REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JR. MISC. APPLICATION NO.264 OF 2008

IN THE MATTER OF: AN APPLICATION BY GEDI JILLOW ROBLE FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI MANDAMUS AND PROHIBITION AGAINST THE ELECTORAL COMMISSION OF KENYA

AND

IN THE MATTER OF: THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT (CAP.7, LAWS OF KENYA)

AND THE REGULATIONS MADE THEREUNDER

AND

IN THE MATTER OF: THE LOCAL GOVERNMENT ACT, CHAPTER 265 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE LOCAL GOVERNMENT ELECTIONS RULES

AND

IN THE MATTER OF: THE PUBLICATION OF NOTICES IN THE KENYA GAZETTES OF 25TH JANUARY, 25TH APRIL AND 2ND MAY, 2008

BY ELECTORAL COMMISSION OF KENYA

BETWEEN

GEDI JILLOW ROBLE.....APPLICANT

-VERSUS-

THE ELECTORAL COMMISSION OF KENYA.....RESPONDENT

J U D G M E N T

By a chamber summons dated 9th September, 2008 brought under Section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Act, the exparte applicant Gedi Jillow Roble hereinafter referred to as the applicant sought courts leave to institute judicial review proceedings against the respondent herein the Electoral Commission of Kenya for orders of certiorari, mandamus and prohibition in terms of prayers 1(a), (b), (c) and (d) and that if such leave was granted, the same to operate as stay of the intended civic polls by the respondent with respect to Kalaliyo Central Ward pending the hearing and determination of the application inter-partes. Prayers 1(a), (b), (c) and (d) were in the following terms:

1. THAT this Honourable court be pleased to grant leave to the Applicant to apply for:

(a) AN ORDER OF CERTIORARI to remove to the High Court to investigate and quash the decisions by the Electoral Commission of Kenya (hereinafter "the ECK") as contained in the Kenya Gazette Notice of the 25th of April 2008 to declare the Kalaliyo Central Ward (hereinafter "the Ward") vacant and to appoint a returning officer to conduct a by-election in the Ward.

(b) AN ODER OF CERTIORARI to remove to the High Court to investigate and quash the resolutions of the ECK as contained in the Kenya Gazette Notice of the 2nd of May 2008 to:

(i) Determine that there was a tie in the civic election in the Ward held on the 27th December 2007, between the Applicant herein and one HUSSEIN SHEIKH MOHAMED.

(ii) Carry out a by-election in the Ward on the 11th June, 2008.

(c) AN ORDER OF MANDAMUS directed at the Respondent to cancel the gazette notices of the 25th April 2008 and 2nd of May 2008 in so far as they relate to the Ward and the Applicant herein.

(d) AN ORDER OF PROHIBITION to restrain and prohibit the Respondent from carrying out any polls howsoever whatsoever in the Ward on the 11th of June 2008 or on any other date during the tenure of the Civic Election of 27th December 2008 for the ward.

The application was filed together with supporting and verifying affidavit sworn by the exparte applicant and a statutory statement.

The application was placed before Dulu, J on 12th May, 2008 who directed that the same be served on the respondent for hearing interpartes. The application was then argued interpartes on 22nd May, 2008 and in a ruling delivered on 5th June 2008, the applicant was granted leave to commence judicial review proceedings for orders sought in prayer 1(a), (b), (c) and (d) provided that the main notice of motion was filed within 15 days from date of the ruling. The leave granted was to operate as a stay of the civic polls for Kalaliyo Central Ward intended to be held on 11th June, 2008 until the hearing and determination of the main motion.

Pursuant to this grant of leave the exparte applicant filed the substantive motion by way of notice of motion dated 19th June, 2008 seeking orders of certiorari to remove to the High Court and quash decisions of the respondent reflected in Kenya Gazette Notice of 25th April 2008 declaring Kalaliyo Central Ward vacant and to appoint a returning officer to conduct a by-election in Kalaliyo Ward *(hereinafter referred to as the* **"Ward").**

The applicant also sought orders of certiorari to remove to the High Court to quash resolution of the respondent as contained in Kenya Gazette Notice of 2nd May, 2008 determining that there was a tie in the civic election in the ward held on 27th December, 2007 between the applicant and one Hussein Sheikh Mohamed and to carry out a by-election in the ward on 11th June, 2008.

