REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION No. 67 OF 2015

IN THE MATTER OF AN APPLICATION BY SUSAN KIHIKA, SAMUEL WAITHUKI NJANE & PAUL KIBET CHEBOR FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF POLITICAL PARTIES ACT, 2011

BETWEEN

REPUBLIC ….…….…….....……APPLICANT

AND

POLITICAL PARTIES TRIBUNAL…….....…… RESPONDENT

AND

GEORGE MWAURA NJENGA……..…1ST INTERESTED PARTY

LEAH JEPKOECH SEREM…… 2ND INTERESTED PARTY

EX PARTE

SUSAN KIHIKA……...….1ST EX PARTE APPLICANT

SAMUEL WAITHUKI NJANE …….... 2ND EX PARTE APPLICANT

PAUL KIBET CHEBOR…….....…… 3rd EX PARTE APPLICANT

JUDGEMENT

Introduction

1. The genesis of the dispute the subject of this judgement was that the *ex parte* applicants herein, **Susan Kihika, Samuel Waithuki Njane** and **Paul Kibet Chebor,** (also referred to as "the subjects") and the

interested parties are members of the Jubilee Coalition comprising mainly URP and TNA. Apparently, on the 30th of June 2014, the Subject, together with other individuals affiliated to the respective parties forming the Jubilee Coalition held a meeting at Kunste Hotel in Nakuru Town at which the interested parties herein who were the leader and the deputy leader of the majority at the Nakuru County Assembly (hereinafter referred to as "the Assembly) were removed from their positions as leader and deputy leader of majority and replaced them with the 2nd and 3rd subjects respectively.

2. Aggrieved by this decision the interested parties instituted Judicial Review proceedings at the High Court in Nakuru being Judicial Review Case Number 20 of 2014 which case was however struck out for lack of jurisdiction prompting the interested parties to institute **Political Parties Disputes Tribunal Complaint No. 13 of 2014 before the Respondent herein** (hereinafter referred to as "the Tribunal"). Once again a preliminary objection as raised on jurisdiction which was apparently not upheld and the Tribunal proceeded to make a determination not favourable the subjects. It is that decision that provoked these proceedings.

3. By a Notice of Motion dated 12th March, 2015, the subjects seek the following orders:

> **1)THAT this Honourable Court be pleased to grant to the Ex-parte Applicants an Order of Certiorari directed to The Political Parties Tribunal ("the Tribunal") to remove into this Honourable Court and quash the entire decision of the Tribunal delivered on 12th February 2015 and 2nd March, 2015 in Political Parties Disputes Tribunal Complaint No. 13 of 2014.**
>
> **2) THAT this Honourable Court be pleased to grant to the Ex-parte Applicants an Order of Prohibition to restrain the interested parties herein from implementing, executing and or acting upon the entire decision of the Tribunal delivered on 12th February 2015 and 2nd March, 2015 in Political Parties Disputes Tribunal Complaint No. 13 of 2014**
>
> **3) THAT the costs of this application be provided for**
>
> **4) THAT such further and other relief be granted to the applicant as this court deems fit.**

The Subjects' Case

4. The facts upon which application was based were that the interested parties filed a complaint before the Tribunal dated 2nd December, 2014 and the Supporting Affidavit of **George Mwaura Njenga** dated and sworn on the same day together with further affidavits both sworn on 15th day of December, 2014 and filed on the 18th of December, 2014. According to the Subjects, the complaint was based on issues that arise out of an alleged inter-party disputes.

5. To the said complaint, the subjects filed a notice of preliminary objection praying that the complaint be struck out and/or dismissed with costs for lack of jurisdiction by the Tribunal to hear and determine issues raised by the complainants as contemplated under Article 159(2)(b) of the Constitution of Kenya 2010 and sections 40(1) & (2) of the ***Political Parties Act, 2011***. The matter then proceeded to hearing when both notices of preliminary objections were canvassed concurrently. By a ruling delivered on the 12th February, of 2015 the Tribunal declined to rule on the preliminary objection and instead directed that the parties canvas the complaint and leave to file further replying affidavit granted.

6. The Tribunal subsequently delivered its ruling on 2nd March, 2015 which ruling provoked these proceedings.

7. According to the subjects the Tribunal failed to appreciate that there were provisions for Internal Party Dispute Resolution Mechanism (IDRM) within the Coalition Agreement which ought to have been exhausted before the matter could be entertained by the Tribunal. It was contended that by failing to make a determination on the preliminary objection until after hearing the complaint and even then only after

determining the complaint, the Tribunal was biased and this was discernible from the comments it made in declining to rule thereon which comments were favourable to the interests of the interested parties. It was contended that in the said comments the Tribunal took into account irrelevant matters.

8. To the subjects the Tribunal's decision was *ultra vires* and without jurisdiction and was arrived at without the due consideration of the law and on biased opinion.

9. The subjects conceded that the interested parties filed a Judicial Review matter in the High Court of Kenya in Nakuru being **JR No. 20 of 2014 R vs. Susan Kihika & 2 others *ex-parte* George Mwaura Njenga,** in which the applicant took up the issue of the jurisdiction of the Court to entertain the matter before the same was determined by the Tribunal, which objection was upheld. The Subjects were however of the view that at that time they was of the opinion that the matter lay within the Tribunal as established under the ***Political Parties Act of 2011*** (hereinafter referred to as "the Act"). However, the interested parties having regard to the decision of the High Court and without proper counsel resorted to file their complaints with the Tribunal and upon further consultation, it was noted that the Respondents had not even brought their case to the coalition's internal dispute resolution mechanism.

10. As proper forum to listen to the grievances of the Respondents was the internal dispute resolution mechanism, the Applicant objected on jurisdictional grounds that the Political Parties Tribunal also was not the initial and proper forum to hear the complaints by the Respondents. However, despite the fact that the interested parties having failed to show evidence that they had involved the IDRM, the Tribunal proceeded to give them audience in contravention of the law particularly, section 40 of the Act which is couched in mandatory terms.

