REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 576 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLE 23 OF THE CONSTITUTION 2010

AND

IN THE MATTER OF POLITICAL PARTIESACT

AND

IN THE MATTER OF POLITICAL PARTIES TRIBUNAL

AND

IN ACCORDANCE WITH ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF AN APPLICATION

BETWEEN

SAADIA AHMED MUMIN.....EX PARTE APPLICANT

AND

POLITICAL PARTIES TRIBUNAL.....1ST RESPONDENT

CLERK WAJIR COUNTY ASSEMBLY.....2ND RESPONDENT

AND

KATLUMA ABDULAHIM MAALIM.....1ST INTERESTED PARTY

KENYA AFRICAN NATIONAL UNION PARTTY.....2ND INTERESTED PARTY

RULING

1. By a Chamber Summons dated 20th September, 2017, the applicant herein, **Saadia Ahmed Mumin**, seeks leave to apply for the following orders:

> **a. An order of Certiorari to remove to this honourable court to bring to the court for the purposes of being quashed the decision by the 1st Respondent made on or about 28th July, 2017 to record and adopt a consent order substituting the 1st Respondent as candidate No. 1 in the party list in place of the ex parte applicant.**
>
> **b. An order of prohibition prohibiting the 2nd Respondent from swearing in the 1st interested party as a nominated member of the 2nd interested party in Wajir County Assembly representing Special Interest Groups.**

Applicant's Case

2. According to the applicant, she was nominated by KANU, the 2nd interested party (hereinafter referred to as "the Party") and gazetted on 28th August, 2017 to represent special interest groups in Wajir County Assembly (hereinafter referred to as "the Assembly"). However as she was preparing to be sworn in, she saw the name of the 1st interested party in a special gazette notice dated 6th September, 2017 to replace her as a member representing special interest groups in the said County Assembly.

3. According to the applicant, the alleged replacement was as a result of a consent recorded and adopted with the 1st Respondent on 28th July, 2017 in PPDT Complaint Number 500 of 2017 to which she was not a party. Upon communicating with her party, the applicant contended that the Party denounced participating in the said consent. The applicant similarly averred that the registrar of political parties confirmed that the 1st interested party was not a member of KANU but Agano Party.

4. It was the applicant's case that the 1st interested party exercised jurisdiction through a misrepresentation of the 1st interested party's status of membership as she is not a member of KANU and at the time was a substantive member of another political party.

5. Based on legal advice, the applicant contended that her right to a fair administrative action was obliterated as the decision/consent to change her name was done in her absence.

6. In response to the 1st interested party's replying affidavit and the preliminary objection, the applicant averred that she instituted these proceedings to challenge the unlawful and unprocedurally adopted consent recorded before the Tribunal. Prior to filing these proceedings, she was unaware of the said consent and believed that the Commission had without basis substituted her name with that of the interested party. She clarified that the Milimani CM's Petition No. 12 of 2017 was seeking an order stopping the swearing in of the interested party and a declaration that the substitution of her name with the 1st interested party's was without lawful basis. At the time she filed the said case, she averred she had not been gazetted and no orders were given though she was nevertheless sworn in as a nominated Member of the Assembly. To the applicant since her petition was never gazetted by the Chief Justice, the same was overtaken by events and as a result she never paid security for costs.

7. It was in any event the applicant's position that the matter before the CM's Court is different from this one since it does not deal with the consent hence its cause of action is different, the parties are not the same as IEBC and the Tribunal are not parties therein.

8. In the applicant's view, the Election Court, the CM's Court cannot address her grievance which is the unlawful recording of the consent. Since the subject matter of these proceedings is that violation of the right to administrative action and fair hearing, it was her case that this Court is the right forum to deal with the same.

9. The applicant averred that since the said Milimani Case has been withdrawn, these proceedings are not sub judice. It was her case that she only learnt of the Garissa proceedings in the preliminary objection

filed herein and to him the matter therein are unrelated to this one.

2nd Respondent's Case

10. The 2nd Respondent herein, the Clerk Wajir County Assembly, (hereinafter referred to as "the Clerk") did not oppose the application.

