



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL PPLICATION NO. 406 OF 2014

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF PROHIBITION & CERTIORARI**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT

BETWEEN

THE POLITICAL PARTIES DISPUTE TRIBUNAL.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

HON. MUSALIA MUDAVADI.....1ST RESPONDENT

HON. JEREMIAH KIONI.....2ND RESPONDENT

KASSIM SAWA.....3RD RESPONDENT

UNITED DEMOCRATIC FORUM PARTY.....4TH RESPONDENT

WYCLIFFE OYONDI, CAROLINE MUTHONI BOY AND

PAULINE ACHIENG ABETTO.....5TH RESPONDENT

EX PARTE..... PETRONILA WERE

RULING

Introduction

1. By a Chamber Summons dated 28th October, 2014, the applicant herein, **Petronila Were**, seeks the following orders:

1. **THAT leave of this court be granted to the Applicant to apply by way of Judicial Review an order of certiorari to bring to this court and quash the 1st Respondent's decision/or orders issued on 17th October, 2014 in the Political Parties Disputes Tribunal Civil Case No. 10 of 2014 Wycliffe Oyondi Okeo & 2 Others versus Hon. Musalia Mudavadi & 3 Others affirming the appointment of Muma & Kanjama Advocates, dismissing the Notice of Appointment filed by Kithi & Company Advocates to act for United Democratic Forum Party, the Interested party therein.**
2. **THAT leave of this Honourable Court be granted to the Applicant to apply by way of Judicial Review an order of prohibition to issue prohibiting the 1st Respondent from hearing and/or determining Political Parties Disputes Tribunal Civil Case No. 10 of 2014 Wycliffe Oyondi Okeo & 2 Others versus Hon. Musalia Mudavadi & 3 Others.**
3. **THAT leave so granted do operate as a stay of the order made on 17th October, 2014 in Political Parties Disputes Tribunal Civil Case No. 10 of 2014 Wycliffe Oyondi Okeo & 2 Others versus Hon. Musalia Mudavadi & 3 Others.**
4. **THAT the costs of this Application be provided for.**

Applicants' Case

2. The applicant was supported by a verifying affidavit sworn by the applicant who deposed that she was the CEO-Secretary of the National Executive Committee and sits in the United Democratic Forum Party's (hereinafter referred to as the Party's) Governing Council, the Party's National Executive Council and the National Delegates Congress.

3. According to the Applicant, on or about the 16th October, 2014 suspended officials known as **Abraham Limo** and **Hassan Osman** filed affidavits purporting to give **Muma & Kanjama Advocates** (hereinafter referred to as the Firm) authority to act on behalf of the Party in **Political Parties Disputes Tribunal Civil Case No. 10 of 2014 Wycliffe Oyondi Okeo & 2 Others versus Hon. Musalia Mudavadi & 3 Others** (hereinafter referred to as the said Cause). However the issue of representation was in serious contest as the firm of **Kithi & Company Advocates** were tussling over the same and the Tribunal directed that the Registrar of Political Parties be summoned to present the Register of the Party.

4. On 17th October, 2014 an official presented a register of political parties on which the Tribunal relied to make a decision. However neither the applicants nor the Respondents in the said Cause were given an opportunity to respond to the same and the orders affirming the said Firm as the legal advocates for the Party openly favoured the claimants in the said Cause since the crux of the matter touches on their continued stay in office after being suspended by the party organs.

5. It was contended that the Tribunal proceeded to give final orders in dismissing the Notice of Appointment filed by **Kithi & Company Advocates** without hearing the Applicant which is against the Rules of Natural Justice.

6. On lodging a complaint with the Registrar of Political Parties on the open bias exhibited by the official who presented the information on behalf of the Registrar, the later respondent by stating inter alia that the officer who presented the information to the Tribunal did not take the Tribunal through the summary of the Party correspondences regarding the Party's National Executive Council and that he was not the one who deals with Party matters thus confirming that the official was not conversant with the Party matters and hence did not give sufficient information to enable the Tribunal make an informed and just decision.

4th Interested Party's Case

7. According to the 4th interested party, the Party is a duly registered political party and a body corporate with perpetual succession and a common seal and is capable of suing and being sued in its own name as

well as performing all such acts as appertains to a body corporate and that the National Executive Council authorise **Hassan Osman** and According to the **Abraham Limo** to represent the party and instructed advocates to act on their behalf hence they instructed the said Firm of **Muma & Kanjama** Advocates act for to represent the Party. According to the 4th interested party no other firm of advocates has been instructed to represent the Party.

