



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 297 OF 2016**

**ISAAC ALUOCH POLO ALUOCHIER .....PETITIONER**

**VERSUS**

**THE NATIONAL ALLIANCE AND 542 OTHERS.....RESPONDENTS**

**JUDGMENT**

**INTRODUCTION**

1. The petitioner has sued 12 political parties which he alleges unconstitutionally and illegally nominated named candidates for the General Election of 4<sup>th</sup> March 2013, such nomination contravening the qualification requirements of the Constitution, Code of Conduct for Political Parties and the law on election offences, and for that purpose seeking, initially, relief from the Registrar of Political Parties and thereafter before this Court purportedly under the Fair Administrative Action Act, 2015.

2. By a ruling dated 12<sup>th</sup> October, 2016 the Court ruled that the proceedings before the Court went beyond the purview of an application or appeal pursuant to the Fair Administrative Action Act, 2015. The ruling is set out in full below:

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## RULING

1. By a Petition dated 13<sup>th</sup> July 2016, described as “being an appeal from the decision of the Registrar of Political Parties in a letter dated 27<sup>th</sup> June 2016, pursuant to a complaint dated 5 April 2016 and lodged on 6 April 2016 with the Registrar against The National Alliance and 542 other Respondents”, the Petitioner seeks the very orders that he had sought against the Registrar of Political Parties only this time round to be issued by the Court.

2. The Respondents did not enter appearance to the Petition. Submissions were made by the Petitioner in the absence of the respondents who had been duly served on 26<sup>th</sup> September 2016 and on the basis of the 90-day limitation under section 8 of the Fair Administrative Action Act, 2015 a date for judgment was scheduled a fortnight later on the 12<sup>th</sup> September 2016.

3. As I prepared the Judgment, I took the view that this was not an appeal from the decision of the Registrar of Political Parties within the meaning of the Fair Administrative Action Act nor an application for review under section 7 thereof, and that it was consequently not governed by the 90-day period for disposal.

4. As I observed in CONSTITUTIONAL PETITION NO. 292 OF 2016 ISAAC ALOUCH POLO ALOUCHIER VERSUS THE HON. STEPHEN KALONZO MUSYOKA & Ors., under the Fair Administrative Action Act, the word appeal only relates to an appeal to the Court of Appeal from the decision of the High Court on judicial review under section 9 of the Act which provides as follows:

“9. (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

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

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

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

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.”

5. From the foot notes, the Petition (at p.35) is expressed as being brought under Section 7 (2) which is in the following terms:

“7. (2) A court or tribunal under subsection (1) may review an administrative action or decision, if-(d) the action or decision was materially influenced by an error of law:”

6. So before the Court should have been an application for review under section 7(2) of the Act. Such an appeal would have pointed to the decision of the Registrar of Political Parties and seek to demonstrate, pursuant to section 7(2) (d) of the Act, that “the action or decision was materially

influenced by an error of law”

7. In seeking of the Court the same reliefs, determinations and orders as sought in the complaint before the Registrar of Political Parties, the petitioner is asserting some concurrent jurisdiction on the part of the Court to make the orders that the Registrar could make in the Political Parties Act, such as suspending the registration of some of the respondents, withholding funds from political parties and call for undertakings to the Registrar of Political Parties and the Independent Electoral and Boundaries Commission, among other actions under the Political Parties Act, the Elections Act and the Anti-corruption and Economic Crimes Act.

8. Invocation of such a concurrent jurisdiction is an original petition rather than an application for review or indeed, appeal, from the administrative action for purposes of the Fair Administrative Action, 2015, and section 8 limitation of time for disposal cannot apply.

9. Indeed, this expanded scope of the proceeding is confirmed by the Petition itself at paragraph 7 as follows:

“7. Consequently, the petitioner invokes the jurisdiction of the High Court pursuant to Article 165(3) of the Constitution, including its unlimited original jurisdiction in criminal and civil matters, its jurisdiction to hear any question respecting the interpretation of the Constitution, and any other jurisdiction, original or appellate, conferred on it by legislation. Pursuant to Article 165(3) (e) of the Constitution, the Petitioner invokes the judicial review (appellate) jurisdiction of the High Court pursuant to sections 7 and 8 of the Fair Administrative Action Act, 2015.”

10. Of course, the court is mindful of the need for expedition in all causes before it as a constitutional imperative of Article 159 of the Constitution of Kenya 2010. However, the larger timelines under the Civil Procedure Act, being sixty days from the date of conclusion of hearing for delivery of judgment, will give the Court more time for consideration of the undoubtedly weighty issues raised in this petition.

11. Accordingly, to allow the Court to adequately consider the issues raised in this Petition, the Court resets the Judgment for delivery on the 10<sup>th</sup> November 2016 at 2.30pm.

DATED AND DELIVERED THIS 12<sup>TH</sup> DAY OF OCTOBER 2016.

EDWARD M. MURIITHI

JUDGE”

3. Following the filing of the Claim before the Registrar of Political Parties by a Complaint dated 6<sup>th</sup> April 2016 against political parties, their officials and members, the Registrar by a letter dated 27<sup>th</sup> June 2013 rejected the complaint prompting the “appeal” herein by the petitioner seeking the same very orders from the Registrar of Political Parties as are sought from this Court in this Petition.