11. By its ruling delivered on 12th day of February, 2015 the ex-parte applicant's preliminary objection was dismissed.

12. In the Subjects' view, the Respondent's decision was marred by illegality, bias, unreasonableness and taking into account irrelevant considerations. According to the Subjects, the correct forum is clearly prescribed under the TNA-URP coalition agreement which in clause 8.3 and clause 8.4 deals with the procedure for IDRM and provides for an appeal therefrom the Tribunal.

13. It was contended that in its decision the Tribunal navigated and varied the issue in contention by alleging that it was now the political parties that were in dispute while in fact the coalition and respectively, TNA & URP were not at loggerheads. To the Subjects the findings of the Tribunal meant that the differences between the members would lead to the difference between the political parties yet this was not part of the submissions before it and none of the parties contemplated the same. Similarly the finding that the jurisdiction of the Tribunal under S. 40 (1) (c) cannot arise without compliance with the IDRM was not raised by any of the parties. According to the Subjects, section 40(1)(c) provides for disputes between political parties. However, the instant dispute is between member of a coalition and the decision of the coalition members as opposed to a party to party dispute. To hold otherwise as the Tribunal did is illegal having interpreted the issue to suit their ruling in favour of the interested parties herein, which was evidence of bias.

14. To the Subjects, the interested parties had an issue with the decision taken by the members of the coalition and the 2nd and 3rd ex-parte applicants were only sued because they had been the ones elected in place of the interested parties. As for the 1st ex-parte applicant she was only sued maliciously as she is the speaker of the Nakuru County Assembly and did not even have the voting powers.

15. It was submitted by the Subjects with respect to the competency of the application that at the leave stage, only the aggrieved party or parties should appear as applicants and that it is only after the leave has been granted and the actual judicial review proceedings commence that the proceedings are instituted in the name of the Republic. It was however submitted that the error in indicating the Republic as the Applicant at the leave stage is a mere procedural technicality which does not go to the substance of the application and in support of this submission the applicant relied on **Polycarp Wathuta Kanyu vs. The County Government of Kirinyaga [2014] eKLR** and **Republic vs. Chairman Matungiu Land**

Dispute Tribunal exp Electrina Wang'ona.

16. In this case it was submitted that the error has not occasioned any prejudice to the interested party.

17. It was further contended that since the exhibits were annexed to the affidavit accompanying leave the contention that the exhibits were improperly annexed does not arise.

18. It was submitted that the Tribunal acted illegally and ultra vires by purporting to assume jurisdiction which it did not have as enshrined under section 40 of the Act merely from the argument of counsel in Judicial Review No. 20 of 2014.

19. It was submitted that the complaint before the Tribunal whose decision is being questioned pertains to a dispute between members of a coalition and the decision of a coalition and as such the Tribunal does not have jurisdiction as manifested by section 40(1) of the Act unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms as it does not have jurisdiction under section 40(1) if section 40(2) has not been adhered to. It was therefore submitted that the Tribunal is not the first forum for determination of the dispute since it determines the matter only after the dispute has been determined by the internal political party.

20. In this case, it was submitted that the interested parties did not at any point show that they attempted to resolve the matter at the coalition's dispute resolution council and that the Tribunal gave itself powers under section 40(1) which deals with disputes between political parties.

21. It was contended that the decision of the Tribunal to deal with the preliminary objection after ruling on the main complaint was irrational.

Interested Party's case

22. According to the interested parties, the notice of motion dated 12th March 2015 and the chamber summons dated 4th March are incompetent pleadings and they ought to be struck out since they cannot be a basis upon which this court can exercise its jurisdiction to grant the orders sought. To the interested parties, before a motion for judicial review is filed leave to file the application in the name of the state must be obtained by the ex parte applicant. Leave cannot be obtained by the republic. In the chamber summons filed by the subjects herein, the republic was the entity which applied for and was granted leave to file a motion for judicial review. The subject never applied for and was never granted any leave to commence the application for judicial review. Consequently the notice of motion filed in an incompetent pleading and it ought to be struck out.

23. Secondly, it was contended that the documents which are produced by an applicant ought to be produced under oath and they ought to be annexed to the affidavit verifying the facts. In the notice of motion filed on dated 12th March 2015, documents were attached to the statutory statement. This makes the entire application fatally defective and it ought to be struck out *in limine.*

24. It was further contended that the subjects have not annexed a certified copy of the order which they seek to quash.

25. According to the interested parties, although the Subjects attacked the decision of the Tribunal on the grounds of illegality/*ultra vires,* bias, unreasonableness and taking into account irrelevant considerations, none of these grounds were elaborated and that most of the documents annexed to the Subjects' application were either a repetition of the same issues or out rightly irrelevant. Whereas, the subjects' case is that the respondent assumed jurisdiction under section 40 of the Act when it never had such jurisdiction, it was contended that the position taken by the subjects in PPDT 13 of 2014 was both shifty and all along it demonstrated that the subjects' intention was to deal with matters on the basis of technical objections.

26. According to the interested parties, the meeting which resolved that they be removed and replaced as

the leader of majority and deputy leader of majority at the Nakuru county assembly was a meeting between members of TNA and URP. The challenge that was mounted at the Political Parties Tribunal related to the resolutions made at that meeting by the respective members of the political parties. Under section 40 of the Act, the respondent has jurisdiction to determine disputes between members of a political parties as well as disputes between a members of a political party and a political party. Since in the interpretation of statutes, words in singular must be given the same meaning as words in plural, the respondent had jurisdiction to determine a dispute between the interested parties and members of the TNA and URP since they are the members who made the decision to oust them from their respective positions.

