**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO.156 OF 2011**

**IN THE MATTER OF A DECISION BY THE CHAIRMAN, INTERIM INDEPENDENT ELECTORAL COMMISSION TO RECOMMEND**

**REVOCATION OF NOMINATION AND NOMINATION OF COUNCILLORS**

**AND**

**IN THE MATTER OF THE LOCAL GOVERNMENT ACT, CAP 275 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF THE ORANGE DEMOCRATIC MOVEMENT**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

1. **PAUL KIPLAGAT BIRGEN**
2. **ELISHA KIPKORIR BUSIENEI**
3. **SAMUEL KIPROTICH KISORIO**
4. **SYLVON KIPROTICH BETT**
5. **JUDITH JERUBET**
6. **PAULINE JEMUTAI CHEMWENO**
7. **DORIS CHEROTICH**
8. **KIPLAGAT JAMES SANG**
9. **KIBII ROTICH**

**10. SARAH TORGOTIT**
**11. JAMES KIPKOECH MELI**
**12. JOSELPH KIBET BARNO**
**13. MOSES KIPNGETICH CHERUIYOT.....APPLICANTS**
**14. HASSAN KIPKEMOI KIRUI**
**15. RICHARGED CHERUIYOT SIGEI**
**16. JOHN KIPKEMOI KIRUI**
**17. DAVID KIPROTICH KORIR**
**18. EUNICE CHEBET LEITICH**
**19. THOMAS KIPROTICH BONEN**
**20. BENJAMIN CHELANGA**
**21. FREDRICK KIPTUM SANG**
**22. OMAR ABDULLAHI HASSAN**
**23. HUSSEIN MAALIM MOHAMED**
**24. RICHARD ONDIEKI OMOKE**
**25. MARY KERUBO**
**26. HON. ADEN DUALE**

**VERSUS**

**1. INTERIM INDEPENDENT ELECTORAL COMMISSION**
**2. THE MINISTER FOR LOCAL GOVERNMENT.....RESPONDENTS**
**3. THE HONOURABLE ATTORNEY GENERAL**

**RULING**

The 1st – 28 applicants have been serving as nominated councilors in various Municipals and county councils within the Republic of Kenya having been nominated pursuant to the provisions of sections 26(1) (b), section 39(1) (c) of the Local Government Act and section 33 of our old constitution. They were all nominated by the **Orange Democratic Movement**. The 29th applicant is the Member of Parliament for Dujis. It is contended that at the point of nomination as councilors the applicants met all the legal requirements set by law to hold the positions for which they were nominated. Through letters dated 23rd June 2011, 28th June 2011, 30th June 2011 and 3rd July and 4th July 2011 the **Orange Democratic Movement** (ODM) wrote to the 1st respondent requesting for revocation and nomination of new councilors in the positions of the once to be revoked or de-nominated. All the said letters were originated by the Secretary General of the **Orange Democratic Movement Prof. Anyang' Nyong'o**. All the letters were also copied to the Deputy Prime Minister and Minister for Local Governments. Upon receipt of the said letters, the 1st respondent wrote back to the Secretary General of **ODM** asking for prove that indeed the names forwarded were for councilors nominated by his party. The 1st respondent contended that it was compelled to take that action owing to controversies arising out of revocation and nomination of councilors by political parties which all ended up in court. The Secretary General of **ODM** forwarded to the 1st respondent communication made to the predecessor of 1st respondent made in the year 2008. The Secretary General of the **Orange Democratic Movement** also provided the 1st respondent with various gazette notices showing the gazettement of the various councilors of the various councils made by the said party.