### **The Petition**

4. By the Petition herein dated 13<sup>th</sup> July 2016, the petitioner seeks orders as follows:

**“WHEREFORE, the Petitioner humbly prays that this Honourable Court -**

1. Discovers that, pursuant to section 72(2) of the Elections Act, Respondent Nos. 1 to 12 knowingly nominated the candidates scheduled in table 1 of the Petitioner’s Complaint, in the general elections of 4 March 2013, when the said candidates did not meet the requirements of the Constitution. The court further finds that, pursuant to section 21(1) of the Political Parties Act, the

said respondents contravened the provisions of Article 91(1)(h) of the Constitution, as read together with paragraphs 6(a) and(b) of the Code of Conduct for Political Parties, did not adhere to the law relating to the nominations of candidates in the general elections of 4<sup>th</sup> March 2013, and instigated and participated in the commission of election offences. Pursuant to sections 34(a) and 45(5) and (7) of the Political Parties Act, as read together with paragraphs 6(a) and (b) of the Code of Conduct for Political Parties, the Court;

- a. (a) Suspends the registration of Respondent Nos, 1 to 12 for a period of 12 months from the date of this order, pursuant to section 21(3) of the Act.
- b. Withholds funds from the Political Parties Fund to those in receipt of the same of respondent Nos, 1 to 12 that is respondent nos. 1, 2 and 6 for a period of 12 months from the date of this order, pursuant to section 21(3) of the Act.
- c. Pursuant to section 21(2)(a) of the Political Parties Act, informs respondent Nos 1 to 12 that the particulars of breach or contravention of the Constitution are as detailed in table 1 of the Complaint with respect to each political party and their errant candidates.
- d. Pursuant to section 21(2)(b) of the Political parties Act, informs respondent Nos, 1 to 12 by this written order of the Registrar's intention to deregister each of them.
- e. Pursuant to section 21(2)(c) of the Political Parties Act, directs each of respondent Nos 1 to 12 to provide legally enforceable non revocable written undertakings to both the registrar and to the Independent Electoral and Boundaries Commission, acknowledging without prejudice to any plea in any possible criminal proceedings, that it contravened section 72(2) of the elections Act and the Constitution as laid out in table 1 of the Complaint, that it is disqualified from nominating any candidates in the next elections to be held in the affected electoral areas, and that it will not attempt to nominate any candidate in the next elections to be held in the affected electoral areas, and to provide the said undertaking within a period of ninety days of the date of this order.
- f. Pursuant to section 21(2)(c) of the Political Parties Act, and taking note of the objective of section 72(3)(b) of the Elections Act, incorporated into the Political Parties Act by paragraph 6(b) of the Code of Conduct for Political Parties, pursuant to section 45(7) of the Political Parties Act, directs each of Respondent Nos, 1 to 18 to refrain from nominating any of the errant candidates in the general elections of 4 March 2013 in the next elections in the electoral areas where the said errant candidates were nominated contrary to the requirements of the Constitution. The court further finds that the Registrar should direct all political parties not party to this complaint, within a period of 14 days from the date of this order, to likewise refrain from nominating in the next elections in the said electoral areas any of the said errant candidates.
- g. Pursuant to sections 21(2)(c), 45(2) and (4), and 7(3)© of the Political Parties Act, directs Respondent Nos 1 to 12 to appropriately discipline those of their numbers who are among respondents Nos 19 to 300, for the violations by these political party officers of paragraph 6(a) and (b) of the Code of Conduct for Political Parties, with a view to ensuring that none of these errant political party officers remains or acts as a member of the governing body of a registered political party, and to so discipline the said political party officers within a period of ninety days of the date of this order.
- h. Pursuant to section 21(2)(c) of the Political Parties Act, and sections 51 and 56B of the Anti-Corruption and Economic Crimes Act, 2003, directs respondent Nos 1,2 and 6 to repay, within a period of ninety days, all funds they have received from the Political parties fund subsequent to the general elections of 4 Match 2013, and to enter into an out of court settlement with the Ethics and anti-Corruption Commission for the repayment of the same entering into the said out of court settlement within a period of ninety days of the date of this

order.

i. Pursuant to sections 21(2)(c) AND 45(2) and (4) of the Political Parties Act, sections 51 and 56B of the Anti corruption and Economic Crimes Act, 2003, and section 23 of the Penal code, directs respondent Nos 1,2 and 6 to inform the Ethics and Anti Corruption Commission, within a period of ninety days, of those of their political party officers among respondent Nos 19 to 82 and 139 who are to share in their liability of repaying funds to the political Parties Fund, funds received subsequent to the general elections of 4 March 2013, that the Ethics and anti Corruption Commission may recover from these political party officials any shortfall in funds not settled by respondent Nos, 1, 2 and 6 within a period of ninety days of the date of this order.

2. Finds that, pursuant to Article 77(2) of the Constitution, respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18, contravened the said provision by having allowed appointed State officers to hold offices in them between 27 August 2010, when the Constitution was promulgated and 29 January 2013, when the nominations for the general elections of 4 March 2013 commenced. The errant state officers who contravened Article 77(2) are as laid out in Table 2 of the Complaint, and the court so finds. Consequently, pursuant to section 7(3)(d) of the Political parties Act, such errant state officers are disqualified from being in the governing body of any political party. Additionally, the Court finds that each of respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18 during the times of contraventions of Article 77(2) are, pursuant to section 45(2) of the Political Parties Act as read together with paragraph 6(b) of the Code of Conduct for Political Parties, also culpable with respect to having contravened article 75(2). The errant NEC officers who contravened Article 75(2) are as laid out in table 3 of the Complaint. Pursuant to section 45(5) of the Political Parties Act, the Court.

a. By this order issues a formal warning to respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18 on account of persistent contravention of Article 77(2) of the Constitution from 27 August 2010 and persistent contravention of Article 75(2) and hereby requires the said respondents to ensure that, within a period of ninety days of the date of this order, none of their officers will also be appointed State Officer.

b. Hereby requires that no errant person, who has contravened Article 77(2) of the Constitution or Article 75(2) and by such contravention violated Chapter Six of the Constitution or Article 75(2) and by such contraventions violated Chapter Six of the Constitution, as found by the court and laid out in Tables 2 and d3 of the complaint, be a member of the governing body of a political party, and should any such person be a member of the governing body of a political party, that political party is required to ensure that such person ceases to be so and to so comply with this requirement within a period of ninety days of the date of this order. In this regard, the Court finds that the registrar should inform all political parties, within 14 days of this order, of the errant persons who have been found to have contravened Article 77(2) and 75(2) of the Constitution, to facilitate compliance by all political parties of the provisions of the political Parties Act.

