REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 747 of 2006

IN THE MATTER OF: AN APPLICATION BY HON. UHURU KENYATTA, HON. WILLIAM RUTO AND HON. BILLOW KERRO, HON DALMAS OTIENO, HON HENRY KOSGEY, HON CHRIS OKEMO AND HON. GIDEON NDAMBUKI (*hereinafte*r referred to as 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Ex-parte Applicants respectively) FOR THE JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS DIRECTED AT THE REGISTRAR OF SOCIETIES, ELECTORAL COMMISSION OF KENYA

NICHOLAS K. BIWOTT, HON. KATANA NGALA, HON. SAM ONGERI, JOSPHIPHINE OJIAMBO. (*The 1st, 2nd, 3rd, 4th, 5th and 6th Respondents).*

AND

IN THE MATTER OF: THE LAW REFORM ACT, CAP 26, LAWS OF KENYA

AND

IN THE MATTER OF: THE SOCIETIES ACT, CAP 108 LAWS OF KENYA

AND

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

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA AFRICAN NATIONAL UNION

REPUBLIC.....APPLICANT

VS.

THE REGISTRATION OF SOCIETIES.....1ST RESPONDENT

ELECTORAL COMMISSION OF KENYA.....2ND RESPONDENT

HON. NICHOLAS K. BIWOTT.....3RD RESPONDENT

HON. KATANA NGALA.....4TH RESPONDENT

HON SAM ONGERI.....5TH RESPONDENT

JOSEPHINE OJIAMBO.....6TH RESPONDENT

Ex-parte

1. **HON. UHURU KENYATTA**
2. **HON. WILLIAM K. S. RUTO**
3. **HON. BILLOW KERROW**
4. **HON DALMAS OTIENO**
5. **HON HENRY KOSGEY**
6. **HON. CRIS OKEMO**
7. **HON GIDEON NDAMBUKI**

J U D G M E N T

A: The Application and Other Pleadings

This judgment relates to the Notice of Motion dated and filed on 8th January 2007, *(the motion*) by which the

Applicants, that is to say, Hon. Uhuru Kenyatta, Hon. William K. S. Ruto, Hon. Billow Kerrow, Hon. Dalmas Otieno, Hon. Henry Kosgey, Hon. Chris Okemo and Hon. Gideon Ndambuki (collectively "*the Applicants*") seek the following orders:-

1. *An Order of Certiorari to bring into court and quash the decision of the Registrar of Societies reflected and represented in the letter dated 28th November 2006 signed by the Registrar/1st Respondent addressed to Josephine Ojiambo, purporting to change the names of National Officials of KANU to inter-alia Hon. Nicholas K. Biwott, Hon. Katana Ngala, Hon. Sam Ongeri, Josephine Ojiambo, as officials of KANU with effect from 28th November 2006; together with any accompanying notices lodged with the Registrar of Societies under Section 17, of the Societies Act, Cap 108 as read with Societies Rules Rule 11 and the Form H dated 27th November 2006;*

2. *An Order of Certiorari to bring into court and quash the Electoral Commission of Kenya (ECK), decision to recognize Hon. Nicholas K. Biwott, as Chairman and leader of KANU as contained in a letter dated 1st December 2006, signed by Samuel Mutua Kivuitu, Chairman of Electoral Commission of Kenya*

(hereinafter referred to as E.C.K.)

3. *An Order of Prohibition staying the effect of the Registrar of Societies' decision to make changes of party officials of KANU as contained in its letter dated 28th November 2006 and all or any other proceedings, directions or applications therein;*

4. *An Order of Prohibition staying the effect of Electoral Commission decision to recognize Hon. Nicholas Biwott as KANU's Chairman as contained in its letter dated 1st December 2006 and all or any other proceedings, directions or application therein;*

