius Mweri Baya Civil Application No. Nai. 184 of 2005** held that it would make no sense to have express rules of procedure, which are not enforced and enforced with consistency.

30. It is therefore my view and I hold that I have no jurisdiction to entertain this matter. The requirement for leave was explained by a three judge bench comprising **Bosire, Mbogholi-Msagha & Oguk, JJ in Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321, Nyamu, J** (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**

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

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

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

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

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

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

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

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

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

36. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile.

37. In this case I associate myself with the holding in *David Muriuki Ndwiga vs. Robert Mutemi Mutua & 3 Others [2016] eKLR* at paragraph 74 that:

“...shed of all the craftiness of legal drafting of pleadings, the present Petition is an election petition seeking nullification of the 1st Respondent’s nomination to the National Assembly. It was clothed as an Article 38 constitution Petition but it is not and it is now obvious why.”

38. Where the Court clearly has no jurisdiction as I have found in this matter, it would be futile to grant leave. In the premises decline to grant the leave sought herein.

39. In the result I uphold the preliminary objection raised herein and strike out these judicial review proceedings with costs to the Respondents.

40. It is so ordered

Dated at Nairobi this 31st day of October, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ahmed Ibrahim for the 1st and 2nd Respondents

Mr Kinaro for Mrs Odia for the Applicant

CA Ooko