Having been provided with all the relevant information, the 1st respondent allegedly in good faith wrote a letter dated 30th June 2011 to the Deputy Prime Minister and Minister for Local Government forwarding the list of nominees from the **Orange Democratic Movement Party** for revocation and nomination of new councilors. The said list included the names of applicants and many other persons. It is contended that the 29th applicant stumbled upon that letter dated 30th June, 2011 from the Chairman of Interim Independent Electoral Commission addressed to the Minister for Local Government calling for revocation of the applicants as councilors and purporting to recommend the nomination of other persons. In a letter

dated 6th July 2011, the chairman of the 1st respondent recalled the said letter on allegation that he had discovered that there were errors in the said letter and that the Registrar of Political Parties brought to his attention certain new information which affects the list as presented by the party. He informed the Minister for Local Government to ignore the contents of the letter dated 30th June 2011 and urged him to consider it as recalled. The Chairman also informed the Minister that he would communicate with him in due course with the final list.

On 7th July 2011, the Chairman of 1st respondent wrote a letter to the Secretary General of **Orange Democratic Movement**, informing him that the list of nominated councilors submitted for revocation had names of councilors that were nominated by other political parties. He also contended that the list had names of persons who were registered as members of other political parties. Consequently, he informed the party that the list submitted does not meet statutory criteria for the nomination and de-nomination of councilors. He also informed the party that the Commission was not in a position to take any other action on the list as proposed unless the anomalies are rectified and/or corrected.

On the same day, the Secretary General of the **Orange Democratic Movement**, resubmitted the list to the Chairman of the 1st respondent for onward transmission to the Minister for Local Government. In the said letter, the party complained that it had legal prerogative, to degazette its civic leaders and that its internal decisions be respected. The party also requested the chairman of 1st respondent to forward the list since he did not have authority and/or powers to supervise political parties or veto their decision on nominations and de-nominations.

After satisfying itself with all the requirements, for the nomination, and de-nomination of a councilor, the 1st respondent wrote a letter dated 12th July 2011 to the Minister for Local Government enclosing a letter dated 7th July 2011 from the **Orange Democratic Movement Party** containing the list of councilors to be revoked and nominated. Being aggrieved, the applicants filed Chamber Summons dated 6th July 2011 but subsequently amended on 14th July 2011.

It is important to note that in the initial application, the applicants were aggrieved by a letter dated 30th June 2011 which was recalled. The amendment was necessitated because the list was resubmitted through a letter dated 12th July 2011 addressed to the Deputy Prime Minister and Minister for Local Government. The applicants obtained leave which was ordered to operate as a stay. As a result they filed the Notice of Motion dated 26th July 2011 seeking the following orders;

**1. An Order of Certiorari to remove into the High Court and quash the decision of the Interim Independent Electoral Commission contained in a letter dated 12th July 2011 addressed to the Deputy Prime Minister and Minister for Local Government requesting and/or recommending the revocation of nomination of the 1st to 28th Ex-Parte Applicants.**

**2. An Order of Prohibition do issue to stop and/or refrain the Deputy Prime Minister and Minister for Local Government from acting on the request and/or recommendation by the Interim Independent Electoral Commission.**

**3. The Ex-Parte Applicant be at liberty to apply for such further Orders and/or directions as this Honourable Court may deem fit and just to grant.**

**4. Costs herein be borne by the Respondents.**

The application is grounded on the grounds that the decision does not conform to the rule of law and seeks to stifle the applicants' rights without according them an opportunity to be heard. Secondly the decision is founded on a unilateral decision of a section of the **ODM** party and not the duly recognized body to undertake the decision to revoke their nomination. Thirdly the decision violates the express and mandatory requirement of section 17(7) of the political Parties Act 2007 which requires a party to be heard before expulsion from a political party. It is also the contention of applicants that they have not

participated in any forum of the **Orange Democratic Movement Party** where their conduct or their unsuitability to continue serving as nominated councilors had been discussed. They also complained that the 1st respondent's action has no factual or legal justification. They accused the 1st respondent as acting in bad faith and that its decision as illegal and unreasonable. They also contend that they have neither voluntarily ceased being members nor expelled from the party. They further complain the decision violates the constitution of the **Orange Democratic Movement Party** which outlines elaborate procedures for disciplining and expelling members from party.