c. Hereby suspends the registration of respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18 for a period of six months from the date of this order pursuant to section 21(3) of the Act.

d. Pursuant to section 21(2)(a) of the Political Parties Act, hereby informs respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18 that by having among its offices any of the persons listed in Tables 2 and 3 of the Complaint, persons who have contravened article 75(2) of the Constitution, in not appropriately disciplining those of their officers who were in contravention of Article 77(2), they contravened Article 91(1)(h) of the Constitution, as read together with paragraph 6(a) and (b) of the Code of Conduct for Political parties.

e. Pursuant to section 21(2)(a) of the Political parties Act, hereby informs Respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18 that by having among its officers any of the persons

listed in tables 2 and 3 of the Complaint persons who have contravened Article 75(2) of the Constitution as read together with section 45(2) of the Political Parties Act, they contravened or are in contravention of Article 91(1)(h) of the Constitution as read together with paragraphs 6(a) and (b) of the Code of Conduct for Political parties and section 7(3)(d) of the Political Parties Act.

f. Pursuant to section 21(2)(b) of the Political Parties Act hereby informs respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18 of the Registrar's intention to deregister each one of them.

g. Pursuant to section 21(2)(c) of the Political Parties Act hereby directs Respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18 to ensure that within ninety days of the date of this order, none of their officers appearing in either or both of tables 2 and 3 of the complaint remains as their officer, through inviting such of these who are still their officers to resign their offices within 14 days of such invitation, and failing such resignation to effect their political party disciplinary procedures with a view to removing such persons from being their officers, and completing the disciplinary process within ninety days of the date of this order. In the alternative each of respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18 should show cause to the Registrar why it should not be deregistered.

3. Orders the respondents to pay the petitioner's costs."

5. The Petition was not supported by an affidavit setting out the facts of the case. There was, however, attached to the Petition the Complaint filed before the Registrar and three Tables showing, respectively, Table 1 on Violations of Constitutional Provisions on Nominations in the Last General Elections, Table 2 on State Officers who contravened Article 77 (2) of the Constitution and Table 3 on Political Parties' NEC Members who Contravened Article 75 (2) of the Constitution. Correspondence exchanged on the complaint filed before the Registrar between the Registrar and the political parties and official/member of a respondent political party are also attached to the Petition.

### **Response and Submissions**

6. Despite service by registered post and advertisement in daily Newspapers pursuant to orders of the Court, none of the respondents entered appearance and or filed a response to the Petition, which, therefore, proceeded to hearing on 26<sup>th</sup> September 2016 when the Petitioner made oral submissions on the Petition, in the absence of the Respondents, and Judgment was reserved.

### **Issue for Determination**

7. As shown in Paragraph 7 of the Petition, the Petitioner's cause of action asserts the broad jurisdiction of the High Court under the Constitution and maintains that –

*“7. Consequently, the petitioner invokes the jurisdiction of the High Court pursuant to Article 165(3) of the Constitution, including its **unlimited original jurisdiction** in criminal and civil matters, its jurisdiction to hear any question respecting the interpretation of the Constitution, and any other jurisdiction, original or appellate, conferred on it by legislation. Pursuant to Article 165(3) (e) of the Constitution, the Petitioner invokes the **judicial review (appellate) jurisdiction** of the High Court pursuant to sections 7 and 8 of the Fair Administrative Action Act, 2015.”*

8. The true question for determination is whether the Court has under the expressed provisions jurisdiction to make the reliefs sought by the Petitioner. In making this determination two issues arise for the Petition as pleaded before the Court as follows:

**a. Whether the Petition is competent; and**

**b. Whether the Court can grant the reliefs sought in the Petition.**

## **Determination**

9. Articles 75 and 77 of the Constitution, upon which the Petitioner's suits are in the following terms:

*“75. (1) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—*

- (a) any conflict between personal interests and public or official duties;*
- (b) compromising any public or official interest in favour of a personal interest; or*
- (c) demeaning the office the officer holds.*

***(2) A person who contravenes clause (1), or Article 76, 77 or 78 (2)—***

- (a) shall be subject to the applicable disciplinary procedure for the relevant office; and***
- (b) may, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office.***

*(3) A person who has been dismissed or otherwise removed from office for a contravention of the provisions mentioned in clause (2) is disqualified from holding any other State office.*

*77. (1) A full-time State officer shall not participate in any other gainful employment.*

***(2) Any appointed State officer shall not hold office in a political party.***

*(3) A retired State officer who is receiving a pension from public funds shall not hold more than two concurrent remunerative positions as chairperson, director or employee of—*

- (a) a company owned or controlled by the State; or*
- (b) a State organ.*

*(4) A retired State officer shall not receive remuneration from public funds other than as contemplated in clause (3).”*

## **Want of supporting evidence to the Petition.**

10. Under ***The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013***, for the enforcement of the Bill of Rights and which by the practice of the Court have been used for all constitutional litigation, there is no requirement that a petition be supported by an affidavit on the facts. In ***Bryson Mangla v. A.G & Ors.*** Nairobi Pet. No. 284 of 2016, this Court held that:

***“13 The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013 do not require that a petition must be supported by an affidavit, see Rule 11 thereof in these terms:***

***“11. Documents to be annexed to affidavit or petition***

- (1) The petition filed under these rules may be supported by an affidavit***
- ((2). If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.”***

14. *It is conceivable that a petition which challenges, for example, constitutionality of a particular legislative text may not require an affidavit. Where however, a petition relies on matters of evidential fact, this must be proved by affidavit or oral testimony as the court may direct.*”

11. So where, as here, it is sought to rely on matters of fact a suitable affidavit with documentary annexures ought to be filed in discharging the burden of proof of a plaintiff in terms of section 107, 108 and 109 of the Evidence Act, which provide as follows:

**“107. Burden of proof**

***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

**108. Incidence of burden**

*The burden of proof in a suit or proceeding lies on **that person who would fail if no evidence at all were given on either side.***

**109. Proof of particular fact**

*The **burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence,** unless it is provided by any law that the proof of that fact shall lie on any particular person.”*

12. The liability of the respondents, which is sought by the Petitioner herein depends on the proof of the facts that the respondents breached the Constitution and statute as pleaded on the Petition. The petitioner, therefore, has the general burden of proof (ss. 107 and 108 of the Evidence Act) and of the particular facts (s. 109 of the Evidence Act) of the respondents’ positions as **state officers** and **party officials** and of their **nominations** in breach of the law. There was no evidence that the named respondents alleged to have been state officers were also officials of political parties while they held those state offices.