27. The second limb of the argument by the subjects herein, it was contended was that the matter ought to have been referred to the internal disputes resolution mechanism of the coalition before the court could exercise its jurisdiction. To this end the subjects produced the coalition agreement between TNA and URP. The coalition agreement was between the two parties and it refers to resolution of disputes between those two parties. At the hearing of the matter at the tribunal, counsel for the subjects was challenged to state whether the parties had established an internal disputes mechanism to which the matter could be referred and she stated that she was not aware. It was therefore averred that for the respondent to divest itself of jurisdiction it had to be demonstrated that the coalition had activated the internal disputes resolutions mechanism and the interested parties failed and/or refused to refer the matter to that forum. In this case it was not demonstrated that there was such a mechanism. It was however disclosed that after the meeting was held and a resolution was passed to oust the interested parties and the deputy leader of majority the interested parties wrote a letter to the TNA complaining of the un-procedural manner in which they were ousted which letter was followed by another letter from the local TNA branch. After consideration of the said letters, the secretary general of the party responded and stated that the meeting which ousted the interested parties was null and void. Therefore as members of TNA in the Jubilee Coalition, the interested parties could only raise their grievances through their respective parties since they never had any control over the constitution of an internal dispute resolution mechanism. Failure by any of the party to constitute an internal dispute resolution mechanism could not be a ground to divest the respondent of jurisdiction.

28. It was further averred that this matter had originally been filed at the High Court in Nakuru where it had been registered as Judicial Review number 20 of 2014. The subjects raised an issue that the High Court has no jurisdiction and that the matter belongs to the Political Parties Tribunal which preliminary objection was upheld and the judicial review matter was struck out. The argument that the tribunal never had jurisdiction to hear the matter was an attempt to approbate and reprobate. It was on that ground that the tribunal rejected the preliminary point on jurisdiction.

29. It was therefore contended that the Tribunal had jurisdiction to try and dispose of the matter. First, jurisdiction is bestowed upon the tribunal by section 40 of the Act. Secondly reference of a dispute to the internal party mechanisms presumes existence of such mechanisms. In this case it was the subjects own position that mechanisms had not been activated. Thirdly, the subjects, through their own counsel submitted before court that the matter belonged to the Political Parties Tribunal.

30. On bias, the interested party, based on legal advice averred that the same bias would only arise where the members of the tribunal approach the issues at hand in a manner so skewed as to favour one of the parties (real bias) or where some of the parties have a relationship with one of the litigants (apprehension of bias). The subject has not stated in their affidavits that there was such a situation hence the alleged bias has not been demonstrated either in the statement or the deposition.

31. To the interested parties, the following were the findings made by the Tribunal:

1) The meeting which ousted the leader and the deputy leader of majority was held in a hotel. Conducting official business of the county assembly in a hotel is patently illegal and the standing orders cannot be invoked.

2) Taking the meeting which ousted the leader and deputy leader of majority as a decision

making body, it was not demonstrated that the affected parties had prior notice of the meeting and the allegations facing them. The meeting was in total breach of the rules of natural justice.

3) The tribunal could not divest itself of jurisdiction in a situation where; first the coalition had not activated any dispute resolution mechanism, where the matter related to the members of the coalition and where the subject herein had clearly stated in court that the matter belonged to the tribunal.

32. Instead of making a blanket statement of irrationality, the interested party contended that the subject in this matter ought to have pleaded, deposed and demonstrated the aspect of the finding of the respondent which they consider irrational. Similarly, it has however not been demonstrated what the irrelevant considerations were and how the affected the final outcome of the tribunal.

33. It was therefore the interested parties' contention that the application herein is incompetent and the same ought to be struck out with costs. Even if the application was to be considered on its merits, it is devoid of merit and it ought to be dismissed with costs.

34. In their submissions the interested parties set out the background of the dispute. They disclosed that the facts leading to this matter are as follows; the subjects herein and the interested parties are members of the jubilee coalition representing the respective major parties forming the coalition. Those parties are URP and TNA. On the 30th of June 2014, the Subjects, together with other individuals affiliated to the respective parties forming the Jubilee Coalition held a meeting at Kunste hotel in Nakuru town. The meeting was held between 1.00p.m and 3.00 p.m. the agenda of the meeting was to arrange the removal of the leader and the deputy leader of the majority at the County Assembly of Nakuru. Prior to the meeting and the resolutions which followed, the interested parties were the leader and the deputy leader of the majority at the Nakuru County Assembly. That meeting was duly held and the resolutions were passed whose effect was to remove the interested parties as leader and deputy leader of majority and replace them with the 2nd and 3rd subjects respectively. On the same day at around 4.10 p.m, the 1st subject made an announcement of the replacement and the 2nd and 3rd interested party took over office under very acrimonious circumstances.

35. Following the foregoing a challenge was in High Court in Nakuru in Judicial Review Case Number 20 of 2014 which case was however never heard on merits following the upholding of a preliminary point of law on jurisdiction taken up by the Subjects in which the Court declined jurisdiction and directed that the matter belongs to the realm of the Political Parties Tribunal.

36. Thereafter, the interested parties filed a complaint to the Political Parties Tribunal before which a preliminary objection to the effect that the tribunal never had jurisdiction was taken. This preliminary objection was heard by way of oral submissions and the tribunal ruled that under the circumstances of the case, it required further submissions to be able to make a definite finding. The parties made further submissions and the tribunal, the respondent herein made its finding as follows:-

1) By conducting official business of the county assembly in a hotel, the subjects herein acted illegally and all those proceedings were a nullity.

2) Taking the impugned meeting as a decision making entity, there was breach of rules of natural justice and the proceedings and the resolutions are a nullity.

3) The tribunal could not divest itself of jurisdiction especially in the present circumstances where the coalition has not set in motion an internal dispute resolutions mechanism.

4) The subjects herein having properly argued that the matter belonged to the tribunal cannot be allowed under the law to approbate and reprobate.