5. *An Order of (prohibition) Prohibiting the Registrar of Societies and/or the Electoral Commission or anybody else whosoever whatsoever from consulting Hon. Nicholas K. Biwott or anybody else stated in the Registrar's letter dated 28th November 2006 for purposes of appointing Commissioners to Electoral Commission of Kenya, in any purport that he or they are KANU's officials enjoying the offices purported by the Registrar's letter dated 28th November 2006;*

on. K. biwotti 6. *An Order of Prohibition restraining HON. Nicholas K. Biwott, Hon. Katana Ngala, Hon. Sam Ongeri, Josephine Ojiambo, whether by themselves, their servants or agents or whosoever whatsoever from exercising any power vested in the National Chairman, NEC or any other organ established in the Constitution of Kenya African National Union (KANU); the Constitution of Kenya; National Assembly and Presidential Elections Act, Cap. 7; The Societies Act, Cap 108 or any other powers that a National Chairman and office bearers of a Political party exercise or would exercise with respect to KANU on the basis of the Registrar of Societies letter dated 28th November 2006 and or E.C.K's letter dated 1st December 2006 until and unless they are duly elected as such KANU officials, in accordance with KANU's Constitution;*

7. 7

7. *An Order of Prohibition restraining Hon. Nicholas Biwott, Hon. Katana Ngala, Hon. Sam Ongeri, Josephine Ojiambo, whether by themselves their servants or otherwise, howsoever from assuming any responsibility over the conduct of the affairs of Kenya African National Union (KANU) or in any other manner whatsoever interfering with the management thereof on the basis of the Registrar of Societies letter dated 28th November 2006 and or E.C.K's letter dated 1st December 2006 until and unless they are duly elected as such KANU officials in accordance with the Party Constitution;*

8. *An Order of Prohibition restraining the Registrar of Societies, Hon. Nicholas K. Biwott, Hon. Katana Ngala, Hon. Sam Ongeri, Josephine Ojiambo, jointly and severally by themselves, their officials, servants, agents or otherwise howsoever from attempting to obtain the control and management of, threatening to obtain control and management of, or in any manner whatsoever interfering with the leadership and affairs of the Political Party known as Kenya African National Union (KANU) or in any way howsoever dealing with the said Kenya African National Union (KANU) by reason of the purported office secured to Hon. Nicholas K. Biwott, Hon. Katana Ngala, Hon. Sam Ongeri, Josephine Ojiambo, by the Registrar of Societies letter dated 28th November 2006 and or E.C.K's letter dated 1st December 2006 until and unless they have been duly elected as such KANU officials in accordance with the Party Constitution;*

9. *on An order of Prohibition restraining Hon. Nicholas K. Biwott, Hon. Katana Ngala, Hon. Sam Ongeri, Josephine Ojiambo, their servants and agents from possession, occupation, custody and management of the Kenya National Union (KANU) and al KANU's assets (moveable and immovable) rights and or accruals on the basis of the Registrar's letter dated 28th November 2006 and E.C.K's letter dated 1st December 2006 howsoever whatsoever until and unless they have been elected as such KANU officials in accordance with the Party Constitution;*

10. *An Order of Mandamus compelling the Registrar of Societies to reinstate the status of KANU's*

national officials as it was before the changes reflected in the Registrar's letter of 28th November 2006, unless and until otherwise advised by KANU's bona-fide officials of any other changes;

11. *An order of mandamus to issue compelling the Electoral Commission of Kenya (E.C.K) to reinstate its records so as to reflect status of KANU's national officials as it was before the changes effected and reflected in the letter signed by E.C.K.'s Chairman's dated 1st December 2006, unless and until otherwise advised by KANU's bona-fide officials of any other changes;*

12. *An Order of mandamus compelling the Registrar of Societies to avail and manifest to Court all documents and particulars upon which the Registrar of Societies/1st Respondent relied to purport to change KANU's officials as set out in her letter dated 28th November 2006;*

13 THAT the Honourable Court be pleased to give further Orders and directions as it may deem fit and just to grant;

14. THAT the costs of this application be provided for.

The Application was premised upon the Statutory Statement, the Affidavit Verifying the Facts (wrongly dubbed the Supporting Affidavit) of Hon. Uhuru Muigai Kenyatta sworn on 13th December 2006 and annexed to the Chamber Summons dated and filed on 13th December 2006 on the occasion of seeking leave to bring the judicial review Application, the subject of this judgment. The Application was also premised upon the grounds set out on the face of the Application, and which in light of the circumstances giving rise to the proceedings herein we set out *in extenso.*

" (a) *The Registrar of Societies/1st Respondent has improperly, by way of representation in a letter dated 28th November 2006 effected changes in the National officials of KENYA AFRICAN NATIONAL UNION (KANU) and the E.C.K. has in consequence recognized the Hon. Nicholas K. Biwott/2nd Respondent as KANU's Chairman/Leader.*