13. While the Court may, under section 60 (1) (f) of the Evidence Act, take judicial notice of the *cabinet* positions of the some of the respondents which are gazetted in the Kenya Gazette, it is not so with the *Party* positions they are alleged to have held at the time of the nominations for the 2013 elections. The officials of political parties are matters of fact the particulars of which are registered with the Registrar of Political Parties, but which must be proved before the Court.

14. Section 60 of the Evidence Act provides for facts which the Court may judicially notice as follows:

**“60. Facts of which court shall take judicial notice**

*(1) The courts shall take judicial notice of the following facts—*

*(a) all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Act, in any part of Kenya;*

*(b) the general course of proceedings and privileges of Parliament, but not the transactions in their journals;*

*(c) Articles of War for the Kenya Military Forces;*

(d) deleted by L.N. 22/1965;

(e) the public seal of Kenya; the seals of all the courts of Kenya; and all seals which any person is authorized by any written law to use;

**(f) the accession to office, names, titles, functions and signatures of public officers, if the fact of their appointment is notified in the Gazette;**

(g) the existence, title and national flag of every State and Sovereign recognized by the Government;

(h) natural and artificial divisions of time, and geographical divisions of the world, and public holidays;

(i) the extent of the territories comprised in the Commonwealth;

(j) the commencement, continuance and termination of hostilities between Kenya and any other State or body of persons;

(k) the names of the members and officers of the court and of their deputies, subordinate officers and assistants, and of all officers acting in execution of its process, and also of all advocates and other persons authorized by law to appear or act before it;

(l) the rule of the road on land or at sea or in the air;

(m) the ordinary course of nature;

(n) the meaning of English words;

**(o) all matters of general or local notoriety;**

(p) all other matters of which it is directed by any written law to take judicial notice.

(2) In all cases within subsection (1) of this section, and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference.

**(3) If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it considers necessary to enable it to do so.**

[L.N. 22/1965.]”

15. The petitioner did not produce any evidence official document from which the facts of the party positions held by the respondents may be judicially noticed. The compilation in the Tables attached by the Petitioner would not suffice for lack of official authentication. In addition, the positions held by any of the respondents in Political Parties are not “*matters of general or local notoriety*”, of which the Court may properly take judicial notice under section 60 (1) (o) of the Evidence Act.

16. The fact of holding Political Party positions while at the same time being state officers are ***facts in issue*** in the Petition which must be proved by admissible evidence. Section 3 of the Evidence Act defines ***fact in issue*** as follows:

“***fact in issue***” means ***any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied***

***in any suit or proceeding, necessarily follows.”***

17. It is not permissible to adduce evidence by attaching it to submissions, or for this matter to a pleading. Unless it is a matter which the Court may take judicial notice of, the rule of evidence require that all **facts in issue** be proved, or disproved as the case may be.

**No Evidence by Submissions**

18. The applicable principle is that there shall be ***no evidence by submissions***. Attaching to the written submissions filed in a matter evidence which ought to have been put in evidence by affidavit or oral testimony is an invalid way of production of evidence as held by decision of the Court of Appeal (Nambuye, Ouko and Kiage, JJA.) in ***Douglas Odhiambo Apel & Anor. v. Telkom Kenya Limited*** [2014] eKLR. However, even if this defect were overlooked, pursuant to the Article 159 principle of substantial justice, there is still no evidence of the facts relied upon in the Petition.

19. What the Petition contained are *statements* of fact that the Political Parties listed in Table 1 in the Schedule to the Petition allegedly violated the constitutional provisions for nominating the state officers named therein to contest for the 2013 general elections; Table 2 the state officers who allegedly violated the Article 77 (2) of the Constitutional provisions regarding the holding of political party positions; and Table 3 on respondents who held party positions in breach of Article 75 (2) of the Constitution. These *statements* remain *allegations of fact* which must be proved by admissible evidence by affidavit or oral testimony in terms of Rule 20 of ***The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013***.

**Jurisdiction of the Court**

20. The original and unlimited jurisdiction of the High Court in civil and criminal matters, Human Rights and constitutional interpretation, and its appellate jurisdiction are set out in Article 165 (3) of the Constitution as follows:

*“(3) Subject to clause (5), the High Court shall have—*

***(a) unlimited original jurisdiction in criminal and civil matters;***

***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***

*(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;*

***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—***

*(i) the question whether any law is inconsistent with or in contravention of this Constitution;*

*(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*

*(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*

*(iv) a question relating to conflict of laws under Article 191; and*

**(e) any other jurisdiction, original or appellate, conferred on it by legislation.”**

21. See the decisions of the Court in *Abdulrahman Ahmed Abdalla & 3 Ors. v. Uhuru Kenyatta & Registrar of Political Parties* [2012] eKLR; *Rogers Mogaka v. George Onyango Oloo & 2 Ors.* [2015] eKLR and *Isaac Aluoch Polo Aluchier v. Uhuru Muigai Kenyatta & William Samoei Ruto* [2016] eKLR

22. The High Court has clearly no jurisdiction, which lies elsewhere with the Registrar of Political Parties, to order the removal of a party official or to deregister a political party to exercise the powers of the Registrar of Political Parties under the Political Parties Act. The jurisdiction cited by the Petitioner under the Appellate Jurisdiction Act, cap. 9 where the Appellate Court may on appeal exercise the powers of the trial court applies only to the Court of Appeal and not to the High Court, and it would in any event not apply to purely executive administrative powers for the deregistration or suspension of political parties or their officers.