There are three affidavits filed on behalf of applicants. The first one was sworn by **Hon. Aden Duale** who alleges to be the Vice Chairman Political affairs of the **Orange Democratic Movement Party**. He contends that his attention has been drawn to the request and/or recommendation for revocation of the nomination of the applicants made by the 1st respondent to the 2nd respondent. He avers that the **Orange Democratic Movement Party** is governed by a constitution which sets out the circumstances and the manner in which a person can cease being a member of the party. He contends that he is not aware of any forum of the party where the conduct and the membership of the applicants or the revocation of their nomination were discussed. In paragraph 9 he says and I quote;

**"That I am aware the mandate of the 1st respondent is set out in the constitution of Kenya and is neither discretional or arbitral."**

Then in paragraph 10 he prays that the request and/or recommendation of the 1st respondent to the 2nd respondent be called into this court and quashed.

There is also a verifying affidavit by **Halima Ibrahim Ali** who is a nominated councilor of the County Council of Garissa having been nominated in 2008 by the **Orange Democratic Movement Party**. She avers that on 4th July 2011 she received information from **Hon. Aden Duale** that he had seen a communication from the chairman of the 1st respondent addressed to the Minister for Local Government calling for revocation of her nomination and purporting to recommend the nomination of other persons. She contends that the decision to revoke her nomination has never been communicated to her nor was she informed of the circumstances leading to the purported revocation of her nomination. She also contends that she has not received any complaints from her nominating party regarding her conduct, as a party member of the execution of her duties as a nominated councilor.

The last affidavit was sworn by **Elisha Kipkorir** who contends that his attention was drawn to a request or a recommendation by the 1st respondent for revocation of nomination of 34 councilors some of whom have been nominated by **Orange Democratic Movement Party**. He sought the confirmation of Hon. **Aden Duale** who categorically informed him that the **Orange Democratic Movement Party** had not met to resolve that the nomination of the 34 councilors be revoked. He says that he has been informed by his advocate on record that the issue of revocation of nomination of councilors is a constitutional issue and is neither discretional nor arbitral. He also says that he has been informed by his advocate on record that the question of the 2nd respondent's power to revoke nomination of councilors has been considered in **Civil Appeal No.107 of 2006** in the famous case of **Taib** where the court of appeal found that the 2nd respondent has no capacity to revoke the nomination of councilors. He says unless allowed to serve for their term of five years, they will be gravely be prejudiced, as they have financial commitments with third parties.

The 1st respondent in a replying affidavit sworn by **Mohamud Jabane** contend that upon receiving various letters from **Orange Democratic Movement Party** and seeking legal advice they wrote to the Deputy Prime Minister and Minister for Local Government on 14th July 2011 drawing the said Minister's attention to applicable legal principles in the matter of revocation of nomination of nominated councilors. It is the position of the 1st respondent that the Minister for Local Government is obligated to abide the legal principles set out in the **Taib** case. The 1st respondent also confirms and/or acknowledges having authored the letter dated 12/7/2011, forwarding the names of the applicants to the 2nd

respondent.