(b) *That there have been no other elections of KANU national officials since they were last done on 31st January 2005 to 1st February 2005, upon which elections the Applicants herein were elected KANU officials, but have been ousted with the effect of the Registrar's of Society/1st Respondent notice dated 28th November 2006.*

(c) *Any alleged KANU meeting effecting elections was not a KANU meeting properly convened within the meaning and intent of the KANU Constitution. It is only the Delegates who in their National Delegates Conference who can effect elections of KANU officials. The KANU Constitution gives either the National Chairman or National Executive Council (N.E.C.) exclusive portfolio to convene a Delegates Conference.*

(d) *There was no properly constituted notice of KANU elections as prescribed by KANU's Constitution setting out as a substantive agenda the matter of election to the bona-fide KANU National officials.*

(e) *That the persons purporting to have convened a KANU meeting at which elections were effected had a membership of persons who are not KANU members; and otherwise many others who were not bona-fide KANU delegates.*

(f) *There were not adequate notices to all bona-fide KANU delegates or any delegates meeting as contemplated by KANU's constitution and/or notice to delegates for KANU's national officials election.*

(g) That the Registrar disregarded an objection lodged by the Applicants to any change of National officials and has further acted contrary to the Societies Act, Cap 108, and the KANU constitution.

(h) The Registration as done by the 1st Respondent, Registrar of Societies is an affront to the

Constitution of KANU, the Societies Act, Cap 108, the Kenya Constitution, equity , principles of multi-party democracy, the rule of law, separation of powers, and principles of Natural justice.

(i) Unless the ouster of the Applicants as KANU officials is quashed, the Applicants, party members, and Kenyans shall suffer unquantifiable injury, loss and damage that is irreparable together with the cause of multi-party democracy.

(j) That the Hon. Nicholas K. Biwott, Hon. Katana Ngala, Hon. Sam Ongeri, Josephine Ojiambo, stature amounts to a public body's function taking into account their status as obtains upon registration. Hon. Nicholas K. Biwott, Hon. Katana Ngala, Hon. Sam Ongeri, Josephine Ojiambo shall jointly and severally become office bearers of KANU; members of its N.E.C. members of NGC and members of N.D.C. with the change of these functions and offices the Respondents joint and several actions would steer, determine and or influence the vision aspirations and self determination of KANU as the Official Opposition Party on inter-alia issues of nomination of presidential contenders under Section 5 of the Constitution of Kenya, Members of Parliament and Commissioners of the Electoral Commission of Kenya under Section 41 of the Constitution; nominations and attendees of local authority councils and also members to East African Legislative Assembly. They would also determine Kenya's multi-party democratic process and destiny under Section 1A of the Constitution. The Chairman of opposition party would secure statutory, Constitutional, equitable and customs/usage advantages including office facilities as a Chairman of the Opposition Party, provision of security, means of transport, attendance at diplomatic circles mostly at the expense of taxpayers, and shall otherwise shape Kenya's Multi-party democratic aspirations including future elections in terms of nominees, to electoral Commission and stature of official opposition at international level.

(k) That further to the above the official opposition party, and the Chairman of the official opposition party are persons whose functions are in the nature of public duty and function on the premises inter-alia that the leader of the Official Opposition Party is automatically a Commissioner of Parliamentary Service Commission; is a member of House Business Committee; can chair public Accounts Committee (PAC) and Public Investment Committee (PIC) all of which are fundamental causes of multi-party democracy, rule of law, and constitutionalism, especially the checks and balances in the three arms of Government.

(l) That further the leader of the opposition party has the public duty of 1st response to all motions and bills presented in parliament; and is obligated to constitute a shadow cabinet. The 2nd Respondent does not have enough M.Ps supporting him to constitute a Shadow Cabinet.

(m) That as the bona fide KANU officials, the Applicants, are under overwhelming pressure to ensure the party leadership is not seized by a coup, and this application is made to Court as the arbiter and protector of the rights of all Kenyans including KANU members. That the Applicant's rights, entitlements and legitimate expectations have been compromised by the Registrar of Societies 1st Respondent. These include inter-alia; the rights to be at liberty to choose leaders of their choice, to associate and determine destiny of expression, freedom of assembly and association, protection from discrimination and right to enjoy and participate in a genuine multi-party democracy.