8. According to the party as the dispute before the Tribunal must be completed within three months of filing.

9. It was contended that concurrently with these proceedings an application was filed before the Tribunal seeking an order for review of its orders which application was heard and dismissed on 7th November, 2014.

10. It was denied that the firm of Kithi & Co. Advocates were never given a hearing before the Tribunal or that the matter proceeded in their absence. It was contended that since a Memorandum of Appeal had been filed dealing with the same matter the subject of these proceedings, namely High Court Civil Appeal No. 466 of 2014 these proceedings should either be stayed or dismissed.

11. To the 4th interested party, the grant of the orders sought herein would gravely prejudice the 4th interested party, some of whose organs cannot conduct their normal business prior to conclusive determination of who are the proper registered officials of the said organs hence the interest of justice favour expeditious hearing of the matter before the Tribunal.

5th Interested Parties' Case

12. The 5th interested parties on the other hand contended that the application was a non-starter, frivolous, vexatious and an utter abuse of the court process. Further the same was prepared and filed in bad faith and improper motives. It was their position that the application had been overtaken by events due to the advanced stage of the proceedings giving rise to these proceedings.

13. It was contended that the applicant and her advocates were forum shopping with one application after another to derail the said proceedings. Since section 41(1) of the **Political Parties Act** No. 11 of 2011 provides that a political party dispute ought to be determined within three months from the date the dispute is lodged, the claim by the 5th interested parties having been filed on 18th September, 2014 ought to be heard and determined by the end of the month of November. It was therefore contended that the aim of the applicant is to frustrate the proceedings before the Tribunal and that this application was meant to undermine judicial process in light of the fact that at the time of filing this application there was pending before the said Tribunal an application seeking to review the order sought to be quashed herein.

14. It was averred that the applicant, in contending that the applicant relied on the evidence of a non-party to the proceedings failed to disclose that the Tribunal's decision was arrived at *suo moto* based the register of the Party held by the Office of the Registrar of Political Parties, an action which the Tribunal took in the exercise of its judicial discretion.

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 and whether the grant of that leave, if so granted, ought to operate as a stay of the proceedings in question.

16. The requirement for leave was explained by a three judge bench comprising **Bosire, Mboghli-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... In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a *prima facie* case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a *prima facie* case. For that, he should have been granted leave to apply for the orders sought.”

20. 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**, the Court of Appeal was of the view 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.

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

“Application for leave to apply for orders of judicial review are normally *ex parte* and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court’s discretion. 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 and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him.... 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.”

22. 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*.”

23. In this case, the applicant’s case is that the Tribunal did not afford the parties before it an opportunity of being heard before it arrived at its decision under challenge. In my view the impression created that where a Tribunal raises a matter *suo moto*, it is not under any obligation to hear parties before it is not, as contended on behalf of the 5th Interested Parties, necessarily correct. Even in cases where the issue is a jurisdictional the decision to make a decision without hearing the parties if parties are desirous of being heard ought not to be arrived at lightly and such a decision would only be justified in exceptional

circumstances.

24. In Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 the Court of Appeal expressed itself as follows:

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

25. What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded. I however did not understand the Court to be saying that the Court ought not to hear the parties on the issue of jurisdiction before determining an issue raised *suo moto*. In fact in the said decision the Court held that as soon as the issue arises, the court should hear and dispose of that issue without further ado. It is therefore incorrect to contend that where a Tribunal raises a matter *suo moto* the right to hear parties is thereby dispensed with.

26. Mwera, J (as he then was) in Nagendra Saxena vs. Miwani Sugar Company (1989) Limited (Under Receivership) Kisumu HCCC No. 225 of 1993 while citing Habig Nig Bank Limited vs. Nashtex International Nig Ltd Nigeria Court of Appeal Kaduna Division CA/K/13/04 and Playing God: A Critical Look At Sua Sponte Decisions By Appellate Courts By Adam M Milani and Michael R. Smith, Tennessee Law Review {VOL. 69 XXX 2002} dealt with the *suo moto* procedure extensively and expressed himself as follows:

“The term *suo moto* is a Latin term meaning “on its own motion” and it is approximately an equivalent of the term “*sua sponte*” (Latin) which means, “of one’s own accord”. The term defines one acting spontaneously without prompting from another party. Blacks Dictionary defines “*sua sponte*” as “of his or its own will or motion, voluntarily and without prompting or suggestion”. In our jurisdiction action “*suo motu*” or “*sua sponte*” for the two mean the same thing, a judge or court in a given case takes a course or decision without prior motion or request from the parties. Usually the matter being decided *suo motu* or *sua sponte* is not in the pleadings, briefs, submissions, issues and evidence placed before the court for determination. For that is the essence of the adversarial systems where the parties direct the course of the litigation that brought them to court while the judge plays the referee. He/she hears them and makes a decision. In matters *suo motu* the court usually on perusing the file before it comes by a matter that is of the essence of the case but not raised by the parties. It could be a matter of law or procedure or other. Then that is considered by the judge who rules on it. The better course in matters dealt with sua sponte is to notify the parties to the cause of the point(s) in question, inviting them to submit on it, before a ruling/finding is arrived at. There is no dispute that the fundamental premise of the adversary process is that the advocates do uncover and present more useful information and arguments to the decision-maker than would be developed by a judicial officer acting on his own in an inquisitorial system. Accordingly most lawyers probably never think about a possibility that a court will decide a case or an issue that the court itself raises and which was neither briefed nor argued by the parties. But it happens

and it is known as *sua sponte*. Once a court raises an issue *sua sponte* the court can go about deciding it in one of two ways. First, it can involve the parties and request that they submit briefs on the issue to assist the court in reaching a decision. In this context, while the issue may be raised *sua sponte* the decision on the issue is made in accordance with the principles and traditions of the adversarial system. Alternatively, the court can decide the issue on its own without the input from the parties. In this context, the issue is not only raised *sua sponte*, but is also decided *sua sponte*. *The proper approach to decide sua sponte issues is the former approach – the approach that involves the parties in the decision-making process...It is not in doubt that hearing parties on issues sua sponte or suo motu is better favoured since the parties have been heard before a decision...Even when a court raises a point suo motu the parties must be given an opportunity to be heard on the point particularly the party that may suffer a loss as a result of the point raised. The law is well settled that on no account should a court raise a point suo motu, no matter how clear it may appear to be, and proceed to resolve it one way or the other without hearing the parties...If it does so, it will be in breach of the parties right to fair hearing.*” [Emphasis mine].

27. Therefore, if the parties desired to be heard on the issue, the Tribunal ought to have afforded them an opportunity of being heard before arriving at a decision whose effect was to determine by which firm the Party was to be represented. The right to be represented in legal proceedings by an advocate of one’s choice where legal representation is permitted in my view is an element of a fair hearing under Article 50 of the Constitution.

28. The issue of determining matters raised *suo moto* without hearing parties was also alluded to by the Court of Appeal in *Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] EKL* where the Court expressed itself as follows:

“In the present case it was the Superior Court which put the appellant in the predicament it finds itself in. It was mistaken on the applicable law. The appellant acted promptly and sought an order reviewing the erroneous order. The court declined jurisdiction with the result that the limitation period expired. If that decision is not reviewed it would not have any remedy. It is hardship of that nature which the review jurisdictions should be exercised to obviate, more so if it is shown that the applicant did not contribute to that state of affairs. The case of *Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others vs. Kilach [2003] KLR 249*, does not hold that review is not available under Order 53 of the Civil Procedure Rules. It would be oppressive and an affront to common sense in a case like the one before the court where the court precipitated a situation for the same court to turn round and say it lacks jurisdiction to correct what is obviously a wrong decision, more so where, as here, the court was not addressed on the merits or otherwise of the application for leave. The court *suo moto* raised the jurisdictional issue without asking the applicant’s counsel to address it on the matter.”

29. It is irrelevant whether the Tribunal would have arrived at the same decision even if it had afforded the parties an opportunity of being heard before making its decision. It must always be remembered that where a party has a right to be heard that right cannot be taken away by the mere fact that the Tribunal considers that the said party’s contribution is unlikely to affect the decision. As was held in *Onyango Oloo vs. Attorney General [1986-1989] EA 456*:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at.....Denial of the right to be heard renders any decision made null and void ab initio.”