11. According to the Clerk, the ex parte applicant was gazetted by the Commission as the duly nominated member of the Assembly under the gender tip up list through the Kenya Gazette Notice No. 8380 Vol. CXIX – No. 124 of 28th August, 2017.

12. It was disclosed that the Assembly held its first sitting on 7th September, 2017 where all the elected members including the ex parte applicant were sworn in on the strength of the said Gazette Notice. It was the Clerk's case that he was unaware of the subsequent Gazette Notice No. 8752 Vol. CXIX – No. 131 dated 6th September, 2017 as the same was not brought to his attention in time by the Commission and by the time this was done, the swearing in of members was already done.

13. It was averred that vide a letter dated 29th September, 2017, the Speaker of the Assembly sought clarification on the issue with the Chairperson of the Party and vide a letter dated 5th October, 2017, the Chairperson confirmed that the ex parte applicant was the nominee of the Party and that the Commission was in the process of rectifying the anomaly.

14. It was the Clerk's case that once a nominated Member of County Assembly is gazetted by the Commission he/she becomes an elected Member of that Assembly and by dint of Article 194 of the Constitution as read with section 37 of the ***Elections Act*** the only known channel through which a nominated and/or elected Member can be degazetted and/or his/her seat declared vacant are through the death or resignation of a Member from the Assembly or from the sponsoring political party or nullification by he Election Court. In this case it was contended that the conditions for the degazettement of the applicant have not been met.

15. It was the Clerk's case that his role is limited to the administration of oaths or affirmations to all members present in the Assembly on the first suiting of the Assembly pursuant to Standing Order 3(c) of the ***County Assembly of Wajir Standing Orders*** and the day to day management of the County Assembly. He asserted that he does not have the power to administer any oath or affirmation after the first sitting.

1st interested party's case

16. The application was a notice of preliminary objection and replying affidavit. According to the notice of preliminary objection:

> **1) This Honourable Court lacks jurisdiction to hear this matter as the net effect of the orders sought would be to stop the swearing in of a duly nominated and elected Member of a County Assembly and this will ultimately affect the position of the 1st interested party as a duly elected member of the County Assembly of Wajir which issue falls within the jurisdiction of the Election Court.**
>
> **2) The issue before this Honourable is sub judice as the same issue is currently and substantively before the Chief Magistrate's Court at Milimani under Milimani having been filed by the ex parte applicant under Election Petition Number 12 of 2017 – Saadia Ahmed Mumin vs. The Independent Electoral and Boundaries Commission, Clerk of the County Assembly of Wajir, Kenya African National Union and Kaltuma Abdullahi.**

17. According to her, she is a golden member of KANU having paid up the requisite fees required by the party. Sometimes in the month of May 2017, KANU invited applications for nominations to various positions including special seats in various county assemblies in the Country and interested applicants

were required to fill up forms, submit the same to the Party offices and pay up the requisite nomination fees. The 1st interested party averred that she applied for the nomination for Special Gender seats provided for under Article 177(2) of the Constitution of Kenya and met all the requirements set out by the Party rules besides the qualifications set out in the Constitution of Kenya and the County Governments Act for one to be a member of the County Assembly.

18. According to her following the submissions of the applications, the Party shortlisted the successful candidates in the gender special seats to the Assembly entailing all the wards in the County and on diverse days the Independent Electoral and Boundaries Commission (hereinafter referred to as "the Commission") called on all the political parties to submit their respective party lists to enable the Commission designate the nominees in proportion to the number of seats a political party gets in the general election. Accordingly the Party submitted its gender top up list and the Commission on its website on 23rd July, 2017 published the list for the said County which included the applicant and the interested party herein. However being dissatisfied with the ranking in the said list, the interested party wrote to the Party secretariat complaining about the issue but the Party failed to resolve the same through its internal dispute resolution mechanism forcing the interested party to refer the complaint to the Political Parties Disputes Tribunal, the 1st Respondent herein (hereinafter referred to as "the Tribunal" for redress.