The applicant also sought orders of mandamus directed at the respondent to cancel the gazette notice of

25th April, 2008 and 2nd May, 2008 and an order of prohibition to prohibit the respondent from carrying out any polls in the ward on 11th June, 2008 or any other date during the tenure of the Civil election of 27th December, 2008 for the Ward.

The notice of motion was premised on fifteen grounds which are as stated on the face of the application, a supporting affidavit sworn by the applicant on 19th June, 2008 and annextures thereto.

On 4th July, 2008 Hussein Sheikh Mohamed filed an application dated 1st July, 2008 seeking to be enjoined in the proceedings as an interested party. The application was allowed on 27th October, 2008.

Basically, the applicant's case as can be discerned from the grounds supporting the notice of motion, the statutory statement and verifying affidavit supporting the initial application for leave is that the applicant was a civic candidate in the Kalaliyo Central Ward in the general elections held on 27th December, 2007 supervised by the respondent herein. That after votes were cast, tallied and counted, the applicant emerged the winner of the elections and was announced as such by the respondents' Agent the Returning Officer who declared him the legitimate and duly elected councilor for the ward. That subsequently on 25th January, 2008 the respondent published the applicant's name in the Kenya Gazette as the elected Councillor for the Ward as provided for under Rule 39A(1) of the Local Government Election Rules.

Subsequent to this Gazettement, the applicant was sworn in by the Clerk to the County Council of Mandera as the duly elected Councillor for the Ward on 25th February, 2008.

However, while still serving his term as a Councillor, Hussein Sheikh Mohamed the interested party herein instituted an election petition in the Senior Resident Magistrate's court in Mandera being petition No.1 of 2008 which was on an undisclosed date marked as withdrawn with no determination having been made on the election dispute.

The applicant further contends that despite his having been declared the winner of the election for the Ward, having been gazetted as such and sworn in as a Councillor, the respondent proceeded to declare his Civic seat vacant vide gazette notice of 25th April, 2008 and published its resolution to hold a by-election in the Ward on 11th June, 2008.

The applicant was aggrieved by this decision by the respondent and maintains that the same was ultravires the provisions of the Local Government Act which provides for when a by-election in a Civic Ward should be held and that the decision was illegal, irregular and unprocedural as it was made contrary to the rules of natural justice.

In the replying affidavit sworn by Samuel Mutua Kivuitu the then Chairman of the Electoral Commission of Kenya (ECK), the respondent admitted that the applicant had been declared the winner in the elections held on 27th December, 2007 but that when the election results were challenged in Mandera Senior Resident Magistrate's Court petition Nol.1 of 2008, parties filed a letter of consent which was duly adopted by the court. That it was on the basis of the said court order that the respondent published the Gazette Notice of 2nd May, 2008 calling for fresh elections for the Ward on 11th June, 2008. It is the Respondent's case that since the decision being challenged by the applicant did not exclusively emanate from the respondent but was based on a court order, the same is not amenable to orders of certiorari, prohibition and mandamus as prayed.

In opposing the applicant's Notice of Motion, the interested party filed a Replying affidavit sworn by him on 25th June, 2009. I have decided to reproduce paragraphs 4, 5, 6 and 7 of the said replying affidavit as I will be referring to them later in this judgment.

In the said four paragraphs the interested party sequentially deponed as follows:

4. ***THAT the presiding officer appointed by the Electoral Commission of Kenya one Murtar Molu Kike who was presiding over the general election on the 27th day of December 2007 in Belle Primary School polling station was biased and failed to conduct the counting of the ballots diligently causing some ballots in my favour uncounted.***

5. THAT had the counting of the ballots been done diligently there would have been a tie of 415 for the Applicant and 415 for myself.

6. THAT I challenged the outcome of the results vide Mandera Senior Resident Magistrate's Court Petition Case Number 1 of 2008 where Roble Gedi Jillow was the 2nd Respondent.

7. THAT a consent dated 15th February 2008 and filed in Court the Mandera Senior Resident Magistrate Court Petition Case Number 1 of 2008 was adopted and the election petition settled giving way to a by election in the Civic Ward Khalalio Central. (Annexed hereto and marked as exhibit "HSM 1" are relevant documents).