### **Supervisory jurisdiction**

23. Under Article 165(6) and (7) of the Constitution, the Hogh Court has supervisory jurisdiction as follows:

**“(6) The High Court has *supervisory jurisdiction* over the subordinate courts and *over any person, body or authority exercising a judicial or quasi-judicial function*, but not over a superior court.**

**(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and *may make any order or give any direction it considers appropriate to ensure the fair administration of justice.***

### **Appropriate order/direction**

24. The order or direction that the Court may make must be geared towards the fair administration of justice by the subordinate court, person or body exercising judicial or quasi-judicial authority. It does and not and cannot authorise the Court to exercise the jurisdiction of the subordinate Court, person or body charged with the judicial or quasi-judicial function.

25. To hold otherwise will be to establish a concurrent jurisdiction of the High Court without sanction of the Constitution, when what is contemplated in proceedings under the Fair Administrative Action Act is an application or an appeal arising from an administrative action/decision of the subordinate court, person or body exercising administrative powers.

26. As a Constitutional Court, the remedies that the Court may grant are set out in Article 23 of the Constitution, and they do not include exercising a concurrent original jurisdiction over the matter in dispute before the inferior tribunal. This accords with the general principle of judicial review that it is a special procedure concerned with the process for the making, rather than the substantive content, of the impugned decision. I agree that in exceptional cases the judicial review mechanism may be used to challenge the merits of decision taken by administrative bodies. I consider, however, that there are cases where the exigencies of the matter does not allow for long protracted litigation, the High Court as the supervisor court may exercise the powers of the supervised court. However, when the inferior tribunal may be efficiently and effectively deal with the merits of the case, the Court should defer to the decision making process of the inferior tribunal.

27. Moreover, in the celebrated case of *The Speaker of National Assembly v. Karume*, [2008] 2 KLR (EP) 423, the Court of Appeal held that where an alternative mechanism is established for the determination of particular grievances not only under the Constitution or statute that procedure should be strictly followed.

## ***The Complaints made in the Petition and the reliefs sought***

28. The Petitioner's Complaints as set out in the Petition and the corresponding reliefs sought may be paraphrased as follows:

### **Complaints:**

1. Respondent Nos. 1 to 12 committed an election offence under pursuant to section 72 (2) of the Elections Act, by knowingly nominated the candidates scheduled in table 1 of the Petitioner's Complaint, in the general elections of 4 March 2013, when the said candidates did not meet the requirements of the Constitution.

2. The Political Parties contravened the provisions of Article 91(1)(h) of the Constitution, as read together with paragraphs 6(a) and(b) of the Code of Conduct for Political Parties.

3. Political Parties Respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18, contravened Article 77(2) of the Constitution, by having allowed appointed State officers to hold offices in them between 27 August 2010, when the Constitution was promulgated and 29 January 2013, when the nominations for the general elections of 4 March 2013 commenced.

29. The reliefs sought were as follows:

### **Reliefs**

1. Pursuant to sections section 21(1), 34(a), 45(5) and (7) of the Political Parties Act, as read together with paragraphs 6(a) and (b) of the Code of Conduct for Political Parties, the Court;

a. **(a) Suspends the registration of political parties Respondent Nos, 1 to 12 for a period of 12 months from the date of this order, pursuant to section 21(3) of the Act.**

b. **Withholds funds from the Political Parties Fund to those in receipt of the same of respondent Nos, 1 to 12 that is respondent nos. 1, 2 and 6 for a period of 12 months from the date of this order, pursuant to section 21(3) of the Act.**

c. Pursuant to section 21(2)(a) of the Political Parties Act, **informs respondent Nos 1 to 12 that the particulars of breach or contravention of the Constitution are as detailed in table 1 of the Complaint** with respect to each political party and their errant candidates.

d. Pursuant to section 21(2)(b) of the Political Parties Act, **informs respondent Nos, 1 to 12 by this written order of the Registrar's intention to deregister each of them.**

e. Pursuant to section 21(2)(c) of the Political Parties Act, **directs each of respondent Nos 1 to 12 to provide legally enforceable non revocable written undertakings to both the registrar and to the Independent Electoral and Boundaries Commission, acknowledging without prejudice to any plea in any possible criminal proceedings, that it contravened section 72(2) of the Elections Act and the Constitution as laid out in table 1 of the Complaint, that it is disqualified from nominating any candidates in the next elections to be held in the affected electoral areas, and that it will not attempt to nominate any candidate in the next elections to be held in the affected electoral areas, and to provide the said undertaking within a period of ninety days of the date of this order.**

f. Pursuant to section 21(2)(c) of the Political Parties Act, and taking note of the objective of section 72(3)(b) of the elections Act, incorporated into the Political Parties Act by paragraph 6(b) of the Code of Conduct for Political Parties, pursuant to section 45(7) of the Political Parties Act, **directs each of Respondent Nos, 1 to 18 to refrain from nominating any of the errant candidates in the general elections of 4 March 2013 in the next elections in the electoral areas where the said errant candidates were nominated contrary to the requirements of the Constitution. The**

**court further finds that the Registrar should direct all political parties not party to this complaint, within a period of 14 days from the date of this order, to likewise refrain from nominating in the next elections in the said electoral areas any of the said errant candidates.**

**g. Pursuant to sections 21(2)(c), 45(2) and (4), and 7(3)(c) of the Political Parties Act, directs Respondent Nos 1 to 12 to appropriately discipline those of their numbers who are among respondents Nos 19 to 300, for the violations by these political party officers of paragraph 6(a) and (b) of the Code of Conduct for Political Parties, with a view to ensuring that none of these errant political party officers remains or acts as a member of the governing body of a registered political party, and to so discipline the said political party officers within a period of ninety days of the date of this order.**