30. Similarly in **Pashito Holdings Ltd. & Another vs. Paul Nderitu Ndun'gu & Others Civil Appeal No. 138 of 1997 [1997] 1 KLR (E&L)** the Court of Appeal expressed itself as follows:

“An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under duty to ‘act judicially’.

31. It was however contended that the applicant ought not to be granted leave in light of a pending appeal before this Court. Order 53 rule 2 of the *Civil Procedure Rules* provides:

Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

32. It is clear that the decision whether or not to adjourn the application for leave is an exercise of discretion based on the facts of a particular case. In my view where the interests of the applicant are capable of being adequately catered for by the appeal the judicial review court may well be advised to keep its proceedings in abeyance pending the hearing and determination of the appeal. As was held by **Ochieng, J** in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort; the applicant however will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate.

33. In **Re Preston [1985] AC 835 at 825D Lord Scarman** described it as a proposition of great importance that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort. In **Ex parte Waldron [1986] 1QB 824 at 825G-825H, Glidewell, LJ** observed that the court should always interrogate relevant factors to be considered when deciding whether the alternative remedy would resolve the question at issue fully and directly.

34. This discretion is necessary to ensure that no mischief is perpetrated by a person who with the intention of locking a party from judicial review remedies may file an appeal notwithstanding the merits thereof. In this case since the said appeal was instituted after these proceedings were commenced by the 1st to 3rd interested parties I am not satisfied that the existence of the said appeal ought to be used against the applicant herein in order to suspend the applicant's case.

35. It was also contended that just like in election disputes where it has been held that interlocutory appeals ought not to be entertained, since political party disputes are time dictated, this Court should not entertain these proceedings. It must be appreciated that the mere existence of a right of an appeal is not a bar to judicial review proceedings though that is a factor to be taken into account when considering the efficacy of granting judicial review orders. As was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:**

“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines

of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.”

36. It is therefore my view that interlocutory appeals ought not to be equated to judicial review remedies. Whereas the former deal with merits, the latter deal with the process, and where the process is being undertaken in circumstances which merit the grant of judicial review remedies, I do not see the reason why the Court ought to bar a party from invoking its judicial review jurisdiction especially if the remedies available under the appellate jurisdiction are not convenient, beneficial and effectual.

37. I have considered the issues raised herein and it is my view that the applicant had established a prima facie case and the leave sought is deserved. Accordingly I grant leave in terms of prayers 1 and 2 of the Chamber Summons herein. The substantive Motion to be filed and served within 15 days.

38. With respect to the direction that the leave granted do operate as a stay, this Court has held in Miscellaneous Application No. 363 of 2013 **In Re: Meridian Medical Centre:**

“...it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant’s case notwithstanding.....It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.”

39. Apart from the foregoing the Court must also look at the likely effect of granting the stay to the proceedings in question. In other words the Court ought to weigh the likely consequences of granting the stay and not doing so and lean towards a determination which is unlikely to lead to an undesirable outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

40. In this case the applicant intends to apply for certiorari to bring to this court and quash the 1st Respondent’s decision affirming the appointment of **Muma & Kanjama Advocates** and dismissing the Notice of Appointment filed by **Kithi & Company Advocates** to act for United Democratic Forum Party. As was held in **David Morton Silverstein vs. Atsango Chesoni Civil Application No. Nai. 189 of 2001[2002] 1 KLR 867; [2002] 1 EA 296** where the Court of Appeal cited **Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another Civil Application No Nai 50 of 2001:**

“We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay

is not granted. The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless...These remarks aptly apply to the application before us. What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory”.

41. Similarly, if the applicant succeeds in the intended judicial review proceedings, the impugned decision would thereby be quashed with the consequences that the proceedings pursuant thereto would be set aside. On the other hand if the proceedings in question are stayed, there is no guarantee that the three months period stipulated for the hearing and determination of the political disputes would be met. This Court does not wish to contemplate what the consequences would be for failure to resolve the said dispute within the said period. In order not to be confronted with such untidy circumstances, it is my view that the lesser evil would be not to interfere with the said proceedings. Accordingly I decline to direct that the grant of leave herein shall operate as a stay of the proceedings before the Tribunal.

42. The Costs of this application will be in the cause.

Dated at Nairobi this 17th day of November, 2014.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Musiega for Mr Kithii for the Applicant

Mr Njoroge for Mr Eboso for the 1st to 3rd Interested Parties.

Miss Chelagat for the 5th Interested Parties.