From the replying affidavit sworn by the interested party and by Samuel Kivuitu on behalf of the respondent, it is common ground that the 2007 Civil election results in the Ward were contested in a Court of Law in Petition No.1 of 2008 filed at the Mandera Senior Resident Magistrate's Court and it is based on its interpretation of the purported consent recorded by two parties in the case and adopted by the court that the respondent decided to conduct a by election and published the gazette notice of 2th May, 2008 fixing date for the by-election on 11th June, 2008.

Turning now to the written submissions filed by the parties herein as highlighted by their respective counsel on 25th October 2011, Mr. Arusei for the respondent submitted that the applicant's Notice of Motion dated 19th June, 2008 was fatally defective and irregular and that it should be struck out/dismissed with costs for three reasons namely:

(1) That it was filed pursuant to leave granted on the basis of chamber summons dated 12th March, 2008 which was allegedly defective and incompetent having been filed in contravention of the provisions of Order 53 of the Civil Procedure Rules. In particular, the respondent's claimed that the said chamber summons was defective in that it was accompanied by a supporting affidavit, a statutory statement and a verifying affidavit contrary to Order 53 Rule 1 (2) which provides that the exparte chamber summons should be accompanied by only a statutory statement and a verifying affidavit.

(2) Secondly, that the Notice of Motion was filed together with a supporting affidavit while as Order 53 Rule 4(1) does not provide for filing of Notice of Motion with any affidavit. Order 53 Rule 4(1) is in the following terms:

"Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon orany relief sought at the hearing of the motion except the grounds and relief set out in the said statement".

(3) Thirdly, that the applicant has lumped evidence in support of his case in the statutory statement dated 9th May 2008, supporting affidavit sworn on 9th May **2008** ***(supporting application for leave),*** supporting affidavit sworn on 19th June, 2008***(supporting Notice of Motion)***and the verifying affidavit. It was the respondent's submission that these lumping of evidence was fatal to the Applicant's Notice of Motion as evidence ought to have been pleaded only in the verifying affidavit. He relied on the cases of Commissioner General, Kenya Revenue Authority –vs- Silvano Onema Owaki t/a Marenga Filing Station – Civil Appeal No.45 of 2000 and Republic –vs- Land Adjudication Officer Narok Area and others (NRB) Misc. Civil APP. No.383 of 1993.

Having considered the above technical objections to the validity of the applicant's notice of motion by the respondent, I am of the firm view that the same do not have any merit. As correctly pointed out by Mr.

Ligunya for the applicant, objections to the validity or otherwise of the chamber summons dated 12th May, 2011 cannot be properly raised at this juncture because that application is already spent. Secondly, the same objection regarding filing of the chamber summons together with a supporting affidavit in addition to a statutory statement and verifying affidavit was raised before Dulu, J who heard the application for leave and the same was overruled and for very good reasons I must add. The reason given which I totally concur with is that the supporting affidavit was an additional document to the statutory statement and verifying affidavit which Order 53 Rule 1(2) requires must be filed together with the chamber summons and that in any case in judicial review proceedings, the court should be concerned with administering substantive justice to the parties not shutting out litigants on the basis of technicalities. I will adopt the same reasoning to the objections taken by the respondent to the validity of the notice of motion on account of it having been filed together with a supporting affidavit because in any event Order 53 Rule 4(1) is only silent on whether or not a notice of motion should be filed together with a supporting affidavit. It does not prohibit the filing of affidavits to support a notice of motion filed to commence judicial review proceedings.

The Court is also alive to the provisions of Article 159 (d) of the Constitution which enjoins the courts to administer justice without undue regard to procedural technicalities such as those being raised by the respondent in this case.

On the issue of pleading evidence in the statutory statement, I have had opportunity to look at the pleadings filed by the applicant and particularly the statutory statement and contrary to allegations by the respondent, no evidence was pleaded in the statutory statement. The statutory statement only had three paragraphs on name and description of the parties, reliefs sought and facts and grounds on which the reliefs were sought. The applicant provided evidence only in the verifying and supporting affidavits and as was held by Dulu, J at the leave's stage, the supporting affidavits were additional documents and the court had discretion whether to rely on their contents or not. Their existence *per se* does not render any of the two applications defective or incompetent.