37. Having made that finding the tribunal found that the ouster and the replacement of the interested

parties herein were illegal and the said resolutions were set aside. The finding of the tribunal is the basis of this application.

38. The interested parties in their submissions reiterated the contentions in their replying affidavit that the application is substantively defective and cannot be the basis for grant of any order for judicial review as sought. Under Order 53 rule 1, an application for leave to commence a motion for judicial review ought to be filed by an applicant by way of an ex parte chamber summons. It is the ex parte applicant who is granted leave to commence a motion for judicial review in the name of the Republic. Once the leave is granted, the ex parte applicant files a motion in the name of the republic and he/she appears a subject. The filing of an application for leave is a procedural step but it affects the substance of the application. Without leave the notice of motion cannot be sustained. They added that since the application for leave dated 4th March 2015, the application was made in the names of the republic, the entire application was wrongly entitled and leave was therefore granted to and in the name of the republic. The consequent application by way of notice of motion is incompetent and the same ought to be struck out. Reliance was placed on **Republic vs. Konza Ranching & Farming Co-operative society Misc. App. 247 of 2001 and Lithotech Export Ltd vs. Electoral commission of Kenya Misc. App. 999 of 2007.**

39. According to the interested parties, the matter which was before the tribunal was between members of URP and TNA who voted to oust the interested parties and the other group of members who never voted. A member of a political party bears a different definition from a member of a coalition. Section 2 of the ***Political Parties Act*** defines a coalition as an alliance of two or more political parties formed for the purpose of pursuing a common goal and are governed by a written agreement deposited with the registrar. Section 10 of the Act provides that two or more political parties may form a coalition before or after an election and shall deposit the coalition agreement with the registrar. It was submitted that TNA and URP entered into a coalition agreement and the agreement was deposited with the registrar of political parties which agreement is exhibited to the affidavit in support of the notice of motion. The parties to that agreement are set out at page 2 of the agreement as the respective political parties in their corporate character and nowhere in that agreement is it stated that individual members of the parties were in the coalition agreement in their individual character. The argument that the persons who were before the tribunal were members of the coalition and the dispute was between members of a coalition and the coalition was frivolous.

40. According to the interested parties, political coalitions are entered by political with their respective membership. The purpose of entering into political coalition is to pursue an agenda as a corporate entity. In the matter at hand, there was no dispute between the TNA and the URP as corporate entities. There was however a dispute between a section of members within the TNA and a section of members within the URP. Each section supported their position in respect of the ouster of the leader and deputy leader of majority. The interested parties cited the provisions of section 40 of the ***Political Parties Act.***

41. Here the dispute at the tribunal was between members of political parties to wit, parties forming the jubilee coalition. Even if the matter could be extrapolated to mean that there was a dispute between the parties forming the coalition, still the tribunal had jurisdiction to hear and determine the matter hence the challenge on jurisdiction on this limb is frivolous.

42. With respect to the argument that the parties herein ought to have exhausted the internal disputes resolution mechanism before coming before the tribunal the interested parties reproduced clause 8 of the Coalition Agreement between TNA and URP which provides:

> ***8.1. Disputes arising from the coalition agreement between the coalition partners or other parties enjoined pursuant to clause 3 concerning the interpretation and the implementation of the coalition agreement shall be settled amicably.***
>
> ***8.2……. (Establishment of a dispute resolution council.***
>
> **8.3.** ***All disputes arising from this coalition agreement or the coalition matters shall in the first instance be referred to the disputes resolution council. The council shall hear the dispute and***

shall deliver its decision within 30 days.

43. It was submitted by the interested parties that for the interested parties to have referred the matter for determination to the coalition under the cited section, it had to fall within the ambit of clause 8 of the Coalition Agreement. In other words, the dispute must arise from the coalition agreement and between the parties to the coalition agreement or other parties enjoined under clause 3 of the agreement. Under clause 3 the parties which can be joined to the coalition agreement can only be political parties in their corporate character. However, when the subjects raised this issue before the tribunal, the tribunal posed the question as to whether the coalition had activated the internal dispute resolution mechanism. To this question counsel for the subject stated that she was not aware of any. For the tribunal to have divested itself of jurisdiction the subject had to demonstrate that there was an existing dispute resolution mechanism which the interested parties had failed to refer the matter to. Ouster of the jurisdiction of the tribunal proceed on the factual basis that there is an existing alternative mechanism for the resolution of the dispute which the interested parties have failed to initiate. In support of this submission the interested parties relied on **Republic vs. Ministry of Interior and Coordination of National Government & the Public Procurement Administrative Review Board Ex-Parte: ZTE Corporation and ZTE Corporation (Kenya) Limited Judicial Review Case No. 441 of 2013** for the proposition that where ouster clauses leave the party without remedy, they may be struck out for being unreasonable. They also relied on **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati [2008] KLR 728**, where the court observed that ouster clauses ought to be interpreted strictly and where it is possible to interpret them to maintain jurisdiction, then the interpretation which preserves jurisdiction ought to be preferred. Further reliance was placed on **Stephen Asura Ochieng & 2 Others vs. ODM & 2 Others [2011] eKLR** where the court observed that the fact that a political party has failed to activate its internal dispute resolution mechanism cannot be a basis upon which the Political Parties Tribunal can divest itself of jurisdiction and submitted that the argument that the tribunal had no jurisdiction has no basis in law and the same ought to be rejected.

