



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**JUDICIAL REVIEW NO. 18 OF 2013**

**IN THE MATTER OF NOMINATION OF CANDIDATES TO THE COUNTY ASSEMBLY**

**AND**

**IN THE MATTER OF SECTIONS 8 OF THE LAW REFORM ACT, CAP 26**

**AND**

**IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**

**REPUBLIC.....  
APPLICANT**

**VERSUS**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT.....1ST INTERESTED PARTY**

**ELIZABETH NAITIMA.....2ND INTERESTED PARTY**

**JUDGMENT**

1. The ex-parte Applicant Sallo Wario Elema through a Notice of Motion dated 2<sup>nd</sup> August, 2013 brought pursuant to Order 111 Rule 1, 2, 3 of Civil Procedure Rules and sections 8 and 9 of the *Land Reform Act* sought the following orders;

1. *That an order of certiorari be issued to call and quash the decision of the Independent Electoral and Boundaries Commission dated 17<sup>th</sup> July, 2013.*
2. *That an order of prohibition be issued to stop the implementation of the said decision gazette in Gazette Notice No. 9794 of 17<sup>th</sup> July, 2013 for being a nullity.*
3. *That the orders of prohibition be issued to stop the implementation of the said decision dated 17<sup>th</sup> July, 2013 relating to nomination of county assembly of Isiolo County for being a nullity..*
4. *That costs be provided for.*

The application is supported by the statement of facts and affidavit verifying facts by the applicant.

2. The respondent opposed the application and filed a replying affidavit through Moses Kipkoge, a senior legal officer of the respondent dated 2<sup>nd</sup> October, 2013. The 1<sup>st</sup> and 2<sup>nd</sup> party did not appear nor did they file any replying affidavit on any ground of opposition. The counsel agreed the application be determined by way of written submissions. The Ex-parte applicants' submissions were filed on 21<sup>st</sup> March, 2014 whereas the Respondent's submissions were filed on 16<sup>th</sup> May, 2014. The court has considered the Notice of Motion, the replying affidavit and all annexures and respective oral submissions together with all supportive authorities. The issue for consideration is whether the Judicial Review Application properly before this court and what relief (if any) the ex-parte applicant is entitled to.

3. The Respondent has submitted that the ex-parte applicant challenges the manner in which the 2<sup>nd</sup> interested party was nominated to the position of County Assembly Representatives for the 1<sup>st</sup> interested party, also the ex-parte applicant avers that the Respondent has no power in law to alter, change and or remove a party's choice and replace a nominee with one of their own. Referring to the Elections Act No. 24 of 2011 and the Elections (General) Regulations 2012 the constitution. The applicant further stated she was not called to be informed of the intention or reason for change asserting that the act was unilateral and denies her rights to be heard resulting to breaching her natural rights and justice. She further submitted that the tribunal shown no reason for dismissal of her complaint terming the decision by IEBC as discriminatory and a violation of her constitutional rights.

4. A perusal of the parties affidavits reveal that it is not indispute that the 2<sup>nd</sup> interested party Elizabeth Naitima was gazetted on 17<sup>th</sup> July, 2013 as the duly nominated to the position of County Assembly Representatives representing the marginalized. That in essence meant that the 2<sup>nd</sup> interested party Elizabeth Naitima became a member of the Isiolo County Assembly.

Section 75(I) (A) of the Elections Act No. 24 of 2011 Provides:-

***“A question as to the validity of the election of a member of County Assembly shall be heard and determined by the***

***Resident Magistrate's Court designated by the Chief Justice”.***

5. In the case of:- ***National Alliance Party & Another versus Independent Electoral and Boundaries Commission (2013) eKLR Petition No. 175 of 2013*** D.S. Majanja held that Gazette Notice is a declaration that a person is duly elected and a respondent can only regain her seat if a duly cleared member of parliament losses her seat and the only way that court is permitted to intervene is through an election petition. In view and understanding for once a nominee to County Assembly is gazetted he becomes a member of County Assembly and his position can only be challenged by way of an election petition and not by any other way. Application to challenge such position by way of Judicial Review is in view untenable and misplaced, this is because where a statute has established a dispute resolution mechanism, that procedure must strictly be followed in resolving the dispute (***see case of Speaker of the National Assembly versus Karume (1992)***).

In his instant application for Judicial Review though it concern the Electoral process. The principle that where the constitution or a statute has established a dispute resolution procedure, then that process must be applied, is a universal application. The citation of Judicial Review in an application do not change the High Court Process or inquire, investigate, arbitrate or in any manner deal with issues raised when it is expressly clear that such issues can be dealt with through the dispute resolution procedure provided to by a statute. The Election Act No. 24 of 2011 under section 75(I) (A) provides the procedure to be followed as in my view that is no basis or justification for the law procedure by the statute to be ignored.