Having found that the applicant did not lump evidence in the statutory statement and in the verifying and supporting affidavits and that infact no evidence was pleaded in the statutory statement, I find that the cases of Commissioner General, Kenya Revenue Authority –vs- Silvano Onema Omwaki T/A Marenga Filing Station and Republic –vs- Land adjudication Officer Narok & others (Supra) relied upon by the respondent are irrelevant and inapplicable to the present case as in those two cases the applicant's had included evidence in support of their respective cases in the statutory statement which is not what the applicant has done in this case.

Having made my findings on the preliminary points of law raised by the respondent on the validity or competence of the applicant's notice of Motion, I now wish to turn to a determination of the application on the merits.

After going through the applicants pleadings and the affidavits sworn by Samuel Kivuitu on behalf of the respondent and by the interested party, I find that it is not disputed that the applicant and the interested party were civic candidates in the ward elections held on 27th December 2007, that the applicant was publicly declared the winner thereof by the respondent's agent (Returning Officer for the Ward), that the respondent published a gazette notice on 25th January, 2008 declaring the applicant as the validly elected civic representative for the ward, that on 25th February, 2008 he was sworn in as the duly elected Councillor for the ward in the County Council of Mandera. It is also not disputed that subsequently the interested party challenged the election results in Petition No.1 of 2008 at Senior Resident Magistrate's Court at Mandera and after a purported consent entered into by the parties to the Petition which was adopted by the court, the Respondent published Gazette Notice No.3460 on 25th April, 2008 declaring Kalaliyo Central Ward vacant and Gazette Notice 3754 of 2nd May, 2008 declaring date of a by-election for the same ward to be 11th June, 2008.

According to the applicant as submitted by Mr. Ligunya on his behalf, once the civil elections were held and concluded on 27th December, 2007 and the ward's returning officer had declared the applicant the

duly elected candidate for the ward and this declaration was confirmed by the respondent in its Gazette Notice of 25th February 2008, the respondent became ***fuctus officio*** in the matter. The seat could only be declared vacant if the election results were contested in a court of competent jurisdiction and that court had declared the elections void.

In support of his submissions he relied on Section 61 of the Local Government's Act which clearly stipulates the procedure for contesting validity of elections in local authorities. Mr. Ligunya further submitted that in so far as there was no determination by the Mandera Senior Resident Magistrate as to the validity of the elections and a finding that the same were void, the respondent acted illegally, unproceduraly and ultravires Section 61 of the Local Government Act in publishing the two cited Gazette notices declaring the ward's seat vacant and calling for a by-election and that the two gazette notices should be removed to the High Court to be quashed by issue of orders of certiorari.

Mr. Misati for the interestedpParty submitted that the applicant's notice of motion should be dismissed as it is allegedly an abuse of the court process since the applicant was a party in petition No.1 of 2008 in which parties recorded a consent to have petition marked as withdrawn in order to pave way for a by-election. That a by-election was contemplated in the consent by the parties which was adopted by the court and which formed the basis for declaring the civic seat vacant and calling for a by-election.

Having considered all the pleadings in this case together with the evidence presented by the parties in the form of affidavits alongside the submissions by all the counsels herein as summarized above, I find that the only issue for determination by this court is whether or not the respondent acted within its legal mandate in declaring the Ward's Civic seat vacant and publishing a Gazette Notice on 25th April, 2008 to that effect and in calling for a by-election on 11th June, 2008 as evidenced by the Gazette Notice of 2nd May, 2008.

It is the respondent's case that the respondent was legally mandated to conduct free and fair elections and that it acted lawfully when it called for a by-election under Section 39(B)(1) of the Local Government Elections rules *(hereinafter referred to as the Rules)* since the applicant and the interested party had a tie in votes counted after the elections.

Section 39 B (1) states: ***"where an election results in a tie for any seat or seats, a fresh election shall be held in respect of the seat or seats in accordance with a new notice under rule 12 and the provisions of these rules shall apply accordingly"***.

