REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. APPLICATION NO. 135 OF 2015

IN THE MATTER AN APPLICATION BY KIRIRO WA NGUGI FOR LEAVE TO APPLY FOR ORDER OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE KENYA CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AT NO. 9 OF 2011, LAWS OF KENYA

IN THE MATTER OF THE ELECTIONS ACT NO. 24 OF 2012, LAWS OF KENYA

IN THE MATTER OF THE LEADERSHIP AND INTEGRITY ACT, CHAPTER 182 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE DECISION BY THE DISPUTES RESOLUTION TRIBUNAL

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT

KIRIRO WA NGUGI…….....……..….APPLICANT

VERSUS

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

THE RETURNING OFFICER, KABETE CONSTITUENCY…….....2ND RESPONDENT

AND

JUBILEE ALLIANCE PARTY….....…….1ST INTERESTED PARTY

FERDINAND NDUNGU WAITITU…….....….....2ND INTERESTED PARTY

RULING

1. By a Chamber Summons dated 22nd April, 2015, the applicant herein, **Kiriro Wa Ngugi,** seeks

the following orders:

1. That this application be certificated as urgent and service hereof be dispensed with in the first instance.

2. That leave be granted to the Applicant herein to apply for Judicial Review Orders for:

i. An Order of Certiorari to bring into this honourable court and quash the proceedings and ruling of the Disputes Resolution Committee of the IEBC in Complaint Petition No. IEBC/DRC/KCBE/09/205 of 17th April 2015 upholding the nomination of Ferdinand Ndungu Waititu as the Jubilee Alliance Party nominee for the By-election for Kabete Constituency.

ii. An order of Certiorari do issue to remove into this honourable court and quash the Nomination Certificate issued to Ferdinand Ndungu Waititu by the Independent Electoral and Boundaries Commission on 7the April 2015 to vie for the seat of Member of National Assembly in the By-election for Kabete Constituency on a Jubilee Alliance Party (JAP) ticket.

iii. An Order of Prohibition directed against the Independent Electoral and Boundaries Commission prohibiting it from in any way allowing Ferdinand Ndungu Waititu to participate or contest as a candidate in the By-election for Kabete Constituency.

iv. An order of Prohibition directed against the Independent Electoral and Boundaries Commission prohibiting it from including Ferdinand Ndungu Waititu, his image and party symbol from appearing in the ballot papers for the Kabete Constituency By-election to be held on 4th May 2015.

3. That costs and incidental to this application be provided for.

4. Such further relief as the honourable court may deem just and expedient to grant.

2. When the application for leave came up before **Hon. Mr Justice Korir** on 23rd April, 2015 he directed that this matter be place before me for directions the same afternoon. In the afternoon when the parties appeared before me, I directed that the application be heard inter partes pursuant to the proviso to Order 53 rule 1(4) of the ***Civil Procedure Rules***. I further directed that the preliminary objections file by the 2nd interested party be argued in opposition to the said application.
3. What provoked these proceedings was a decision made by the 1st respondent's Dispute Resolution Committee (hereinafter referred to as "the Tribunal") in complaint Petition No. IEBC/DRC/KCBE/09/205 (hereinafter referred to as "the Complaint") on 17th April, 2015 in which the Tribunal upheld the nomination of the 2nd interested party as the 1st interested party's nominee for the by-election for Kabete Constituency (hereinafter referred to as "the Constituency").
4. The ex parte applicant herein contends that he is a candidate on a Democratic Party (DP) ticket for the said bye-election which is due to be held on 4th May, 2015.
5. According to the statutory statement filed herein, the applicant intends to rely on the following grounds:

1. **In arriving at its decision, the 1st Respondent's Dispute Resolution Committee disregarded the provisions of Article 88 (d)(d) and (e) of the Constitution, and its decision was contrary to the provisions of Section 4(d) and (e) of the Independent Electoral and Boundaries Commission Act, No. 9 of 2011 and Sections 22(1)(a), Section 22(1)(a),24(1)(b) and 24(2)(h)**

of the Elections Act, No. 24 of 2014.