44. On the allegations of bias, it was submitted that there was no demonstration as to how the tribunal was biased. At paragraph 7 of the chamber summons, the subjects pleaded that the fact that the tribunal made a finding on the preliminary objection after the findings on the main complaint was an aspect of bias. When weighed against the objective meaning of bias which is sufficient for the court to quash a finding, the allegations by the subjects are frivolous and reliance was placed on **Zacharia Wagunza & Another vs. Kenyatta University Students Disciplinary Committee & Others Judicial Review Application No. 155 of 2013** where the court observed that both the existence and the apprehension of bias are important aspects in the administration of justice. The court gave illustrations of situations in which bias may be inferred. The interested parties also cited **Republic vs. Cabinet Secretary for Transport and Infrastructure & Others** where court stated as follows:-

> **"The Court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in S v Roberts, decided shortly after *Sarfu*, where the Supreme Court required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds. It is no doubt possible to compact the double aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance…"**

45. It was submitted that for the subjects to succeed on the ground of bias they have to fit their claims within the ambit of the reasonableness test which they have failed to do since it has not been demonstrated that how the determination of the preliminary objection as a last point instead of the first point gave the interested party substantive advantage. Similarly, it has not been demonstrated how that determination substantively prejudiced the subjects.

46. On irrationality, it was submitted that a decision will be quashed by way of an order of certiorari if it

is so unreasonable and in defiance of logic and moral standards that on reasonable tribunal addressing its mind to the facts of the case could have arrived at such a decision. This standard was laid down in the case of **Associated Provincial Pictures Limited vs. Wednesbury Corporation [1948] 1 KB 223**. However both in the notice of motion and the chamber summons for leave, the subjects never demonstrated by way of deposition how the finding of the Tribunal, the respondent herein was in defiance of logic that no tribunal directing its mind to the facts and the circumstances of the case could have arrived at such a decision. The interested party urged the Court to take into account the following:

1) First, the tribunal was faced with a situation where members of political parties within a coalition met and a private hotel, transacted official functions solely preserved for the county assembly, made resolutions and eventually ousted the interested parties.

2) Faced with the above circumstances the tribunal found that the meeting held at a private hotel to transact official party business is patently illegal.

3) Secondly, the tribunal was faced with a situation where the interested parties were never informed of the accusations facing them and never invited to challenge those accusations. Under these circumstances the tribunal found that there was a clear breach of the rules of natural justice.

4) Thirdly the tribunal was faced with two opposing group in a coalition. The first group supported the removal of the interested parties while the other group opposed the removal. Further, the subject had advanced a situation in the high court that the matter belonged to the Political Parties Tribunal. The tribunal found that under section 40 of the Political Parties Tribunal, it had jurisdiction to deal with the matter. Further the tribunal found that the subjects cannot be allowed to approbate and reprobate.

5) Fourthly and on jurisdiction the tribunal was faced with a situation where the party had not activated the internal party disputes resolution mechanism. Further a situation where the coalition agreement was limited to disputes between the parties as the corporate entities forming the coalition. Under these circumstances the tribunal refused to divest itself of jurisdiction.

47. In the interested parties, view, all the findings of the tribunal, singularly and cumulatively cannot be said to be in defiance of logic that no reasonable tribunal could have come up with such a finding. These grounds ought to be dismissed.

48. With respect to allegation that the Tribunal took into account irrelevant matters, it was submitted that the subject never pointed out by way of deposition what the irrelevant considerations were. This court can look at the finding of the tribunal and the consideration it took into account to establish whether those considerations were irrelevant. The tribunal made a finding that it had jurisdiction to try and dispose of the matter. In reaching this finding the tribunal took into account the facts that the dispute fell within the province of section 40 of the ***Political Parties Tribunal Act*** and it was between members of political parties. The court further took into account the fact that the political parties within the coalition had not activated the internal dispute resolution mechanism and under the circumstances, the tribunal found that it has jurisdiction. The finding of the tribunal was based on the submissions of the parties and the authorities submitted to it. The tribunal further found that the meeting in which the interested parties were ousted was illegal since it was held in a private hotel to transact official county assembly business. Further the tribunal found that the said meeting and the resolution were in breach of rules of natural justice. These finding were based on the submissions made by counsel appearing for both parties. All the consideration taken into account by the tribunal was relevant.

49. It was submitted that the alleged finding by the Tribunal that a dispute between the members of the coalition implies that there is an underlying problem between the coalition partners was not material to the final conclusion made by the court hence the challenge of the findings of the tribunal based on this ground has no merit.

Determinations

50. Having considered the issues raised in the instant application, this is the view I form of the matter.

51. The first issue for determination is whether the instant application is competent. It was contended that the application is not competent due to the fact that the application for leave was indicated to be made by the Republic rather than the applicants. This issue was dealt with by **Maraga, J** (as he then was) in **Republic vs. Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563,** in which the learned Judge held that an application for leave ought to be intituled as hereunder:

In the Matter of An Application by (the applicants for leave to apply for orders of certiorari and prohibition

And

In the Matter of Kenya Ports Authority Act

And

In the Matter of the National Environmental Management and Co-ordination Act 1999.

52. This was in tandem with the decision in **Farmers Bus Service and Others vs. Transport Licensing Appeal Tribunal [1959] EA 779** where the East African Court of Appeal held that the ex parte application for leave ought to have been intituled:

> **"In the matter of an application by (applicants) for leave to apply for an order of Certiorari**
>
> **and**
>
> **In the matter of Appeals Nos. 11 to 16 inclusive, 30, 32-35 inclusive, 37, 39, 41-43 inclusive, all of 1958, of the Transport Licensing Appeal Tribunal."**

53. In judicial review applications, once leave is granted the applicant in the substantive Motion then becomes the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**

54. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

> **"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".**

55. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J** (as he then was) expressed himself as follows:

> **"Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari, Mandamus* or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -**
>
> **"REPUBLIC……..…….....APPLICANT**

V

THE ELECTORAL COMMISSION OF KENYA…..…RESPONDENT

EX PARTE

JOTHAM MULATI WELAMONDI"

56. It must be remembered that judicial review proceedings are commenced by the Notice of Motion and not the Chamber Summons. The Chamber Summons is simply an application for leave or permission to commence judicial review proceedings and whereas on the filing of the Notice of Motion the Chamber Summons is subsumed or submerged in the Motion, it is the Motion that originates the judicial review application proper. I can do no better than quote the Court of Appeal in **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199** where it expressed itself *inter alia* as follows:

> **"The proceedings under Order 53 can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted. It would be somewhat ridiculous to bring the application for leave by way of an originating summons and once the leave is granted, the originating summons is then swallowed up or submerged in the notice of motion."**

57. Similarly, in **Mike J. C. Mills & Another vs. The Posts & Telecommunications Nairobi HCMA No. 1013 of 1996,** it was held *inter alia* that the application for leave does not commence judicial review until such permission is granted to institute appropriate Judicial Review application.