(n) The Registrar's actions are contrary to her statutory duties and functions, are in excess of her statutory powers, are an abuse of all discretion conferred on her, are irrational, oppressive and discriminatory and were effected for ulterior motives, are unlawful and contravene the rule of law.

(o) The actions of the Registrar of Societies/1st Respondents and the Electoral Commission of Kenya, 6th Respondent have caused and continue to cause anarchy in the functions of KANU as a party, and the functioning of parliamentary and electoral processes and all process of legislation, processes of governance in and out of parliament and processes of administration generally."

In addition to the Statutory Statement, the Affidavit Verifying the Facts, and the grounds aforesaid, the Applicants' motion was also premised upon the Further Affidavit of Hon. Uhuru Kenyatta (again wrongly dubbed *Supplementary Supporting Affidavit* – whereas Order LIII rule 4(2) refers to the use of *Further*

(*not Supplementary Affidavit*) sworn and filed on 13th February 2007 in response to the Replying Affidavit, of one Dr. Josephine Rose Majale Ojiambo sworn and filed on 17th January 2007.

In opposition to the Motion, the Registrar of Societies, the First Respondent, one Bernice Gachegu (who is also the Registrar General of such bodies, as political parties, (as in this case), Trade Unions, Marriages, Births and Deaths, Business Names and Companies, Bankruptcies and Insolvencies and such like bodies and therefore a very important and responsible official and officer swore a Replying Affidavit on 14th February 2007, and had it filed on the same day.

Also in opposition to the motion, there was filed on 22nd January 2007 a Replying Affidavit of one Samuel Mutua Kivuitu, the Chairman of the Electoral Commission of Kenya, the Second Respondent, and sworn on the same day.

In further opposition to the Motion by the Applicants an affidavit was sworn by Dr. Josephine Rose Majale Ojiambo, the above-referred to Replying Affidavit, and expressed to be sworn on her own behalf as the 6th Respondent and as authorized agent of and for the 3rd, 4th and 5th Respondents, that is to say, Hon. Nicholas Kipyator Biwott, Hon. Katana Ngala, and Hon. Sam Ongeri.

So the principal sources of arguments and submissions are therefore:

(1) *the ex parte Applicants' Notice of Motion, the Statutory Statement, the Affidavit Verifying the Facts and the Supplemental Supporting Affidavit (the Further Affidavit) both sworn by Hon. Uhuru Kenyatta on his own and on behalf of the Applicants.*

on. Uhuru Kenyatta on his own and on behalf of the Applicant

(2) the Replying Affidavit of Bernice Gachegu, the Registrar of Societies as First Respondent.

(3) the Replying Affidavit of Samuel Mutua Kivuitu, the Chairman of the Electoral Commission of Kenya, the Second Respondent.

(4) the Replying Affidavit of Dr. Josephine Rose Majale Ojiambo, on her own behalf as Sixth Respondent, and on behalf of the Third, fourth and Fifth Respondents referred to above.

In addition to those principal "pleadings" (if we may refer to the Motion, the Statutory Statement, the Affidavit Verifying the Facts, the Further Affidavit, and the Respondents' Replying Affidavits as such), Counsel for the respective parties filed skeletal arguments or submissions together with extensive lists of authorities some of which we shall refer to in this judgement.

The Court is grateful to Counsel on all sides for their respective assiduity. Although this compliment is usually reserved for the last part of the judgment or ruling, we put the compliments here because Counsel formally on record are not the only ones who actually appeared and argued for and against the Motion.

For the Applicants, the Motion was argued by Katwa & Kemboy, the Advocates on record for the Applicants led on the instructions of those Counsel by –

(1) Mutula Kilonzo, Senior Counsel

(2) Pheroze Nowrojee

(3) James Bob Aggrey Orengo

(4) Otiende Amolo

(5) John Katiku

(6) T. J. Kamwang

(7) Katwa Kigen

(8) Njee Muturi

(9) Judy Sijeni (Ms)

(10) Kethy Kilonzo (Miss)

For the Respondents, the galaxy of Counsel was as follows –

(1) Anthony O. Ombwayo –Principal Litigation Counsel, later assisted by S. Langat, State Counsel for the First Respondent, the Registrar of Societies;

(2) Jemimah Keli instructed by the Electoral Commission of Kenya.