2. **The 1st Respondent's refusal to enquire into the suitability of the 2nd Interested Party under Chapter 6 of the Constitution and Sections 22(1)(a), Section 22(1)(a), 24(1)(b) and 24(2)(h) of the Elections Act, No.24 of 2014, was *ultra vires* its mandate under Section 4(d) and (e) of the Independent Electoral and Boundaries Commission Act, No. 9 of 2011.**
3. **The 1st Respondent was acting unconstitutionally and unreasonably by looking out and disregarding evidence of the 1st Interested Party's radio interview for not conforming to the rules of evidence yet the Dispute Resolution Committee is not governed by strict rules of evidence.**
4. **It was incumbent upon the 1st Respondent's Dispute Resolution Committee to adopt a broad and purposive approach towards enforcing the Constitution as required under Article 159 of the Constitution, but on the contrary, the Dispute Resolution Committee locked out crucial evidence on a narrow pedantic application of the law requiring a certificate of authentication of the transcript, by applying strict rules of the Evidence Act which are not applicable to the proceedings of the Committee.**
5. **It is just, fair and equitable that the orders sought herein be granted to the Applicant.**

6. In her submissions in support of the application, **Miss Chepkurui**, learned counsel for the applicant submitted that in arriving at its decision the Tribunal failed to carry out its mandate of considering the complaint against the 2nd interested party on the lack of integrity pursuant to Article 88(4)(d) and (e) of the Constitution, sections 4(d) and (e) of the ***Independent Elections and Boundaries Act*** sections 22(1)(a) and (b) and 24(2)(h) of the ***Elections Act.***
7. It was further contended that the Tribunal in arriving at the said decision wrongly held that the appropriate agency to deal with integrity is the Ethics and Anti-Corruption Commission. It was further contended that the Tribunal failed to consider the evidence which was before it in finding that no evidence was adduced in support of the complaint. To the applicant, the nominations by the 1st interested party of the 2nd interested party were vitiated by fraud and misrepresentation which the Tribunal failed to consider. In the applicant's view, the Triunal failed to consider its constitutional mandate to maintain integrity of all the nominees before issuing its decision hence the orders sought herein ought to be granted.
8. On behalf of the 2nd interested party, it was submitted by **Mr Harrison Kinyanjui**, its learned counsel that this Court has no jurisdiction by virtue of Article 88(4)(e) of the Constitution as read with section 4 of the ***Elections Act*** and regulation 13 of the ***Elections (General) Regulations*** Legal Notice No. 139 of 2012 (hereinafter referred to as "the Regulations"). According to learned counsel, it is not in doubt that the applicant seeks to challenge the Tribunal's decision dated 17th April, 2015. However a look at the context of Article 88(4)(e) aforesaid, the framers of the Constitution envisaged that disputes touching on the conduct of elections in respect of the nomination of candidates be dealt with by the 1st Respondent. It was therefore his view, that the High Court is divested of jurisdiction to decide disputes involving such nominations prior to the elections. This position, according to learned counsel is reflected in section 74 of the ***Elections Act***
9. He contended that to grant the leave sought herein would mean that the Tribunal's decision would be at the centre of these proceedings yet regulation 12 of the Legal Notice No. 139 of 2012 provides for an appeals review from the decisions of the Tribunal. It was his view on account of the issues raised by the applicant, these proceedings are in effect seeking to appeal against the decision of the Tribunal yet this Court in judicial review proceedings does not deal with the merits of the impugned decision but with the process of arriving thereat. In support of this submission learned counsel relied on the case of **The Republic vs. The President & Others ex parte Dr. Wilfrida Itondolo & Others [2014] eKLR.**
10. Based on **Hon. Lady Justice Joyce Khaminwa vs. Judicial Service Commission & Another [2014] eKLR**, learned counsel urged the Court to find that the applicant had not established a prima facie case to warrant the grant of leave.
11. It was further disclosed by learned counsel that the applicant herein has been joined in petition no. 145 of 2015 as the 2nd interested party in which he is represented by the same advocate. Those proceedings are similarly a challenge to the nomination of the 2nd interested party and that these

proceedings were instituted by the applicant while well aware of the pendency of the said petition. It was therefore averred that no person should be permitted to have two bites at the cherry. To learned counsel, the applicant by filing these proceedings is abusing the process of the court since he can ventilate his case in the said petition. He urged the Court to dismiss the application for leave.