58. In this case the applicant for leave was indicated as the Republic and the subjects appeared as the *ex parte* applicants. It is therefore clear from the title of the proceedings for leave that the Chamber Summons was not an epitome of impeccable, elegant or paragon drafting. However, since the subjects herein were clearly indicated as *ex parte* applicants, the failure to indicate them as the Applicants in my view cannot be fatal. Section 72 of the ***Interpretation and General Provisions Act*** Cap 2 Laws of Kenya provides as follows:

> ***Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.***

59. This provisions was adopted with approval by the Court of Appeal in **Daniel Toroitich Arap Moi vs. John Harun Mwau Civil Application No. 131 of 1994 [2008] 2 KLR (EP).**

60. I further wish to defer to the decision of the same Court in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** where the Court expressed itself as follows:

> **"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".**

61. I, however, must state that the failure by a party to properly intitule the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs. It must be remembered by the parties that proper intitulement of applications both for leave and the substantive Motion helps in minimizing confusion at the appellate level hence the need to properly

intitule the proceedings.

62. Section 40(1) of the ***Political Parties Act*** provides in part as follows:-

> ***(1) The Tribunal shall determine—***
>
> ***(a) disputes between the members of a political party;***
>
> ***(b) disputes between a member of a political party and a political party;***
>
> ***(c) disputes between political parties;***
>
> ***(d) disputes between an independent candidate and a political party;***
>
> ***(e) disputes between coalition partners; and***
>
> ***(f) appeals from decisions of the Registrar under this Act.***

63. I will now consider the legalistic or literal approach to the interpretation of the above provisions. Was the dispute herein between members of a political party? A political party is not defined under the Act. Instead is it described in some form of escapist manner in section 2 of the Act as having the meaning assigned to it in Article 260 of the Constitution. Not much help can be gotten from the reference to the Constitution either. Article 260 of the Constitution provides that "political party" "means an association contemplated in Part 3 of Chapter Seven" That part does not define a political party but simply provides for basic requirements for political parties and provides for a legislation in respect thereof.

64. A coalition is however defined in section 2 of the Act of as meaning:

> ***"an alliance of two or more political parties formed for the purpose of pursuing a common goal and is governed by a written agreement deposited with the Registrar."***

65. A coalition therefore may not necessarily be formed with a view to pursuing the interest for which a political party is formed. However since political parties must adhere to certain conditions, coalitions being composed of political parties are necessarily guided by the conditions which favour the continued existence of political parties themselves. That a coalition may front different candidates for the same position is not unusual. However, a political party can only front one candidate for the same seat.

66. The process of the formation of a political party is governed by Part II of the Act while a coalition as its definition denotes is formed by agreement between the parties deposited with the Registrar of Political Parties as required under section 10 of the Act. It follows that a Coalition is not a political party but a conglomeration of parties. In this case the dispute seems to have been between members of a Coalition *inter se* rather than between members of a political party. The dispute pitted members of the TNA and URP without necessarily delineation of interests between them. At least there is no evidence before me that the dispute pitted members of TNA against URP based on their party affiliations.

67. The next issue is whether this was a dispute between a member of a political party and a political party. There was no evidence that the dispute was between a member of a party on the one hand and a political party on the other. It would seem that the dispute simply pitted members of the Coalition amongst themselves. In this dispute URP as a party was clearly not squabbling with TNA but it was their members who were fighting each other. However there is no evidence that the fight took party lines in order to transmute it into a fight between URP and TNA. Whereas it is correct that the parties are composed of the members, since the protagonists did not take party positions, I am not satisfied that the dispute was between political parties. Obviously the dispute was neither between an independent candidate and a political party nor between URP and TNA or any other coalition partners. Lastly the dispute was not an appeal against the decision of the Registrar. It follows that going by the legalistic or literal approach section 40(1) of the Act would not have been of any assistance to the Tribunal.

68. That however is not the end of the matter. As was appreciated by the Court of Appeal in **Kimutai vs. Lenyongopeta & 2 Others Civil Appeal No. 273 of 2003 [2005] 2 KLR 317; [2008] 3 KLR (EP) 72** while citing with approval ***The Discipline of Law*** 1979 *London Butterworth* at page 12 by ***Lord Denning*****:**

> **"The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the "purposive approach". In all cases now in the interpretation of statutes such a construction as will "promote the general legislative purpose" underlying the provision is to be adopted. It is nolonger necessary for the judges to wring their hands and say, "There is nothing we can do about it". Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind."**

69. I also associate myself with sentiments of **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati [2008] KLR 728** where he expressed himself as follows:

> **"The English language is not an instrument of mathematical precision. It would certainly save judges trouble if Acts of Parliament were drafted with divine precision and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman ... he must supplement the written word so as to give force and life to the intention of the Legislature…It [literal interpretation] is the voice of strict constructionists. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal grammatical construction of words, heedless of the consequences. Faced with staring injustice, the judges are, it is said, impotent, incapable and sterile. Not with us in this Court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach." In all cases now in the interpretation of statutes we adopt such a construction as will "promote the general legislative purpose" underlying the provision… The defect that appears in a statute cannot be ignored by the Judge, he must set out to work on the constructive task of finding the intention of the Parliament. The judge should not only consider the language of the statute but also the social conditions which gave rise to it, and supplement the written word so as to give "force and life" to the intention of the Legislature."**