(2) *Only the candidates who tied may be candidates at a fresh election under paragraph (1).*

There is however no evidence that the ward elections on 27th December, 2007 resulted in a tie of votes between the applicant and the interested party. If there was a tie as alleged then the applicant would not have been declared to be the winner of the elections and the respondent would not have published the Gazette notice of 25th February, 2008 confirming that he was the validly elected representative of the Ward.

It is clear from a reading of Section 39 B(1) of the Rules that the tie contemplated under the section is one that is determined on the day of the elections when the votes are tallied and counted and both candidates garner the same number of votes. In such a situation no candidate would have majority votes and so none would be declared the winner. In this case, it is evident from the undisputed evidence submitted by the parties that the applicant garnered the majority votes after votes were tallied and counted on the election day and that is why he was declared the winner by the respondent's agent.

It is evident from the depositions in the replying affidavit sworn by Samuel Mutua Kivuitu and the replying affidavit sworn by the interested party more particularly at paragraphs 4, 5, 6 and 7 *(reproduced earlier in this judgment)* that there was as a matter of fact no tie in the votes cast and counted for the applicant and the interested party in the civic elections of the Ward on 27th December, 2007. The interested party deponed that the returning officer was biased and failed to count the votes diligently with

the result that he failed to count one vote that had been casted in his favour. Both the Respondent and the interested party were of the view that had that one vote been counted, it would have resulted in a tie of votes so that each candidate would have garnered 415 votes. But that one vote was not counted and therefore there was no tie when the votes were actually counted. It is evident that the alleged one vote was discovered long after the elections had been concluded and the applicant declared the winner thereof. In the circumstances, it was wrong for the respondent to take the position that there was a tie in the votes counted and that as there was no clear winner it was mandated to call for fresh elections under Rule 39(B) (1). The claims by the respondents and the interested party that the returning officer was biased and that he failed to execute his mandate diligently by failing to count all votes cast would in my view be a basis for contesting the election results in a court of law as provided for by Section 61 of the Act but cannot be a legal basis for declaring a Civic seat vacant.

I am in agreement with Mr. Arusei and Mr. Misati in their submissions that the ECK was a body established under the Constitution *(now repealed)* to conduct and supervise free and fair elections but in executing its mandate, the respondent being a public body performing extremely important public duties had a duty to act fairly and to strictly follow the law.

The relevant law which provided for situations when the respondent could lawfully declare civic seats vacant and call for fresh elections is the Local Government Act and the Local Government Election Rules made thereunder.

Under the Act and the Rules the respondent could only declare civic seats vacant and call for fresh elections if any of the following three events happened.

(1) Where a casual vacancy occurred among the elected Councillors of a local authority and the local authority notified the Electoral Commission and the Minister for Local Government about existence of the vacancy with a period of 14 days after its occurrence – see Section 12(1) of the rules.

(2) Where an election results in a tie for any seat or seats.

(3) Where election results have been contested in a Resident Magistrate's Court and after due inquiry, the court has declared the election void under Section 61 (3) of the Act.

Looking at the evidence presented in this case, it is clear that none of the three situations above were applicable to the Kalaliyo Central Ward after the General Elections of 27th December, 2007.

There was no vacancy in the Ward declared to the Respondent and to the Minister for Local Government and as demonstrated earlier, there was no tie in votes between candidates in the elections. It is clear from the wording of the Gazette Notice published on 2nd March, 2008 announcing a by-election on 11th June, 2008 that the respondent was preparing to conduct a by election in the Ward on the basis that there had been a tie in the election – but there was no justification legal or factual for the respondent to take that position having on the election day publicly declared the applicant the winner of the elections and having formally acknowledged him through a publication in the Kenya Gazette as the validly elected representative of that Ward. By its own conduct the respondent had demonstrated that there was infact no tie in the Ward's elections and it was consequently estopped from asserting that there was such a tie.

Lastly, though there is evidence that the interested party was dissatisfied with the election results and he filed Petition No.1 of 2008 at the Senior Resident Magistrate's Court in Mandera, the court was not given an opportunity to conduct a full inquiry into the matter and make a final determination as to the validity or otherwise of the elections. Instead parties filed a purported consent letter dated 15th February, 2008 which led to a court order marking the petition as withdrawn.