The application was argued before me by **Mr. Ongegu** on behalf of the applicants. **Mr. Ongegu** submitted that the actions of the 1st respondent amount to a blatant violation of the rules of natural justice. He also submitted that the decision to terminate the nomination of the applicants was taken exparte and they were never invited to any forum or sitting where their conduct or suitability was discussed. He also submitted that the purported decision to terminate the *exparte* applicants' nomination were taken without complying with the rules of natural justice. He also contended that the decision to revoke the applicants' nomination was reached at by a section of **ODM** members without any regards to the party's constitution and the universal rules of natural justice. He contended that the 1st respondent violated the mandatory provisions of section 17 (7) of the Political Parties Act which echoes the rules of natural justice be observed before a member can be expelled from a party. It was the submission of **Mr. Ongegu** that the applicants came to know about the purported nomination or revocation through a third party. Lastly it was the view of **Mr. Ongegu** advocate that following the reasoning of the Court of Appeal in **Taib** case, the 2nd respondent is not seized of jurisdiction to terminate the nomination of councilors nominated under section 26 of Cap 265. He therefore urged me to follow the principles laid in the **Taib** case and allow the application with costs.
**Mr. Kilonzo** advocate on behalf of the 1st respondent submitted that the issue of revocation has been dealt with by the High Court and Court of Appeal. He submitted the commission has limited responsibilities and is not entitled to question a political party why it seeks the revocation of a councilor.
The application was opposed by **Mr. Kipkogei** learned council of the 2nd and 3rd respondents. He stated that the process of de-nomination starts with the party concerned, then the party communicates the decision to the Electoral commission. The Commission has to transmit the names to the Minister who has powers vested in his office to exercise in the manner he thinks fit and just. He therefore urged me to dismiss the application as it does not meet the criteria for the grant of the orders sought.

I have considered the application and the submissions by the advocates appearing on behalf of the parties herein. The first order sought by the applicants is **an order of certiorari to quash the decision of the 1st respondent contained in the letter dated 12th July 2011 addressed to the 2nd respondent requesting and recommending the revocation of nomination of the applicants and others not before court.** It is important to understand the scope and the efficacy of an order of certiorari. Certiorari and prohibition are complementary remedies based upon common principles. Certiorari issues to quash a decision which is *ultra vires*. Certiorari is also concerned with the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed. It is declared completely invalid so that no one respects it. It is therefore important to understand that certiorari is concerned with decisions, determinations and actions already made. It only lies to bring up to this court and quash something which is a determination or a decision. An essential feature of every judicial review is **a decision** made by some persons whom I will call the decision maker or a refusal by him to make a decision. In my view in order to avoid confusion and complications, judicial review must be accurately focused upon the actual exercise of a legal power and not upon mere preliminaries. The concern of certiorari is about a decision whether or not made under a legal power or a legal authority.

The applicants have approached this court on the basis that their rights have been breached. They contend their rights were breached by the 1st respondent. However, it is not clear who breached their rights and who was to accord them a hearing before any decision is taken against them. Who has breached their rights or who was to accord them a hearing before a decision can be taken against them? Is it the party or the 1st respondent or the Minister? It is incumbent upon who seeks a legal remedy to come with a clear road map so that the court can hear, evaluate, interrogate and determine the grievances suffered or likely to be suffered by the person seeking to benefit from the power of the court. The court can only intervene on clear factual and legal basis. There must be a cause of action against an individual before court clearly and correctly framed in a proper manner.
In **Civil Appeal No.266 of 1996 the Kenya National Examination Council** case, the Court of Appeal addressed its mind to efficacy and purport of the order of certiorari and prohibition. On certiorari the court had this to say;

**"Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons."**

It is clear that the letter dated 12th July 2011 was written by the 1st respondent in its statutory capacity. It is also clear the letter as rightly pointed out by the applicants was requesting or recommending the revocation of the nomination of the applicants and others not before court.

The first issue to be addressed is the role and the responsibility of the 1st respondent. It is uncontested that the 1st respondent is not the appointing authority of the applicants. Secondly the commission is duty bound to forward the nomination of persons proposed by any political party for revocation to the Minister for Local Government after satisfying itself on the following matters;

**(1) The letter asking for revocation and de-nomination is from a political party and written by the bona fide officials duly authorized to communicate with the Commission.**

**(2) The persons whose nomination is to be revoked or nominated are indeed members of the political party forwarding their name(s).**

**(3) The said names or persons in the first place were actually recommended for nomination by the concerned political party.**