70. One of the canons of statutory interpretation is to find out the intention of parliament at the time of the enactment of a statute. It is now however recognised that that principle of interpretation is not necessarily correct since the legislators may not have had the same intention when passing an Act as the Court may think. Accordingly, the most favourable interpretation to be adopted which is widely accepted is to find out the mischief that was intended to be cured by the said legislation. The historical circumstances under which a particular law was passed or enacted are encompassed in what textbook writers and other scholars refer to as the "Mischief Rule" which may also be called the "***Rules in Heydon's Case***" which is to the effect that it is always proper to construe an ambiguous word or phrase in the light of the mischief which the provisions is obviously designed to prevent and in the light of the reasonableness of the consequences which follow from giving it a particular construction. See **Cartside vs. IRC (1968) AC 553, 612**

71. The Mischief Rule is a rule of interpretation of statutes, or put differently, an aid to interpretation. It lays down the proposition that before arriving at any particular interpretation of the statute, the Court will consider and be aided by establishing what the law was before the statute was enacted or amended, the injustice or mischief which existed before the enactment of the statute, and would the interpretation of the statute in the matter before Court perpetuate that injustice or mischief which existed before the enactment of the law?

72. As was appreciated by **Mohamed Ibrahim, J** (as he then was) in **Dubai Bank Kenya Ltd vs. Come-**

Cons Africa Ltd [2004] 2 EA 55 based on ***Bennion's Statutory Interpretation*** **3rd ED P. 725,** :

> **"It is presumed that Parliament did not intend to apply coercive measure going wider than was necessary to remedy the mischief in question and the Court must endeavour to ensure that the remedy provided by Parliament does not set up some other mischief as Parliament is unlikely to intend to abolish one mischief at the cost of establishing another which is as bad, or even worse…It is a principle of legal policy that law should be just, and that court decisions should further the ends of justice. The court when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle and the Court should therefore strive to avoid adopting a construction that leads to injustice."**

73. This spirit was correctly captured by **Mumbi Ngugi, J** in **Stephen Asura Ochieng & 2 Others vs. ODM & 2 Others [2011] eKLR** when the learned Judge expressed herself as follows:

> **"The question that arises is this: can it be properly argued that a dispute cannot be referred for determination to the Political Parties Tribunal because the political party has failed or refused to activate the internal party dispute resolution mechanism, thus leaving an aggrieved party with no option but to turn to the High Court for redress? I think not. To hold otherwise would mean that parties could, by failing to resolve disputes internally, frustrate the operations of the Tribunal and render it totally redundant. [12] To my mind, the intention behind the establishment of the Political Parties Tribunal was to create a specialised body for the resolution of inter party and intra party disputes. The creation of the Tribunal was in line with the provisions of Article 159 of the Constitution which provides for the exercise of judicial power by courts and tribunals established under the constitution and for the use of alternative dispute resolution mechanisms. Further, a major concern in the administration of justice in Kenya has been the extent to which the courts have been unable to deal expeditiously with matters before them. A situation in which disputes between members of political parties amongst themselves or with their parties wind up in the Constitutional division of the High Court would clearly be prejudicial to the expeditious disposal of cases. [13] To my mind, the provisions of Section 40 (2) of the Political Parties Act must be interpreted as permitting aggrieved members of a political party to bring their grievance before the Political Parties Tribunal where the political party has neglected or refused to activate the internal party dispute resolution mechanism. The section must be read as contemplating assumption of jurisdiction by the Tribunal where the internal party mechanism has failed to hear and determine a dispute. Indeed, I do not believe that this court has jurisdiction to entertain this Petition at all in view of the nature of the petitioners' grievance and the parties involved."**

74. The ***Political Parties Act***, as its preamble loudly proclaims is "*AN ACT of Parliament to provide for the registration, regulation and funding of political parties, and for connected purposes.*"

75. In my view the intention of enacting the Act was to provide a mechanism with which disputes arising between members of political parties or between political parties or between coalitions can be expeditiously resolved taking into account the need to respect the internal party governance and to resolve the same in a specialised Tribunal without the necessity of subjecting them to the time consuming process of litigation. Political issues, it is usually prudent that they as much as possible be sorted outside the arena of the Courts due to their inherent nature. Therefore Parliament in its wisdom decided that such disputes be in the first instance resolved within the party itself and if for any reason such a resolution cannot be found at that level by the Political Parties Tribunal and only thereafter may the parties approach the Court. If section 40 of the Act empowers the Tribunal to resolve disputes arising between political parties or even between coalitions, to argue that the Tribunal cannot resolve disputes between members of a coalition even if from different parties therein, in my view, amounts to splitting the hairs. This Court ought to adopt an interpretation that favours the spirit of the Act rather than one which renders the Act stillborn or ineffective. As was held in **Constitutional Petition Number 359 of 2013 Diana Kethi**

Kilonzo vs. IEBC and 2 Others:

> "**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."**

76. It is similarly my view that bodies which have been established by Parliament especially those tasked with resolution of political matters ought to be allowed to grow and the Courts should only step in to ensure that they carry out their mandate in accordance with the Constitution and the legislation.

77. Adopting, as I hereby do, the purposive approach to statutory interpretation rather than the literal interpretation one, my view is and I hold that the dispute of the nature herein falls within the jurisdiction of the Tribunal. The Subjects must have appreciated this when they took the objection in Nakuru High Court Judicial Review Case Number 20 of 2014 that the Court had no jurisdiction. Otherwise I would agree that the position adopted herein, whereas may not necessarily confer jurisdiction the Tribunal if it did not have, amounts to approbating and reprobating. As was appreciated by **Ringera, J** (as he then was) in **Showind Industries Ltd. vs. Guardian Bank Ltd & Another [2002] 2 KLR 378; [2002] 1 EA 284**, a court of equity cannot countenance approbation and reprobation.