(3) Moses Kurgat – together with

(4) - Lucy Kambuni (Mrs)

(5) - Kioko Kilukumi Esq.

(6) - Juma Kiplenge Esq.

(7) - Laedicea Kittany (Miss)

(8) - Omwanza Ombati Esq. for 3rd 4th, 5th and 6th Respondents respectively

B: THE SUBMISSIONS FOR APPLICANTS

(1) The Historical Perspective of the Kenya African National Union

(i) Origins of KANU

Mr. Katwa, Counsel for the Applicants, narrated to the Court, the historical perspective of the Political Party called the *Kenya African National Union* (KANU). The Party has had a rich history of being the oldest political party in Kenya. It had its prime origins in the Kenya African Union (KAU), and in 1960 at the height of agitation for political independence from British Colonial rule, it was registered as the Kenya African National Union. After Independence, and upon attainment of Republican status, KANU merged with the dominant opposition party, the Kenya African Democratic Union (KADU). KADU as a political party disappeared or legally speaking, was dissolved and its leaders, the late Ronald Ngala and former President H.E. Daniel Toroitich Arap Moi were absorbed into KANU, appointed into Cabinet, with Hon. D. T. Arap Moi eventually ending up with becoming Independent Kenya's Second President from 1978 to his retirement upon the defeat of KANU in the General Elections of the year 2002.

(ii) The Politics of Cooperation and Merger of Political Parties.

We have already observed that the party KADU was merged with KANU in 1964 and KADU was dissolved and its cadres incorporated into KANU and the Government of which KANU was the ruling party and the *defacto* sole political party from 1964 to 1982 and the *de lege* sole political party until 1991 (when Section 2A of the Constitution which had declared KANU as the sole political party *(in 1982*) was repealed by the Constitution of Kenya (Amendment) Act, 1991 (No. 12 of 1991) and ushered the reign of the multi-party democratic state.

Faced with serious challenges from agitators for a democratic state and pluralistic rule, KANU sought

cooperation with the National Democratic Party *(NDP)* ending up with the merger with that party early in the year 2002. Even upon losing the 2002 General Elections, KANU sought and temporarily worked with Ford People Party in the year 2003.

The merger and amalgamation by KANU with other less dominant political parties has therefore been part and parcel of KANU's history from its inception each time leading to the amendment of its Constitution to accommodate and incorporate new situations arising from such mergers.

(iii) The KANU Elections of 31.01.2005 to 1.02.2005

The National Elections of KANU were held between 31.01 2005 to 1.02.2005 because the exercise spilt well over to 1.02.2005 (morning). The contestants for the position of Chairman of K.A.N.U were Hon. Uhuru Muigai Kenyatta, and Hon. Nicholas Kipyator Biwott. Hon. Uhuru Muigai Kenyatta was elected Chairman of KANU. In his submissions to the Court, Mr. Katwa stated *inter alia* that Hon. Nicholas Kipyator Biwott, never accepted his defeat at the hands of Uhuru Muigai Kenyatta, and engaged himself in an outfit called "NEW KANU" and that since those Elections no other elections had been held, that there was therefore no basis for the Registrar of Societies, the First Respondent, to purport to register a change of officials of the Party, KANU. Mr. Katwa further submitted that the Registrar had been notified by a letter dated 27th November, 2006 signed by K.K.J. Katwa of the firm of Katwa and Kemboy Advocates of the *bona fide* KANU officials and also under a separate letter dated 27th November, 2006 from Hon. William Ruto, Secretary General of KANU, pointing out the various provisions of the *KANU CONSTITUTION* under which particular officials of KANU may call meetings, and of the powers and duties of the Chairman of the Party, and asking the Registrar of Societies to reverse the decision to register any other persons as officials of the party. In summary Mr. Katwa's submissions were that-

notwithstanding the notification of likely mischief if the registration of the Respondents as officials of KANU was effected, the Registrar of Societies nevertheless proceeded to register the change of officials of KANU on 28-11-2006.