**(4) The said persons were actually gazetted for nomination by the 1st respondent or its predecessor.**

The applicants were sponsored by **ODM** and it is the party which is withdrawing or revoking the nomination or sponsorship granted to them. The 1st respondent cannot hide behind lack of hearing and due process not followed by the party, once the intention to withdraw the nomination and sponsorship has been expressed by the party. It must follow and comply with the four steps; it has legitimate powers to undertake no more, no less. It has a limited statutory power. It has no power and/or authority to question the party of Minister on matters outside its jurisdiction. The 1st respondent cannot substitute or amend and/or enhance the decision of the party, notwithstanding what it thinks o the procedure and process adapted by them. It cannot insist that the party or the Minister to follow proper decision making process. For avoidance of doubt the Commission shares no responsibility, duties, powers, rights and liabilities with the party and/or the Minister. The law does not envisage/contemplate collegial exercise of power between the three parties, namely the party (**ODM**), the Commission and Minister. Each must exercise and make an independent decision. Each is liable for its own commission and omission.

The question is whether the letter dated 12th July 2011 addressed to the Deputy Prime Minister amounts to a decision and whether the 1st respondent committed acts prejudicial to the rights and interests of applicants. **Black's Law Dictionary 6th Edition** defines decision as follows;

**"A determination arrived at after consideration of facts, and, in legal context, law. A popular term having no fixed, legal meaning. It may be employed as referring to ministerial acts as well as to those that are judicial or of a judicial character.**

**A determination of a judicial or quasi judicial nature. A judgment, decree, or order pronounced by a court in settlement of a controversy submitted to it and by way of authoritative answer to the questions raised before it. The term is broad enough to cover both final judgements and**

**interlocutory orders. And though sometimes limited to the sense of judgment, the term is at other times understood as meaning simply the first step leading to a judgment; or as an order for judgment. The word may also include various rulings, as well as orders, including agency and commission orders. U.S. v. Thompson, 251 U.S.407, 40 S.Ct.289, 291, 64 L.Ed.333.**

**The findings of fact and conclusions of law which must be in writing and filed with the clerk. Wilcox v Sway, 69 Cal. App.2d 560, 160 P.2d 154, 156.**

**"Decision" is not necessarily synonymous with "opinion." A decision of the court is its judgment; the opinion is the reasons given for that judgment, or the expression of the views of the judge. But the two words are sometimes used interchangeably.**

**See also Decree; Final decision; Finding; Judgement; Opinion; Order; Verdict."**

**Determination is also defined as follows;**

**"The decision of a court or administrative agency. It implies an ending or finality of a controversy or suit. Piccone v. U.S., 186 Ct. Cl. 752, 407 F.2d 866, 873. To settle or decide by choice of alternatives or possibilities. The ending or expiration of an estate or interest in property, or of a right, power, or authority. The coming to an end in any way whatever.**

**A "determination" is a "final judgement" for purposes of appeal when the trial court has completed its adjudication of the rights of the parties in the action. Thomas Van Dyken Joint Venture v. Van Dyken, 90 Wis.236, 279 N.W. 2d 459, 468.**

**Also, an estimate. As respects an assessment, the term implies judgement and decision after weighing the facts.**

**See also Determination; Decision; Decree; Finding; Judgement; Opinion."**

The catchwords used in the prayer No.1 of the Notice ofMotion under my determination are the words 'requesting and/or recommending'. In order to determine whether the words request or recommend convey the same meaning as a decision or determination, it is also necessary to get their meaning. **Concise Oxford English Dictionary** defines request as follows;

**"An act of asking politely or formally for something. A thing that is asked for in such a way – v. politely or formally ask for. – politely or formally ask (someone) to do something.**

Recommend means;

**"1. Put forward with approval as being suitable for a purpose or role. – advise as a course of action. – advise to do something.**

According to applicants what the 1st respondent did was to request and recommend the Minister for the revocation of their nomination as councilors. From the definition of request it means the chairman of the 1st respondent was asking for something to be granted or done. The issue to be granted or done was

requested by the political party that nominated the applicants. Recommendation also connotes an action which is advisory in nature rather than one having any biding effect. The question therefore is whether the 1st respondent is capable of making a decision or a determination detrimental to the rights of the applicants and secondly whether the letter dated 12th July 2011 amounts to a decision made against the applicants.