12. On behalf of the respondents, **Mr Nyamodi** while associating himself with the submissions of **Mr Kinyanjui**, reiterated that the applicant having been joined to the said petition No. 145 of 2015 in which he can adequately ventilate his issues, by filing this application, he was grossly abusing the court process. He also contended that these proceedings are an appeal by the backdoor disguised a judicial review proceedings since there is no allegation of a wrongful process but just a re-hash of the same grounds which were before the Tribunal. Based on **Zadock A. Kisienya vs. Independent Electoral and Boundaries Commission (IEBC) & Another [2013] eKLR**, learned counsel submitted that appeals do not lie to this Court from the decisions of the Tribunal.
13. **Mr Anyona**, learned counsel for the 1st interested party similarly associated himself with the submissions made on behalf of the respondents and the 2nd interested party, and emphasised that no party should be allowed to file two concurrent suits touching on similar issues as that amounts to a gross abuse of the court process.
14. In her rejoinder, **Miss Chepkurui** submitted that Article 165 bestows upon this Court supervisory jurisdiction. In her submissions, the applicant was joined to petition no. 145 of 2015 by an order of the court as an interested party while the issues raised herein are seeking to quash the decision of the Tribunal as the applicant is seeking to quash the Tribunal's decision for failure to consider the issues which ought to have been considered. Learned counsel contended that the Regulations deal with situations where a party is aggrieved by the decision of a returning officer and not one by the Tribunal. In support of her submissions she relied on **Peter Odoyo Ogada & Others vs. Independent Electoral and Boundaries Commission of Kenya & 14 Others [2013] eKLR.**

Determinations

15. I have considered the positions adopted by the respective parties to this application. It is important to note that the matter before me is a determination whether leave to commence judicial review proceedings ought to be granted to the applicant.
16. 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.**
17. **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".

18. 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.
19. 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:

"The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power…the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter… It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person's legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant's legal rights or interests were affected. The applicant's complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he 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…"

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

"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…. 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."

21. 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. As was held in **Re: Kenya National Federation of Co-Operatives Ltd & Others [2004] 2 EA 128** based on ***Judicial Review Handbook* (3 Ed)**

By Michael Fordham:

"A claimant for permission is under an important duty to make frank disclosure to the Court of all material facts and matters and it is especially important to draw attention to matters which are adverse to the claim, in particular: (1) any statutory restriction on the availability of judicial review; (2) any alternative remedy; (3) any delay/ lack of promptness and so need for an extension of time. In facing up to adverse points, the claimant will have an early opportunity to explain why those points are not fatal and why the case should be permitted to proceed (that is a "confess and avoid"). The duty of "full and frank" disclosure harks back to the time when permission for judicial review was *ex parte."*

22. *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."

23. In this case, the substance of the applicant's case is that the Tribunal did not consider the applicant's evidence that was presented before it and that it further misconceived and misapplied the law. However as was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Limited , Civil Appeal No. 185 of 2001:**

"Judicial Review is concerned with the decision making process, not with the merits of the decision: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether persons affected by the decision were heard before it was made...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision."

24. Similarly in **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR**, the Court pronounced itself as follows:

"Judicial Review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power."

25. In **Meixner & Another vs. Attorney General [2005] 2 KLR 189,** the Court expressed itself as hereunder:

"Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an

error of law. Prohibition restrains abuse or excess of power. Having regard to the law, the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision is correct. The other grounds, which the appellants claim were ignored ultimately, raise the question whether the evidence gathered by the prosecution is sufficient to support the charge. The criminal trial process is regulated by statutes, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court, which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence and that is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."

26. It is therefore clear that, where a decision is arrived at based on complete lack of evidence and out of the blue as it were, unless the same is based on the application of the evidential doctrine of judicial notice, if such a finding is so outrageous, it may amount to gross unreasonableness as to justify the grant of judicial review orders. However mere allegation of sufficiency of evidence will not suffice. Similarly, the mere fact that the evidence favourable to a party was not considered will not be aground for quashing a decision if there was material on record which would have warranted a finding to the contrary. If the Court were to delve into investigation as to whether the evidence favourable to the applicant was not considered the Court would be usurping the powers of the Tribunal.
27. What then are the general grounds for grant of judicial review orders? In the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, the Court citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

28. I have considered the grounds in the Statement as expounded in the submissions and I am not satisfied that the intended application for judicial review raises the issues mentioned in the above decision. As stated hereinabove, in deciding whether or not to grant leave this Court ought to consider inter alia the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved. With due respect I am unable to decipher from the submissions, the grounds and principles of administrative law involved in the intended application as opposed to grounds for an appeal.
29. With respect alternative procedures this Court is aware of the decision in **Constitutional Petition**

Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others where it was held that:

"**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

30. Article 88(4)(e) clothes the 1st Respondent with powers to settle electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.
31. Section 74 of the ***Elections Act*** provides:

(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.