The Registrar of Societies refused to attend to and reply either to the Applicants' Advocates letter or that of the Applicants' Secretary General, William Ruto

Four days after registration of the Respondents as new officials of KANU, the Registrar of Trade Unions wrote to William S. Ruto acknowledging receipt of the minutes, resolutions,

The new officials included the positions of National Chairman and a Deputy Chairman, a position which is not recognized in the Constitution of KANU under Article 5(1) which prescribes for the position of a National Chairman and four (4) National Vice-Chairmen, (and not three and a Deputy Chairman) as purportedly elected by the Respondents Special National Delegates Conference on 24-11-2006.

By a letter dated 1st December, 2006, four days after the purported registration of the new officials of KANU led by Hon. Nicholas Kipyator Biwott as Chairman and Hon Katana Ngala as Deputy Chairman, acknowledging of the receipt of the minutes, resolutions and notification of change of officials of the Kenya African National Union following a meeting of the National Delegates Conference held at Kasarani Sports Centre on 27th November, 2006 and that-

The Registrar had received a notification of change of officials on 27th November, 2006 and the same was registered;

a letter presented to the said registrar through Katwa & Kemboy Advocates on 27th November, 2006 objecting to the registration of any change of officials before registration on 28th November, 2006.

Instead of addressing the above letter, the office of the Registrar of Societies sought time to read:-

the KANU Constitution,

The Societies Act, and other relevant documents to make a reasoned decision

And invited William S. Ruto to call on them on 5th December, 2006 at 9.00 am. in the Conference room

However on 4th December, 2006, the Registrar of Societies wrote to Hon. William S. Ruto referring to Hon. Ruto's letters of 27th, 28th and the application of 29th November, 2006 together with the bundles enclosed of copies of resolutions and notification of change of officials of KANU stated the contents of said letters had been noted and addressed, and confirmed that a new set of officials of KANU had been registered, and that the Registrar was unable to register and/or confirm a second set of officials."

That in view of the above the Registrar of Societies is now functus officio as far as this matter is concerned. The meeting scheduled with Hon. William S. Ruto for 5th December, 2006 at 9.20 am was cancelled.

In light of the above correspondence, Mr. Katwa submitted that due diligence had not been exercised, the first Respondent, the Registrar of Societies would have noted contradictions in its own correspondence-

- *the Registrar had the minutes, resolutions of the Applicants National Delegates Conference held on 27th November, 2006.*

- *that the said meeting was chaired by Uhuru Kenyatta whose leadership the National Delegates Conference endorsed;*

- *that the meeting had been properly convened,*

confirmed and endorsed the cooperation with ODM Kenya,

- *that the decisions had been unanimously taken,*

and that the Respondents had not raised any objection;

- *that even if the Respondents had convened and held a meeting, no minutes thereof were availed to the Registrar as would be expected under Article 6 (5) 9(a) & (b) of the Constitution of KANU which Article and provisions set out the circumstances under which vacant positions for National officials may be filled.*

- *that under Article 6 (5) (b), where a vacancy occurs in the office of National Chairman, the onus is upon the Secretary-General to initiate action in consultation with the National Executive Council (NEC) to convene a Special Delegates Conference within three months of the office of National Chairman becoming vacant, for purposes of holding an election of the Party National Chairman in the manner prescribed in Articles 5 (3) (4) (5) and (11), and the first business in such Conference shall be elections of the National Chairman.*

- *that there was no evidence that the Secretary-General called any meeting for the replacement of the office of the Party National Chairman,*

- *that the election and replacement of other national officials of the party is different from that of Party National Chairman for under Article 5 (8) of the Constitution of KANU, if any vacancy occurs in any national office other than that of the National Chairman from whatever cause, the National Governing Council shall appoint a person among the members of the National Governing Council to act in the vacant position until the vacancy is filled by the Delegates at the next National Delegates Conference.*

Mr. Katwa further submitted on the jurisdiction and powers of the Party National Chairman as more particularly set out in Article 3 (12) of the KANU Constitution that notwithstanding the National

Chairman's powers under Article 3 (7) of the Constitution (that National officials shall hold office for five consecutive years and are eligible for re-election at the expiry of their term in office), the National Chairman, if the interests of the Party demand, may postpone, re-schedule, call off or take any other appropriate action in connection with the holding of elections of the national officials or any one of them. The National Chairman, Uhuru Muigai Kenyatta, did not and does not identify himself with the Respondents' purported National Delegates meeting under the leadership of Hon. Nicholas Kipyator Biwott.