19. According to the 1st interested party following the filing of the said complaint before the Tribunal as Complaint No. 500 of 2017 after service of the same on the 2nd interested party, it was on 28th August, 2017 agreed between the parties that the Party's gender special seat nominees to the Assembly published on 23rd July, 2017 be amended so that the interested party could be ranked first and that there be a declaration that the 1st interested party was the most qualified amongst the applicants in terms of academic qualification in public management and a consent was recorded before the Tribunal on the same day.

20. Pursuant to the said consent, it was averred that the Party amended its party list and sent the same to the Commission. Following the declaration of the results of the election by the Commission, the Party was allocated one seat for gender special seats but despite the aforesaid consent, the Commission erroneously proceeded to publish the name of the applicant as having been validly nominated to the Assembly in the gender top up list vide the Kenya Gazette Notice No. 8380 Vol. CXIX – No. 124 of 28th August, 2017.

21. Aggrieved by the said Notice the interested party demanded that the Commission amends the said Notice in order to declare her as the valid holder of the said slot and the Commission upon realising the mistake proceeded on 6th September, 2017 vide Gazette Notice No. 8752 Vol. CXIX – No. 131 to amend the initial Gazette Notice and the 1st interested party was declared as the holder of the said slot. The 1st interested party averred that she personally presented the amended d Notice to the 2nd interested party on 7th September, 2017 but the 2nd interested party failed to abide thereby and proceeded to follow the contents of the earlier Gazette Notice and invalidly administered the oath of office for the membership of the County Assembly of Wajir to the applicant.

22. It was averred by the 1st interested party that on 8th September, 2017 she presented the amended Gazette Notice to the Speaker of the Assembly who agreed to comply with its contents and scheduled her swearing for 27th September, 2017.

23. It was therefore the 1st interested party's case that she was the validly elected (sic) member of the County Assembly of Wajir as a consequence of the gender top up special list submitted by the Party while the applicant was not validly nominated to the Assembly hence her swearing in was null and void. The 1st interested party denied that she was a member of Agano Party as she had requested that her name be deleted from their records.

24. It was the 1st interested party's position that this Court lacks jurisdiction to hear this matter at this time as the matter involves a complaint by one party against the election of another party hence the net

effect is that the orders sought herein would stop her swearing in as affect her position as a Member of the County Assembly of Wajir. The 1st interested party further averred that the issue before this Court was sub judice as the same issue was before the Chief magistrate's Court, Milimani having been filed by the ex parte applicant under Election Petition Number 12 of 2017 – **Saadia Ahmed Mumin vs. The Independent Electoral and Boundaries Commission, Clerk of the County Assembly of Wajir, Kenya African National Union and Kaltuma Abdullahi**. It was accordingly contended that the filing of these proceedings was an abuse of the court process considering that the existence of those proceedings have not been brought to the attention of this Court.

25. The 1st interested party further sought that pursuant to the provisions of the High Court Organisation and Administration Act, these proceedings be transferred to the High Court, Garissa for the purposes of consolidation with High Court Petition No. 452 of 2017 between **Kaltuma Abdulahim Maalim, the Speaker of the County Assembly of Wajir, Saadia Ahmed Mumin, the IEBC and KANU** which was ordered to be transferred to the said Court by **Aburili, J** on 13th September, 2017.

26. It was however the interested party's case that this application ought to be dismissed with costs.

27. In response to the Clerk's affidavit, the 1st interested party insisted that she was a member of KANU and not Agano Party and that on 6th September, 2017 a gazette notice was published removing the applicant and nominating her as a member of the Assembly.

28. It was averred that in the morning of 7th September, 2017 her advocates issued a notice of the Gazette Notice to the 2nd Respondent and forwarded a copy of the Gazette Notice to him upon his request but the 2nd Respondent proceeded to swear in the ex parte applicant. She therefore maintained that the swearing in of the applicant was irregular as she had already been gazetted and hence she is the nominated member of Wajir County Assembly by KANU and should therefore be sworn in.

Determinations

29. I have considered the issues raised in this application. It is important to note that this ruling is in respect of leave to apply for judicial review orders. 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.**

30. **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".

31. 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.

32. 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…"

33. 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."

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

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

rendered otiose."