It is clear that the 1st respondent was merely conveying the decision of the party that nominated the applicants. It is also clear the applicants have an issue with the party who nominated them in the first instance. The party that requested or recommended for the revocation of their nomination is not a party to these proceedings. The law is clear that the 1st respondent's obligation upon the names being submitted for nomination or denomination is to formally transmit the same to the Minister. It makes no decision concerning the nomination and denomination of councilors. It is therefore my decision that the letter dated 12th July 2011 is not and cannot be termed to be a determination or a decision made by the 1st respondent. In any case the 1st respondent is incapable and has no capacity or authority or power to revoke or recommend the nomination of the applicants. The decision which the 1st respondent was conveying to the Minister was made by the party. In my understanding you cannot challenge an exercise of statutory duty or obligation from being exercised by the 1st respondent. The 1st respondent duly satisfied itself and performed its statutory function before it forwarded the names to the Minister. The 1st respondent has no powers or authority to override or reject the decision of the party when it has satisfied itself on the four issues enumerated hereinabove. After it has satisfied itself, the 1st respondent is like a conveyor belt and it has to ensure the process is forwarded to the next authority to exercise his or her statutory duty. The power of the 1st respondent is to submit the names to the Minister after ensuring that the legal requirements within its boundary have been fulfilled by the concerned party. Here the process was instigated by the party requesting for the cancellation of the nomination of applicants and nomination of others in their place. The steps to be followed are;

(1) The party withdrawals nomination to a member it had nominated as a councilor.

(2) Notice is given to the Electoral Commission by the party which nominated the particular councilor of its intention to withdraw its nomination.

(3) The Electoral Commission notifies the Minister that the nominating party has intimated its intention and recommended for the withdrawal of the nomination to a particular councilor.

(4) The minister may cancel the nomination may be after satisfying himself or herself as to the legal requirement or criteria.

It is the contention of the applicants that they were not given or accorded an opportunity as to why the decision contained in the letter dated 12th July 2011 was made. My understanding of the law is that it is not the 1st respondent who is to give the applicants an opportunity to be heard before the decision for revocation of the nomination is arrived at. The 1st respondent cannot have legitimate powers to intervene on behalf of the applicants when it has satisfied itself, that the party had followed the mandatory requirements before the names were accepted and forwarded to the Minister. As stated earlier, the party was not joined into this proceeding and it is not the role of the 1st respondent to assume the responsibilities of the concerned party that nominated the applicants. It is therefore my decision that there is no decision capable of being challenged and which is amenable to judicial review that was made by the 1st respondent against the applicants herein.

The 2nd prayer is an order of prohibition seeking to stop or refrain the Minister for Local Government from acting on request or the recommendation by the 1st respondent. In the **Kenya National Examination Council** case, the Court of Appeal defined what an order of prohibition is and when it will 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, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – see HALSBURY'S LAW OF ENGLAND, 4th Edition Vol.1 at pg. 37 Paragraph 128. When those principles are applied to the present case, the council obviously has the power or jurisdiction to cancel the results of an examination.**

**The question is how, not whether, that power is to be exercised. If the Council were to declare in advance that it was going to cancel particular results because the candidates involved were not supporters of the government of the day or some such like irrelevant reason, there cannot be any doubt but that the High Court, on application by the candidates so threatened, would issue an order prohibiting the Council from acting either in excess of its jurisdiction or contrary to the laws of the land. In such an event, it would be idle for the Council to contend that it has its own statute and the High Court ought not to intervene; the High Court would be entitled, indeed duty-bound, to intervene. That is why it is said prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision as made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision."**

Certiorari and prohibition frequently go hand in hand and where certiorari is sought to quash the decision and prohibition to restrain its execution. In my view there is very little difference in principle between certiorari and prohibition except that prohibition may be involved at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which could result into its final decisions being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain from so exceeding its jurisdiction.