Mr. Katwa further submitted that for any validity of the Respondents' Meeting, *(the Biwott Group)* must show to the Registrar as is required by Article 5 (2) of the KANU Constitution that there was a notice of a meeting under the hand of the Secretary-General of the Party calling for a National Delegates Conference whereat elections of National officials is on the agenda of the day. There was no such evidence.

Further, Mr. Katwa submitted, that under Article 11 (1) of the Constitution of KANU two types of meetings are provided for, namely, *the National Delegates Conference and a Special National Delegates Conference* and in each case, the National Special Delegates Conference shall be comprised of *(i) all members of the National Executive Council* (ii) *all KANU members of the National Assembly*, and (iii) *twenty delegates from each Branch of the Party* which shall include branch officials. Counsel submitted that these were not people who were present at the Respondents' meeting held on 24th November, 2006.

Further, Counsel submitted that under Article 11 (4) of the Constitution of KANU there is required a notice of fourteen (14) days to persons who ought to receive the notice that is to say, all Branches, Sub-branches and such notice is also to be communicated through the daily newspapers, radio and television. The Respondents did not comply with any of these requirements for the meeting held on 24th November, 2006.

On its part, the Applicants had complied with the requirements of said Article 11 (4) and had notices sent out on 6th November, 2006, and again on 23rd November, 2006 when notices were sent of a Special National Delegates Conference, and announced on radio on 22nd, 23rd 24th, and 25th November,2006. Payment for such radio announcements to Kenya Broadcasting Corporation for 15,000/= was made on 2nd November, 2006, and for KISS FM on 22nd November, 2006 for the sum of Kshs.5,840/=

These matters are deponed to in paragraph 15 of the Affidavit of Uhuru Muigai Kenyatta sworn on 11th December, 2006. On their part, the Respondents, per the Replying Affidavit of Dr. Josephine Rose Majale Ojiambo, have not demonstrated that there was a properly convened meeting on 24th November, 2006, and under Section 107 of the Evidence Act *(Chapter 80, Laws of Kenya*) the burden lies upon the person who alleges the existence or non-existence of certain facts. The Respondents meeting of 24th November, 2006 was not preceded by any such notices.

Mr. Katwa submitted further that the resolutions passed by the Applicants' National Delegates Conference were passed unanimously and mandated the National Executive Council to spear-head and manage the relationship between KANU & ODM – Kenya and report to the *National Governing Council* as and when necessary. Counsel submitted that this was in accord with the provisions of Article 3 (1) (2) and (14) which set out the party's broad aims and objectives (Article 3(1) & (2), and to "*cooperate and collaborate* or otherwise liaise or work with any local, national, regional or international organization or institution whether …… governmental or non-governmental in the promotion and strengthening of the Party, its interests aims and objectives." Thus Counsel submitted that there is no restriction on KANU'S working with any other political party or parties, that for officials of a party to abandon a declaration must be categorical; cooperation is not abandonment.

Counsel further submitted that although newspaper reports alone cannot be interpreted as proof of abandonment by a person of membership of a party, the Daily Nation Monday, June 26, 2006 reported under *NEW KANU to back Kibaki's Government says Biwott;* and under the sub-heading "Political Strategy"

"He (Mr. Biwott) asked the Kalenjin community to unite, saying it was the only way they could be assured of success in their political strategy."

Mr. Biwott defended the registration of the *NEW KANU* Party, a break-away from KANU, saying his group was forced to register it after senior KANU leaders blocked some members from the Party for what he described as "*selfish reasons."*

And again, NEW KANU not yet ready to negotiate a coalition, says Biwott by Nation Reporter and Correspondent.

"*NEW KANU will first set up party structures before negotiating with other parties on a Coalition. Former Cabinet Minister Nicholas Biwott told his supportes at a meeting at the Grand Regency Hotel in Nairobi yesterday that entering into a coalition was a matter of choice that was God-given. He said :- Birds of a feather flock together. With time, we will find other parties that we can work with. He welcomed ODM-Kenya saying Kenyans were free to set up parties and associate with those*.

"*Let Kenyans start as many parties as they wish. Let them interact with those they choose as it's their democratic right" Mr. Biwott said.*

Mr. Biwott's New KANU will likely get a new lease of life in the event that Mr. Kenyatta agrees to let go KANU, the Daily nation commented."