32. Clearly the first port of call in nomination disputes is the 1st Respondent through the Tribunal. However, it is not true as alluded to by the respondents and the interested parties that this Court has no role to play in such disputes. Where the decision made by the Tribunal clearly falls within the realm of illegality, procedural impropriety or irrationality, this Court is empowered and indeed enjoined to intervene. What this Court is precluded from doing is to transform itself into an appellate Court. This position was well appreciated in **Zadock A. Kisienya vs. Independent Electoral and Boundaries Commission (IEBC) & Another** (supra) where the Court while holding that it had no appellate jurisdiction over the Tribunal went ahead to hold that its jurisdiction relates to the process used by the IEBC. The application was therefore dismissed, not on the ground that the Court lacked jurisdiction to entertain any matter questioning the decision of the Tribunal, but on the ground that the applicant had not challenged the due process leading to the Tribunal's decision. Similarly, in **Peter Odoyo Ogada & Others vs. Independent Electoral and Boundaries Commission of Kenya & 14 Others** (supra), the Court while recognising that it ought not to usurp the powers and functions of the various constitutional and statutory bodies emphasised that the role of the Court is to ensure that the fidelity of the Constitution is maintained. In my view the Court's jurisdiction under Article 165 can only be limited by the Constitution and any law which purports to do so without constitutional backing would be null and void. In this case however, there is no allegation that the Regulations purport to limit this Court's jurisdiction under the Constitution.
33. I have perused regulation 13 of the Regulations and I must agree with **Miss Chepkurui** that that regulation deals with decisions of returning officers and not decisions of the Tribunal. Accordingly, that regulation is inapplicable to the present proceedings.
34. It is however not in doubt that the applicant herein is an interested party in Petition No. 145 of 2015 in which directions for hearing were on 21st April, 2015 given in the presence of counsel for the applicant. By that date the impugned decision had been made four days before. No mention was made of the intention to institute these proceedings. These proceedings, just like the said petition seek to challenge the electoral process whose date has been set. The applicant has not attempted to explain why these proceedings were not commenced soon after the impugned decision was given. In this case the elections are due on 4th May, 2015, ten day from now. Under

Order 53 rule 3(1) of the ***Civil Procedure Rules***, ordinarily, the substantive motion ought to be heard at least eight clear days between the service of the motion and the day named for hearing. Subject to the power of the Court to abridge the said period, 8 clear days will take us to 6th May, 2015 which would be after the scheduled elections. I have however noticed that in the instant application, the applicant does not seek any conservatory orders assuming the same could be competently sought in these judicial review proceedings. I have delved into these issues on account of the fact that the applicant took 5 days before instituting these proceedings. In my view and in the circumstances of this case where there is a delay of five days in seeking leave to challenge an election where a date has already been set and the elections are in less than two weeks' time coupled with the fact that the applicant is already a party to existing proceedings challenging the same elections disentitles the present applicant to the orders sought.

35. As was held by **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 and Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707: "***Speed and promptness are the hallmarks of judicial review.***"** Judicial review, it has therefore been held**,** acknowledges the need for speedy certainty as to the legitimacy of the target activities and requires the applicants for judicial review to act promptly. See **Mutemi Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA No. 1108 of 2004 [2006] 1 EA 116.**

36. Therefore whereas under the ***Law Reform Act*** an applicant for judicial review is at liberty to apply for leave before the expiry of six months from the date of the decision being challenged, since the decision whether or not to grant leave is an exercise of judicial discretion, the Court in determining whether or not to grant leave will take into account the delay in making the application and the import and impact of such delay in the administration of justice.

37. This position was similarly appreciated in ***Vania Investments Pool Limited and Capital Markets Authority & Others*** (supra) where the learned Judge pronounced himself as hereunder:

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

Fulham (Respondents) and Other Exparte Burkett &

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

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

38. In the premises, in the exercise of my discretion and taking into account the circumstances of this case which apart from the issue of failure to establish a prima facie case, taken individually may not necessarily be fatal to an application of this nature, considering the cumulative effect of the

foregoing, I decline to grant leave to the applicant as sought in these proceedings.

39. Accordingly, this application is dismissed but as judicial review proceedings proper are yet to be commenced, each party will bear own costs.

Dated at Nairobi this 24th day of April, 2015.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Chepkurui for the Applicant

Mr Nyamodi and Mr Gumbo for the Respondents

Mr Anyona for the 1st Interested Party

Mr Kinyanjui for the 2nd Interested Party

Cc Patricia