



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 414 OF 2013

REPUBLIC.....APPLICANT

VERSUS

THE SPEAKER OF COUNTY ASSEMBLY OF NYANDARUA.....RESPONDENT

AND

SAMUEL KIMANI GACHUHI.....INTERESTED PARTY

RULING

1. The applicant in this ruling, Nyandarua County Disability Forum and Social Reform Centre applied by way of Notice of Motion dated 17th March, 2014 to be joined to these proceedings as interested parties.
2. According to them they are Community based organisation of persons with disabilities in Nyandarua County and non-governmental organisation that seeks to achieve among other objectives, addressing the plight of marginalised groups respectively. It was contended that they are non-partisan charitable organisations dedicated to full and effective implementation of the Kenyan Constitution and hence ought to be joined in these proceedings since their members will be directly affected in the adjudication of this matter with respect to the interpretation of Article 177(1)(c) of the Constitution as read with section 36(1)(f) of the *Elections Act*.
3. In their view, it is necessary and in the interest of justice to bring all the contestants who may have some interest so that all the issues are determined once and for all. According to them no prejudice will be occasioned if they are allowed to be joined to these proceedings.
4. The foregoing position was highlighted by **Mr Gichuki**, learned counsel for the said interested parties who submitted that the applicants are representatives of marginalised groups in the said county and wish to have the views of the marginalised groups represented in these proceedings in order to ensure that public interest is safeguarded. According to **Mr Gichuki**, it is clear from the replying affidavit sworn by **James Ndegwa** in these proceedings that there are issues touching marginalised groups in these proceedings.
5. While the respondent and the interested party were non-committal as to the outcome of the application, the application was opposed by the ex parte applicant. In the replying affidavit, apart from raising the issues relating to the incompetency of the application, the ex arte applicant contended that the applicants herein are not persons directly affected by the suit as provided under Order 53 of the *Civil Procedure Rules*. To the ex parte applicant although the applicants state they are interested parties they have not

indicated that they are persons directly affected. It was deposed that the applicants misapprehended judicial review proceedings to be the same as a Constitutional Petition when in the former the court looks at the decision making process rather than the merit.

6. According to the ex parte applicant the participation of the applicants in these proceedings will not in any way assist the Court in determining the real issue before it which is the illegal act of the Respondent in refusing to swear him as a member of the County Assembly of Nyandarua despite being duly nominated and gazetted. In his view the sole intention of the application is to delay the hearing of the substantive application and deny him the right to take part in the proceedings of the County Assembly of Nyandarua.

7. **Mr C N Kihara**, learned counsel for the ex parte applicant while reiterating the foregoing added that the issues raised by the applicant are not the issues this court will be called upon to deal with in these proceedings. To him the applicants have not explained why they did not participate in other for a provided under the law. To him the Court having found that the ex parte applicant was qualified to be nominated and the Court having ruled that the issue of nomination as res judicata, the merits of the case is not before this court which matter is the subject of an appeal before the Court of Appeal. It was submitted that the only issue before this Court is whether a Speaker of the National Assembly can take an objection and uphold it without hearing a party affected thereby. It was submitted that if the Speaker in the replying affidavit has captured the concerns of the applicant herein there it would be unnecessary to join the applicants to these proceedings.

8. I have considered the foregoing.

9. Order 53 rule 3(2) of the **Civil Procedure Rules** provides:

The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

10. It is noteworthy that the rule provides that the persons who should be served are ***persons directly affected*** rather than interested persons. Therefore it is incumbent upon a person who alleges that he or she ought to have been served to show how the proceedings directly affect him or her. The word “direct” is defined by ***Black’s Law Dictionary***, 9th Edn. page 525 as “straight; undeviating , a direct line, straightforward, immediate.” It must be kept in mind that judicial review orders are concerned with the decision making process rather than the merits of the decision. Therefore judicial review proceedings ought not to be modified into a vehicle through which matters which ought to be ventilated in other forums are determined. This was the position in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, where it was held that for the Court to require the alternative procedure to be exhausted where the alternative procedures are more convenient and appropriate prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort. Similarly, in **The Republic vs. The Rent Restriction Tribunal and Z. N. Shah & S M Shah Ex Parte M M Butt Civil Appeal No. 47 of 1980** the Court of Appeal held that if there is an equally convenient, beneficial and effective remedy available a Court will generally decline to exercise its discretion in favour of an applicant for a prerogative order.

11. In this case the applicant is challenging the decision by the Speaker in declining to swear him as a Member of the County Assembly for Nyandarua County Assembly when he had already been gazetted and without him being afforded an opportunity to make representation on the objection.

12. The applicants on the other hand are interested in protecting the interests of the marginalised in the County. From the application and the supporting affidavit it is not clear what their role is with respect to the impugned decision. It is not therefore surprising that **Mr Gichuki** informed the Court that they will be able to demonstrate their interests at a later stage in the proceedings. In my view, for a party to be joined

to the proceedings under Order 53 rule 3(2) aforesaid the applicant ought to disclose to the Court how he is directly affected. The Court cannot be expected to act in the dark by joining such a person with a view to satisfying itself as to the effect of the orders sought on the applicant at a later stage of the proceedings. In my view these proceedings do not directly touch on the representation of the marginalised groups in the Assembly. Such an issue ought to have been canvassed in other proceedings in which the merits of the representation constitutional or otherwise could be canvassed. To allow such an issue to be canvassed in these proceedings would remove the same outside the ambits of judicial review and would unnecessarily cloud the issues for determination hence delay the determination of the matter herein. In my view, I am not satisfied that the presence of the applicants is necessary for the determination of the issues in these proceedings. I am further not satisfied that the applicant are persons directly affected by these proceedings since this Court will not in its decision dwell on the merits but only the process and will leave the issue of the merits to be alt with in appropriate forums.

13. In the circumstances I decline to grant the application dated 17th March, 2014 which I hereby dismiss but as the applicants allege to represent marginalised groups there will be no order as to costs.

Dated at Nairobi this 8th day of April 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Githinji for the Respondent

Mr Kariuki for the Interested Party