6. In view of the above the ex-parte applicant should have challenged the validity of the nomination of the 2<sup>nd</sup> interested party by way of an election petition being a Resident Magistrate's Court and not that a High Court by way of Judicial Review. The application by way of Judicial Review is not proper as the High

Court is not proper court to enquire of nomination of a member of County Assembly but Resident Magistrate's Court. The court lacks requisite jurisdiction to entertain the ex-parte applicant's application.

7. Though it was held the court lacks requisite jurisdiction to entertain the application, in case the court is faulted on that finding, the court will consider further whether the ex-parte application is entitled to the reliefs sought the Notice of Motion can the issue of orders of certiorari. In application for orders of certiorari the court in exercising judicial review jurisdiction is not concerned with the merit of the application but with procedural propriety of a decision (see Republic versus Public Procurement Administrative Review Board & 2 others Ex-parte – Sanitation Services (E.A) Limited 2013 eKLR). However a court will consider the merits of a decision in the circumstances where the administrative body has acted outside its jurisdiction, or has taken into account matters it ought not to; or failed into account matter it ought to or made a decision that is “so unreasonable, that no reasonable authority could ever come to it”.

8. The Respondent has demonstrated in its replying affidavit and annexures which have not been controverted, that it adhered to the laid down procedure in nominating the 2<sup>nd</sup> interested party which was based on the ODM Isiolo County (Gender Top-up) not submitted to the Respondent. The 1<sup>st</sup> interested Party, ODM has not challenged the Respondents averments to the effect that it followed laid down procedure in nomination. That it allocated special seats on the basis of proportional restoration and that ODM was allocated one gender top-up seat in Isiolo County in which the Respondent nominated the 2<sup>nd</sup> interested party Elizabeth Naitima. I therefore find the Respondent adhered to the procedure set out in the Elections Act 2011 in nominating the 2<sup>nd</sup> interested party who appeared on the ground in Top-up list representing the marginalized and as such orders of certiorari sought to cancel the respondent's decision of 17<sup>th</sup> July, 2013 cannot be granted.

9. On the orders of prohibition sought by the ex-parte applicant. The jurisdiction under which such orders can be granted is well explained by law. In the case of:- **MARIN KIOI & 2 OTHERS VERSUS JOHNSON GATU MIANO & 9 OTHERS (2013) eKLR** the judge cited the ruling Nyamu J. (as he then was) with approval in **MUREITHI & 2 OTHERS (For Mbari Ya Murathimi Clan) VERSUS ATTORNEY GENERAL & 5 OTHERS NAIROBI HCMCA NO. 158 OF 2005** where it was held:-

***“What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not herein lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. That is why it is said prohibition looks at the future so that if a tribunal were to arrange in advance that it would consider itself not bound by the rule of natural justice the High Court would be obliged to prohibit if from acting contrary to the rules of natural justice. However where a decision has been made.....an order of prohibition would not be efficacious against the decision made. Prohibition cannot quash a decision which has already been made it can only prevent the making of a complemented decision. There is nothing the respondents have failed to do, as matter of statute law or legal duty. The other reason why the claim must fail is that the 5<sup>th</sup> and 6<sup>th</sup> respondents are not public bodies but only some juristic land owners. Thus the remedies of mandamus, prohibition or certiorari are only available against public bodies. The 5<sup>th</sup> and 6<sup>th</sup> respondents could be sued in respect of the ownership of the land should the applicants have evidence that the alienation was not done in accordance with the outlined provisions of the relevant Land Registration Acts under which the parcels fall, they might also have relief for full compensation under the Trust Land provisions of the constitution if as stated above, land adjudication and registration or the setting apart were not done as envisaged under the Constitution and the Land Adjudication Act. There is no proof that the alternative remedies as set out above would be less convenient beneficial, or effectual.”***

That is evidently clear that an order of prohibition can only issue to prevent making of a contemplated decision. In the instant case the 2<sup>nd</sup> interested party has already been gazetted as a member of Isiolo

County Assembly. The orders of prohibition sought by the ex-parte applicant are however too late in the day and they have been overtaken by events. The court in the instant application is being asked to make orders which cant be enforced and which orders will be for no effect. The orders sought are ineffective for all purpose and intention and will not be able to be complied with. The court in its jurisdiction will always be bound to decline to grant such orders, and such orders would be mockery of justice has already been spent and as such the court cannot issue orders which cannot be enforce.

10. Having considered the reliefs sought and having come to the conclusion I have, I find that the reliefs sought if the ex-parte applicant cannot be granted for reasons already stated herein above. The upshot is that the ex-parte applicant's application for Judicial Review dated 2<sup>nd</sup> August, 2013 is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MERU THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2014**

**J. A. MAKAU**

**JUDGE**

**Delivered in open court in presence of:-**

**Mr. Ondari for ex-parte applicant**

**Mr. Kiget for Respondent**

**J. A. MAKAU**

**JUDGE**