**h. Pursuant to section 21(2)(c) of the Political Parties Act, and sections 51 and 56B of the Anti-Corruption and Economic Crimes Act, 2003, directs respondent Nos 1,2 and 6 to repay, within a period of ninety days, all funds they have received from the Political parties fund subsequent to the general elections of 4 March 2013, and to enter into an out of court settlement with the Ethics and anti-Corruption Commission for the repayment of the same entering into the said out of court settlement within a period of ninety days of the date of this order.**

**i. Pursuant to sections 21(2)(c) and 45(2) and (4) of the Political Parties Act, sections 51 and 56B of the Anti corruption and Economic Crimes Act, 2003, and section 23 of the Penal code, directs respondent Nos 1, 2 and 6 to inform the Ethics and Anti Corruption Commission, within a period of ninety days, of those of their political party officers among respondent Nos 19 to 82 and 139 who are to share in their liability of repaying funds to the political Parties Fund, funds received subsequent to the general elections of 4<sup>th</sup> March 2013, that the Ethics and Anti Corruption Commission may recover from these political party officials any shortfall in funds not settled by respondent Nos, 1, 2 and 6 within a period of ninety days of the date of this order.**

30. Other reliefs sought were in the following terms:

2. Consequently, pursuant to section 7(3)(d) of the Political Parties Act, such errant state officers are disqualified from being in the governing body of any political party. Additionally, the Court finds that each of respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18 during the times of contraventions of Article 77(2) are, pursuant to section 45(2) of the Political Parties Act as read together with paragraph 6(b) of the Code of Conduct for Political Parties, also culpable with respect to having contravened article 75(2).

3. Pursuant to section 45(5) of the Political Parties Act, the Court.

**a. By this order issues a formal warning to respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18 on account of persistent contravention of Article 77(2) of the Constitution from 27<sup>th</sup> August 2010 and persistent contravention of Article 75(2) and hereby requires the said respondents to ensure that, within a period of ninety days of the date of this order, none of their officers will also be appointed State Officer.**

**b. Hereby requires that no errant person, who has contravened Article 77(2) of the Constitution or Article 75(2) and by such contravention violated Chapter Six of the Constitution or Article 75(2) and by such contraventions violated Chapter Six of the Constitution, as found by the court and laid out in Tables 2 and 3 of the complaint, be a member of the governing body of a political party, and should any such person be a member of the governing body of a political party, that political party is required to ensure that such person ceases to be so and to so comply with this requirement within a period of ninety days of the date of this order. In this regard, the Court finds that the registrar should inform all political parties, within 14 days of this order, of the errant persons who have been found to have contravened Article 77(2) and 75(2) of the Constitution, to facilitate compliance by all political parties of the provisions of the Political Parties Act.**

c. *Hereby suspends the registration of respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18 for a period of six months from the date of this order pursuant to section 21(3) of the Act.*

d. *Pursuant to section 21(2)(a) of the Political Parties Act, hereby informs respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18 that by having among its offices any of the persons listed in Tables 2 and 3 of the Complaint, persons who have contravened article 75(2) of the Constitution, in not appropriately disciplining those of their officers who were in contravention of Article 77(2), they contravened Article 91(1)(h) of the Constitution, as read together with paragraph 6(a) and (b) of the Code of Conduct for Political parties.*

e. *Pursuant to section 21(2)(a) of the Political Parties Act, hereby informs Respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18 that by having among its officers any of the persons listed in tables 2 and 3 of the Complaint persons who have contravened Article 75(2) of the Constitution as read together with section 45(2) of the Political Parties Act, they contravened or are in contravention of Article 91(1)(h) of the Constitution as read together with paragraphs 6(a) and (b) of the Code of Conduct for Political parties and section 7(3)(d) of the Political Parties Act.*

f. *Pursuant to section 21(2)(b) of the Political Parties Act hereby informs respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18 of the Registrar's intention to deregister each one of them.*

g. *Pursuant to section 21(2)(c) of the Political Parties Act hereby directs Respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18 to ensure that within ninety days of the date of this order, none of their officers appearing in either or both of tables 2 and 3 of the complaint remains as their officer, through inviting such of these who are still their officers to resign their offices within 14 days of such invitation, and failing such resignation to effect their political party disciplinary procedures with a view to removing such persons from being their officers, and completing the disciplinary process within ninety days of the date of this order. In the alternative each of respondent Nos 2,5,7,9,10,11,12,13,14,15,16,17 and 18 should show cause to the Registrar why it should not be deregistered.”*

31. Section 72 of the Elections Act provides as follows:

**“72. Election offence by candidate or political party**

(1) *A candidate who, during a nomination or an election campaign engages in or knowingly aids or abets an agent or any person who supports the candidate to engage in bribery violence or intimidation against the opponents of the candidate or any other person, under this Part, shall be disqualified by the Commission and shall not be eligible to participate in the elections.*

**(2) Where a political party knowingly nominates a candidate who does not meet the requirements of the Constitution, the political party commits an offence and shall be disqualified from nominating a candidate to contest in that election or in the next election in that electoral area.**

(3) *Where the offence under subsection (2) is discovered—*

*(a) after the candidate has been nominated to contest in an election, that candidate shall be disqualified by the Commission and shall not be eligible to contest in that election; or*

*(b) after the candidate has been elected, that candidate shall be disqualified by the Commission and shall not be eligible to contest in the next election.*

(4) *Where a political party under subsection (2) commits an election offence which the Commission considers to be of a grave nature or continuously repeats the offence, the presidential*

*candidate of the political party shall not be eligible to contest in a presidential election during the elections or subsequent election as a result of any vacancy in the office of the President where the presidential candidate knowingly abets or aids in the election offence.”*

32. The redress of grievances relating to section 72 of the Elections Act must be in accordance with the provisions of that Act, which clearly set up a dispute resolution mechanism under section 74 as follows:

***“74. Settlement of certain disputes***

*(1) Pursuant to Article 88(4)(e) of the Constitution, **the Commission** shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from **nominations** but excluding election petitions and disputes subsequent to the declaration of election results.*

*(2) An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the dispute with the Commission.*

*(3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.”*

33. The breach of the provision of section 72 (2) of the Elections Act, is also a matter for the Electoral Commission to deal in accordance with the Act and not for this Court to determine. Accordingly, I find and hold that the matters raised by the Petitioner herein as regards section 72 of the Elections Act should have been raised in suitable proceedings under the Elections Act by petitions in that behalf upon the nomination and or election of the particular respondents.