35. 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.

36. However the 1st interested party has taken the issue that this Court has no jurisdiction to entertain this matter since in effect this application seeks to challenge an election to a County Assembly. If that position is correct then there would be no reason to grant leave since as was stated by **Nyarangi, JA** in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR**:

> **"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...*Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction***".** [Emphasis provided].

37. Similarly the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR** expressed itself as follows:

> **"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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), *Constitutional Application Number 2 of 2011*. 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. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."**

38. 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.

39. 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).

40. 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, 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"

41. 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."**

42. 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."**

43. On my part I associate myself with the findings of my learned sister **Hon. Lady Justice 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.

44. It may be argued that since the matter before the Court revolves around the nomination of a Member of the County Assembly 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 Mwicigi & 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 gazettement 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."**

45. 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 f act 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."**

46. 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."**

47. It follows that if by bringing judicial review proceedings the applicant is in effect challenging the gazettement of a Member of Parliament or County Assembly, the applicant would fall 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.

48. In this case the applicant's case is that she had in effect been gazetted as a Member of the Wajir County Assembly and had in fact been sworn in before that position was purportedly rescinded by another Gazette Notice. If the applicant was the first to be gazetted and in fact sworn in it is arguable whether by a subsequent gazette notice the earlier one could be revoked. Authorities seem to indicate that once one is gazetted as an "elected Member of Parliament or County Assembly" by nomination, such a decision can only be overturned by an Election Court and not by the Independent Electoral and Boundaries Commission.

49. What then is the option available to a person whose gazettement has been purportedly rescinded? In my view such a scenario is similar to where for some reason a duly elected member is degazetted. To my mind in such a case the applicant is not challenging the election of his or her substitute but the degazettement. If the position was otherwise, such a person would be left with no remedy since an election petition must pursuant to section 76(1)(a) of the ***Elections Act*** be filed within twenty eight days after the date of declaration of the results of the election. This means that a person who is degazetted after

the expiry of the 28 days period would be unable to lodge a petition and if his only option was to challenged the decision degazetting him or her was by way of a petition, he would be left with no remedy.

50. In my view where what is being challenged is not the election but a decision wrongfully declaring a person who was in effect legally a Member of Parliament or County Assembly to be nolonger such a member, there is no bar to such challenge being initiated by way of judicial review or a petition.

51. Accordingly, I decline to lay down this Court's tools on the basis of lack of jurisdiction.

52. The other objection raised is with respect to the existence of an earlier matter having been filed by the ex parte applicant being Milimani Election Petition Number 12 of 2017 – **Saadia Ahmed Mumin vs. The Independent Electoral and Boundaries Commission, Clerk of the County Assembly of Wajir, Kenya African National Union and Kaltuma Abdullahi**. The applicant however contended that the cause of action in the two matters is different and that the Milimani Case has been withdrawn. Those are not matters which can be determined at this preliminary stage. With respect to the Garissa matter the applicant states that he was not aware of the same.

53. Having considered the issues raised herein, it is my view that the issue whether the applicant having been gazetted and sworn in as a Member of the County Assembly of Wajir could have her election nullified by a gazette notice raises a *prima facie* case for the purposes of leave. As I have alluded to hereinabove, the position here is akin to where a person having been declared to have been duly elected and is subsequently gazetted, the Commission decides out of the blue to purport to de-gazette the said election without a petition being filed, heard and determined. In that event, it is my view that the person who was earlier gazetted cannot file a petition as he was the one elected and is not aggrieved by the results of the election.

54. Accordingly, I hereby grant leave to the applicant to commence judicial review in the manner sought.

55. In order not to complicate the issues further I hereby direct that the leave granted herein shall operate as a stay of any proceedings in the matter pending the hearing and determination of the substantive Motion which is to be filed and served within 7 days or until further orders of this Court.

56. The costs of these proceedings will be in the cause.

57. It is so ordered

Dated at Nairobi this 21st day of November, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Malenya for Mr Okubasu for the applicant

Mr Ahmed Ibrahim for Mr Hussein for the 2nd Respondent and Patrick for the interested party

CA Ooko