I am aware this court can interfere with a Minister's decision if he has acted on no evidence, or if he has come to a decision to which on the evidence he could not reasonably come or if he has given a wrong interpretation to the words of the statute or if he has taken into consideration matters which he ought not to have taken into account or has otherwise gone wrong in law. It is also essential to appreciate that where the validity of an administrative act or decision is attacked, the burden of proof naturally lies upon the person alleging. Whether he can transfer it to the respondents depends upon the nature of the act.

In this case there is no evidence that the Minister has no powers to act on the recommendation or the request of the 1st respondent. There is also no evidence that the Minister would exercise his powers in a particular manner. Further, it is not the case of the applicants that the Minister has no jurisdiction or powers or that he will act in excess or contrary to the rules of natural justice.

I have read and meticulously considered the three affidavits filed by applicants and there is no single averment or contention against the Minister. In the absence of any evidence, it is outside my jurisdiction to assume that the Minister would act in a particular manner or would not act in a particular manner. It is not the role of the court to supervise public bodies in the absence of any information or material that they would act contrary to the rules of natural justice and the laid principles of the law.

I cannot determine whether the rules of natural justice were followed or would be followed by the Minister when there is no evidence or complaint against his conduct or the exercise of his statutory duty. I cannot also determine whether the decision to revoke the applicants' nomination was unilaterally reached by a section of **ODM** members without the presence of the said party before these proceedings.

All in all, it is my decision that the applicants clearly misconstrued and misapprehended the decision of the Court of Appeal in **Taib Ali Taib** case. In this case, there is no decision capable of being quashed made by any of the respondents. What the applicants are challenging is a letter recommending or requesting for revocation of their nomination by a party that has nothing to do with their grievances and complaints. It is also my decision that in the absence of any evidence or contention, it is premature to question whether the Minister has valid powers to exercise in respect of revocation of nomination of applicants.

I think the issue that was alive in the **Taib** case is not present for determination in this matter. The issues set for determination in **Taib** case, **Joseph Okoth Waudi** case and **Otieno Karan** have no relevance and/or application in this matter. In all the three cases, the Minister revoked and degazetted the concerned councilors. The councilors were correctly and clearly challenging the decision and the statutory power exercised by the Minister for Local Government. In this case there is no challenge against the decision of the party seeking for a revocation and nomination of the applicants. There is also no challenge or evidence against the powers and authority of the Minister. I cannot assume that the Minister would act or has acted in a manner contrary to public law.

There is no cause of action established by the applicants against the respondents. No doubt they have no cause or legitimate cause of action against the 1st respondent in exercise of its statutory duties. It is not open to the applicants to ask this court to call and quash a decision which was not made by the 1st respondent. In so far as the issue of revocation of their nomination is concerned, the 1st respondent is blameless. The 2nd respondent cannot also be found guilty without any charges laid against him. I can only interrogate and determine the actions and omissions of the Minister on tangible and valid complaints and evidence. That was not done by the applicants. Clearly the applicants misconstrued and misapprehended the nature of their case. By their own omission and failure, they missed the point and blundered their cause of action. They misdirected their arsenal to the wrong party. Equally they failed to direct their grievances and complaints to the Minister in the correct manner. The Minister cannot be accused when there is no wrongdoing alleged against him. No doubt, I cannot predict or anticipate the direction he would take. I cannot be like the 1st respondent who attempted to anticipate the direction of the Minister and in end gave an orbiter legal opinion, as if he was incapable of getting one. Be that as it may, I think the application in its entirety is without merit. It is misdirected; it is like a radarless plane wandering in the sky without any direction. I cannot direct parties to the routes to follow in achieving their rights, if any. This court must abandon these lost and directionless litigants. In the event they found their compass, this court would be in a position to consider relevant questions and give adequate and compelling answers. Nonetheless this decision equally answers them.

For now the application is dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this **9th** day of **November 2011**.

**M. WARSAME**
**JUDGE**