**Conclusion**

34. The petition was two-fold: it sought that the Court makes declarations and related relief or, in the words of the Petitioner “*Discovers that*”, that the respondents as political parties had violated Article 75 (2) and 77 (2) of the Constitution in allowing and nominating for general elections of 4<sup>th</sup> March 2013 the named respondents who were officials of the said political parties who were public officers within the meaning of the Constitution and therefore prohibited from holding political party offices. The Petitioner also sought relief as consequences and penalties for such violation against the Political Parties and such Party Officials under the Political Parties Act.

35. While the High Court has jurisdiction to make declarations in its interpretative role, such determinations must be made on the basis of evidence presented by the Petitioner in support of his case. Unfortunately in this case, the Petition to the Court was not supported by any affidavit on the facts in issue, and the Court was accordingly not able to make the adjudication sought. Whereas the Court could, pursuant to the Article 159 principle of substantial justice readily take judicial notice in accordance with section 60 of the Evidence Act of the gazetted public officer positions to which the respondents were appointed, the Court would require evidence of the party positions held by such public officers as evidence of the breach of the constitutional prohibition of Article 77(2) of the Constitution.

36. In addition, the High Court does not have under its original unlimited jurisdiction an administrative concurrent jurisdiction to impose and execute the penalties that the Registrar is empowered to mete out on erring political parties under the Political Parties Act. The executive power to deregister, suspend or issue directions as to the operations of the political parties lies with the Registrar of Political Parties under section 21 and 45 of the Political Parties Act as follows:

**“Section 21 of the Political Parties Act**

***21. Deregistration of a political party***

*(1) **The Registrar** may deregister a political party if the political party—*

- (a) has contravened the provisions of Article 91 of the Constitution;
- (b) does not promote free and fair nomination of candidates;
- (c) does not adhere to the law relating to the nomination of candidates;
- (d) does not respect the national values and principles of the Constitution;
- (e) obtained its registration in a fraudulent manner;
- (f) has instigated or participated in the commission of an election offence; or
- (g) has acted contrary to the provisions of section 26.

(2) The Registrar shall, before deregistering a political party—

- (a) **inform** the political party, in writing, of the particulars of the breach or contravention;
- (b) **inform** the political party, in writing, of the intention to deregister the political party; and
- (c) **direct** the political party to remedy the breach or contravention within ninety days or otherwise show cause why the party should not be deregistered.

**(3) The Registrar may suspend the registration of a political party to enable that political party to remedy the breach specified in the notice issued by the Registrar under subsection (2).**

**(4) A political party that has been suspended under subsection (3) shall not be entitled to any of the rights and privileges specified in section 15.**

**(5) The Registrar shall deregister a political party which has not remedied the breach or complied with the Act as required by the Registrar under subsection (2).**

(6) The Registrar shall deregister a political party which has been declared to be a prohibited organisation under the provisions of any written law.”

Section 45 (5) of Political Parties Act

(5) Where a political party commits an offence under this Act, **the Registrar shall have the power to—**

- (a) issue a warning and require the political party to conform to this Act within a specified period;
- (b) suspend the registration of the political party for a period not exceeding twelve months;
- (c) withhold funds to the political party for a period not exceeding twelve months; or
- (d) subject to section 21, deregister a political party.

(6) Notwithstanding subsection (5), a person who is a member of a political party that has been suspended and is a member of Parliament or of a county assembly, shall continue as a member of Parliament or of the county assembly for the unexpired term.”

37. The Court of Appeal in *Narok County Council v. Trans Mara County Council & Another* [2000] eKLR, (Kwach, JA.) discussed section 60 of the former Constitution (similar to Article 165(3) (a) of the Constitution of Kenya 2010) on the unlimited jurisdiction of the High Court and said:

**“Section 60 of the Constitution does give the High Court unlimited jurisdiction but I do not understand it to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a minister as part of his statutory duty. Clearly if Section 270 (b) of the Act had simply provided that the two local authorities should agree on the apportionment without indicating what is supposed to be done in the event of a disagreement, then in that case I would agree with the learned Judge that even without an express provision that in that event the dispute should be taken to court, the High Court would have jurisdiction under Section 60 of the Constitution of Kenya to deal with the matter and make a determination. But in the present case, the law expressly states that in default of agreement between the two councils, the apportionment of assets and liabilities would be undertaken as directed by the Minister.**

**It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister (as in the present case) refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter case, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section the division is to be made on a fair and equitable basis. But if, as in this case, the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court.** The learned Judge says in his judgment that by the time the suit was filed on 11.1.96, the Minister had not deemed it fit to invoke the wide powers he had under Section 270 (b) of the Act to direct how the assets and liabilities were to be apportioned between the two local authorities. And he says the reason for this was animosity between the parties and the fact that the Minister was an interested party being a native of Narok.

With respect, I cannot accept that the reasons given by the learned Judge could justify the Minister's failure to perform his statutory duty. When the Minister took the decision to split Narok and create Trans Mara, he must have known that the decision would be greeted with resentment in some quarters. As a native of Narok the decision to split Narok must have caused him great anxiety than the consequential step of directing how the assets and liabilities were to be apportioned. In any case, as a Minister of the Government with statutory duties such mundane considerations should not weigh in his mind when he is called upon to make important decisions.