78. The second ground of attack however, was based on section 40(2) of the Act. The said provision provides:

> ***Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a) (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.***

79. The objection was based on the existence of the Coalition's Agreement for National Healing & Reconciliation, Inclusiveness & Prosperity. That Agreement established the Dispute Resolution Council. However, the Agreement expressly referred to disputes arising between Coalition Partners or other parties enjoined pursuant to clause 3 and it was to apply to interpretation or implementation of the Agreement. The parties referred to in clause 3 are however other political parties with shared values and objectives. Clearly therefore the Agreement did not encompass resolution of disputes between members of the coalition *inter se*. It was averred which averment was not contested that the Counsel who appeared for the Subjects before the Tribunal was unaware of the existence of the dispute resolution mechanism that would cover the circumstance of this case. Although it is now contended that the said Counsel was not fully briefed, that is now water under the bridge. It was that counsel who appeared on behalf of the Subjects and ought to have been fully briefed. If there was no dispute resolution mechanism covering the circumstances of this case, to send the interested parties to resort to such non-existent mechanism would have been absurd. As this Court held in **Republic vs. Ministry of Interior and Coordination of National Government & the Public Procurement Administrative Review Board Ex-Parte: ZTE Corporation and ZTE Corporation (Kenya) Limited Judicial Review Case No. 441 of 2013**

> **"…ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality… However, where the ouster clause leaves an aggrieved party with no effective remedy or at all, it is my view that such ouster clause will be struck down as being unreasonable."**

80. Therefore where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law is decided in a fair and public hearing before a court or, if appropriate, another

independent and impartial tribunal or body is achieved.

81. Without evidence that there exist a remedy that covers the circumstances under which the dispute under consideration arose this Court cannot find that the Tribunal had no jurisdiction by virtue of section 40(2) of the Act.

82. It was contended that the Tribunal by not hearing the preliminary objection before the complaint was biased. Whereas I agree and this position is supported by authority that where an issue of jurisdiction is raised it ought to be decided *in limine*, the mere fact that it is not so decided does not amount to bias on the part of the Tribunal. Whereas I agree that to some extent the language used by the Tribunal may have been rather stretched and may have created an impression of bias, I am not satisfied that the use of a strong language in a decision *ipso facto* constitutes bias. As was held in **Ogang vs. Eastern And Southern African Trade and Development Bank (PTA Bank) [2003] 1 EA 217:**

> **"Mere strong language by a judge does not establish bias since dialogue between the bench and the bar is commonplace and the views expressed therein do not necessarily amount to a predetermination of issues."**

83. In this case whereas I agree that the Tribunal's language was unnecessarily strong, I am not prepared to find that such a strong language was necessarily a manifestation of bias. As held in **Devji Ladha Patel vs. Nathabhai Vashram Patel Civil Appeal No. 16 of 1943 ([1944] 11 EACA 15:**

> **"Though the letters were couched in strong language, when it is agreed by the parties that the arbitrators shall send their remarks it must be in contemplation that such remarks will include comments on the evidence and reasons for believing or disbelieving the evidence…If one arbitrator is assiduous in the performance of his duties and the other is not that is no ground for setting aside the award of the umpire. Much less could it be regarded as proof of misconduct on the part of the umpire."**

84. As was held by **Apaloo, JA** (as he then was) in **Haji Mohammed Sheikh T/A Hasa Hauliers vs. Highway Carriers Ltd. [1988] KLR 806; Vol. 1 KAR 1184; [1986-1989] EA 524:**

> **"If the Judge introduced into his consideration of the application extraneous matters and founded his decision either partly or wholly on them, then the exercise of his discretion can properly be faulted. But if there is evidence on record to justify the Judge's feeling that the genuineness of the defence was open to suspicion, there is nothing extraneous in the observation...One's experience teaches one that charges of bias or ill-will against a Judge or adjudicator are usually made by defeated litigants often motivated by disappointment at adverse verdicts. Where a party or his advocate's conduct is deserving of judicial censure, strong language by the Judge in condemnation of that conduct cannot properly be stigmatised as bias or judicial hatred. Nor does it justify an appellate Court in substituting its discretion for that of the trial court regardless of the facts, or provide such Court a warrant for exercising that discretion in favour of a party, who, on the facts, is entirely undeserving of it."**

85. It was further contended that the Tribunal's decision was unreasonable. However it is my view that there is a distinction between mere unreasonableness and Wednesbury unreasonableness. It is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. Since unreasonableness is a subjective test, to base a decision to grant judicial review relief merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, and this view is supported by the very test in ***Wednesbury Case***, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or

not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.

86. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

> **"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."**

87. In this case I agree with the interested parties that apart from bare statement, there is no satisfactory material placed before me on the basis of which I can find that the Tribunal's decision was irrational. Whereas one may find it disagreeable that in itself does not elevate it to the level of irrationality. I cannot say that the Tribunal's findings were so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at it.

88. It was further contended that the Tribunal in its decision took into account irrelevant matters. However as rightly submitted by the interested parties, the Subjects did not satisfactorily demonstrate what the irrelevant considerations were and how they affected the final outcome of the tribunal.

89. Having considered the issues raised herein and the material placed before me, I am of the view and hold that this application lacks merit.

Order

90. Accordingly, the order which commends itself to me and which I hereby grant is that the Notice of Motion dated 12th March, 2015 be and is hereby dismissed.

91. However as litigation herein was contributed to by the unclear state of section 40 of the ***Political Parties Act***, there will be no order as to costs.

92. It is so ordered.

Dated at Nairobi this 12th day of November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Said for the Applicant

Cc Patricia