From the purported letter of consent exhibited as SMKI to the Respondent's replying affidavit, it is clear that it was signed by only two of the three parties in the petition. It was signed by the presiding officer Belle Primary School Mr. Muktar Mulo Kike and the interested party. Though the applicant had been

named the 2nd respondent in the petition, he did not participate in the alleged consent. He did not sign the letter. It is trite law that for consents in civil suits to be valid and enforceable, they must be signed by all the parties in the suit. In the premises, the purported consent was not in law a valid consent as it was not signed by all the parties. Secondly, the purported consent only led to a withdrawal of the petition not a determination of the validity or otherwise of the elections in the Ward as envisaged in Section 61(2) & (3) of the Act.
In order to appreciate the full meaning and purport of Section 61 (2) and (3) of the Act, I think it is important to quote them verbatim. They read as follows:

(2) "The Resident Magistrate's court shall, after due inquiry declare whether the candidate whose election is questioned, or any and what other person, is duly elected, or whether the election is void".

(3) "If the election is declared void, a new election shall be held."

Given the clear wording of those provisions, there cannot be room for doubt that the order made by the Mandera Senior Resident Magistrate exhibited as SMKI did not amount to a determination or declaration that the election conducted in the Ward on 27th December, 2007 was either valid or void. It follows then that there was no court order declaring the election void which would have entitled the respondent to declare the Ward seat vacant and call for a by-election.

In view of the foregoing reasons, I find that the respondent had no legal basis to declare the Kalaliyo Central Ward seat vacant and to call for a by-election. The respondent acted illegally and ultra vires the provisions of the Local Government Act in publishing Gazette notices declaring the Ward seat vacant and announcing date of by-election without first ascertaining that circumstances existed which legally mandated it to call for fresh elections. It did so without giving the applicant an opportunity to be heard although he was already serving his term as the validly elected representative of the Ward and the respondent knew that, its decisions would adversely affect him. The respondent was a public body performing public functions and it was duty bound not only to observe the rule of law but also to act fairly and observe the rules of natural justice when making decisions that had such serious consequences on the rights of the applicant.

Having acted illegally and without jurisdiction, to the detriment of the applicant and without observing the rules of natural justice, the respondent's actions are amenable to the judicial review remedies of certiorari, mandamus and prohibition where applicable.

The remedy of judicial review is concerned with reviewing not the merits of a decision subject of the judicial review proceedings but with the decision making process. In the case of **Chief Constable of North Wales Police –vs- Evan [1982} ALL ER 142 at page 143 Lord Halsham L.C. stated:**

"It is important to remember in every case that the purpose of (the remedy of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question".

In this case the respondent was constituted by law to conduct General elections including Civic elections and declare winners thereof. It did so in Kalaliyo Ward and declared and confirmed the applicant to be the winner thereof. Having done so its mandate ended and it thereafter became ***fuctus officio*** unless and until its mandate was revived by a declaration of a vacancy by a local authority or voidance of the elections by a court of competent jurisdiction.

Since none of the above two events happened in the Ward in question, the decision by the respondent to declare the seat vacant and to call for a by-election were illegal as they were made without jurisdiction. They were also made without following the due process of the law as provided for in the Local Government Act Cap.265 of the Laws of Kenya to the detriment of the applicant.

I find that the aforesaid two decisions by the respondent evidenced by Gazette Notice 3460 published on

25th April, 2008 and Gazette Notice No.3754 published on 2nd May, 2008 were a nullity in law and they should be quashed by orders of certiorari as prayed. I consequently order that the aforesaid two gazette notices be removed to the High Court for purposes of being quashed by orders of certiorari which I hereby issue in line with prayer 1(a) and (b). I also hereby issue orders of prohibition to prohibit the Respondent from carrying out any polls in the ward on any date during the tenure of the Civic elections of 27th December, 2008.

I decline to issue orders of mandamus as prayed in prayer 1(c) since having quashed the two offending gazette notices, an order of mandamus if issued as prayed would be superfluous.

In the end, the Notice of Motion filed herein on 20th June, 2008 is hereby allowed with costs to the applicant. The costs of the application to be borne by the Respondent.

Dated, **Signed**and**Delivered** by me at Nairobi this 24th day of November 2011

C. W. GITHUA
JUDGE

In the presence of:

Florence – Court Clerk

…… for Applicant

…… for Respondent

…… for Interested Party