**The Minister was required by law to direct the apportionment of assets and liabilities if this could not be agreed between Narok and Trans Mara. Having refused or neglected to act, an application should have been made to the High Court by either party for an order of mandamus to compel the Minister to perform his statutory duty. The High Court does this in exercise of its special jurisdiction of judicial review of administrative action. The Minister's refusal to act did not and could not confer any right on Trans mar a to institute proceedings against Narok over the issue of division of assets. The refusal by Narok to agree the apportionment could only give rise to a ministerial directive but could not render it liable to a suit at the instance of Trans Mara.”**

I agree. **Ditto** for the Office of Registrar of Political Parties under its statutory duty of the Political Parties Act. In the case of offences under the Elections Act, it the Independent Electoral and Boundaries Commission.

### **Supervisory jurisdiction of the High Court**

38. The standards of review under section 7 and 9 of the Fair Administrative Action Act include the provisions that –

“7. (1) Any person who is aggrieved by an administrative action or decision may apply for **review**

**of the administrative action or decision to.**

(a) a court in accordance with section 8; or

(b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

(2) A court or tribunal under subsection (1) may **review an administrative action or decision, if-**

(a) the person who made the decision-

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to-

(i) the purpose for which it was taken;

(ii) the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power.

(3) The court or tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that-

(a) the administrator is under duty to act in relation to the matter in issue;

(b) the action is required to be undertaken within a period specified under such law;

(c) the administrator has refused, failed or neglected to take action within the prescribed period.

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

### **The Registrar's decision**

39. The Registrar of Political Parties did not hear the Complaint by the Petitioner. From the Registrar's letter dated 27<sup>th</sup> June 2016 which is the subject of the application before the High Court it is clear that the Registrar did not hear the Complainant but rather proceeded to make a determination based on a defence that "***the office has duly executed its mandate to ensure that political parties are in compliant with the Political Parties Act***", without giving the claimant an opportunity to urge his case. The said letter is in terms as follows:

"Ref No: RPP/FRP/001(72

Date: 27<sup>th</sup> June 2016

Isaac Aluochier

P O Box 44848-00100

**NAIROBI.**

Dear Sir,

**RE: COMPLAINT AGAINST TNA & 542 OTHERS**

The above matter refers.

The office has received and acknowledged your letter dated 20<sup>th</sup> June 2016 with regards to the response and claims raised by the Respondent No 352. Hon John Harun Mwau dated 3<sup>rd</sup> June 2016.

The responses and correspondences herein are subject to the complaint lodged with the office by you on 6<sup>th</sup> April 2016 enjoining, numerous political parties' leaders and their respective political parties as the Respondents. In response to your letter the office wishes to state as follows:-

1. Upon receiving your complaint the Office of Registrar of Political Parties forwarded the complaint to all affected political parties with a further request to forward the same to the affected respective members. It is on this basis that Hon. John Harun Mwau through a letter dated 3<sup>rd</sup> June 2016 sought for more particulars, information and supporting documents from your good-self as the complainant on the allegations raised against him as a party to the complaint. This is based on the cardinal principle in the law of fair hearing that states that he who avers must a proof.

2. Kindly take note that Sec 12(2) of the Political Parties Act 2011 exempts members of Parliament from the restriction of holding a political office. The respondent No 352 herein was a Member of Parliament within the period in reference.

3. The above notwithstanding, being cognizant of our mandate under the Political Parties Act 2011, to regulate, monitor and supervise political parties the office issued a circular dated 4<sup>th</sup> July 2013 requesting all political parties to ensure compliance with section 12 and 13 of the Political Parties Act 2011 which restricts activities of public officers in political parties.

4. Kindly note that the said position was reiterated by the High Court in its Judgment dated 11<sup>th</sup> September 2015 in the Petition No 96 of 2014 Rodgers Mogaka Mogusu v George Onyango Oloo & 2 Others (Office of Registrar of Political Parties was a party), it is on the basis of the said Circular and the subsequent Court decision, that the office received various resignations from the leaders affected to ensure compliance.

5. The above notwithstanding the office further sent a reminder to all Political parties vide a letter dated 30<sup>th</sup> September 2015 outlining the definition of the Ward 'Public Officer' Under Art. 260 as read together with other relevant constitutional and statutory provisions relating to the subject matter.

**6. Without any prejudice kindly note that the complaint is based and subject to other Acts of Parliament of which are not within the purview of the office to oversee compliance. However, the office has duly executed its mandate to ensure that political parties are in compliant with the Political Parties Act.**

Yours faithfully

**Lucy K. Ndungu(EBS)**

Registrar of Political Parties

C.c. 1. Hon John Harun Mwau

2. Secretary General PICK”

### **Appropriate Relief**

40. Articles 23 and 165 of the Constitution require the Court to grant appropriate relief or make appropriate order or directions. Where, as in this case, the Registrar of Political Parties failed to hear and determine the complaint, the Petitioner was entitled to sue for judicial review order of mandamus to compel performance of the statutory duty under section 34(g) of the Political Parties Act. In these circumstances, an order of Mandamus appears to be the most effective remedy as jurisdiction to make the reliefs sought in the Petition lie with the Registrar. In failing to hear the petitioner's Complaint, the Registrar has acted in breach of the petitioner's right to fair hearing under Article 50 of the Constitution and the Fair Administrative Action Act, 2015

### **Orders**

41. The Court, therefore, orders that the Registrar of Political Parties shall hear the Petitioner's Complaint herein dated 6<sup>th</sup> April 2016 and make a determination thereon as appropriate. Accordingly, the Court grants an order of mandamus for the Registrar to hear and determine the matter in accordance with the law.

**DATED AND DELIVERED THIS 29<sup>TH</sup> DAY OF NOVEMBER 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

Mr. Isaac Aluoch Polo Aluochier, the Petitioner in person.

N/A for the Respondents.