Mr. Katwa also referred to the Constitutional Ruling by Hon. Francis Ole Kaparo, Speaker of the *NATIONAL ASSEMBLY*, delivered on 30th November, 2006, in the National Assembly and in which the Speaker of the National Assembly affirmed the position of Hon. Uhuru Muigai Kenyatta as leader of the Official Opposition in the National Assembly being a leader of not less than 30 members of Parliament whereas KANU had 68 members out of the 210 members of National Assembly and that consequently the Executive arm of Government, accorded him ministerial privileges.

In conclusion, Mr. Katwa submitted that the Applicants had adhered to all the applicable law and the Constitution of the Party KANU, and in light thereof and his submissions, urged the Court to find that the Respondents cannot claim to be legitimate officials of the Kenya African National Union (KANU) Party.

(2) The Constitutional Perspective of the Applicants' Motion

The Constitutional perspective of the Applicants' motion was urged by Mutula Kilonzo, *Senior Counsel (S.C.).* Because of the centrality of the Constitution in this matter we set out Senior Council's submissions in *extenso*. Counsel submitted that the Applicants' case rested also on the relevant provisions of the Constitution of Kenya. The primary provisions are-

(1) Section 1A, which declares that Kenya shall be a multi-party democratic state;

(2) Section 5 (3) (a) – whenever Parliament is dissolved, an election of a President shall be held at the ensuing general election, and at that election – each political party taking part in the general election shall nominate one candidate for President in such manner as may be prescribed by or under an Act of Parliament;

(3) Section 32 (1) (read together with Section 1A) the side note of which says, elections of elected members on the role of political parties and provides for the division of Kenya into constituencies in accordance with Section 42 of the Constitution and therefore presupposes multiplicity of political parties.

(4) Section 33 (3) that persons appointed as nominated members of Parliament shall be nominated by Political parties according to the proportion of every Parliamentary party in the National Assembly, taking into account the principle of gender equality.

(5) By 123 of the Constitution a Political Party, means a political party which is duly registered under

any law which requires political parties to be registered, and which has complied with the requirements of any law as to the constitution or rules of political parties nominating candidates for the National Assembly.

Besides the provisions of the Constitution above, Senior Counsel also invoked the provisions of Section 17 B (2) (4) and (5) of the National Assembly and Presidential Elections Act (Chapter 7, Laws of Kenya) which provide-

(a) *Every Political Party shall bear the expenses relating to the nomination of candidates for contesting Parliamentary elections*.

(b) Every political party shall notify the

Electoral Commission of the name of the person authorized by the party to certify to the Commission that any person has been selected by the party under subsection (1) and the person so named shall deposit his or her specimen signature with the Commission in such manner as the Commission may require;

(c) No person who is elected or nominated as a member of the National Assembly with the support of or as a supporter of a political party (other than the party whose candidate has been elected President at an election) shall be appointed a Minister of the Government of Kenya, under Section 16 of the Constitution without the concurrence of the Party which supported him for election or nominated them for appointment as a member of the National Assembly."

Reference was also made to Section 15 (1) of the Societies Act, (Chapter 108, Laws of Kenya) that where any society is aggrieved by the Registrar's refusal to register it, or by the cancellation or suspension of its registration under Section 12 of the Act, such society may, in the case of a *political party* appeal to the High Court within thirty (30) days of such refusal, cancellation or suspension.

With the above provisions of the Constitution, the National Assembly and Presidential Elections Act, and indeed the Societies Act itself, Senior Counsel submitted that political parties do not merely exist under the Societies Act, that a political party has far wider significance than a mere social club, village or clan association under the Societies Act.

Consequently, therefore, if any person purporting to be an official of a political party walks into the office of the Registrar of Societies, with papers purporting to be notification of change of officials of a political party, let alone political party which is also a Parliamentary party whose leadership under Parliamentary Conventions constitute the Official Opposition with a Chief Whip and a Shadow Cabinet, the Registrar is constitutionally bound to have in mind, and consider the likely constitutional implications of her of his decision in light of the above provisions of the Constitution, the National Assembly and Presidential Elections Act, and indeed the other provisions of the Societies Act itself. Senior Counsel submitted that if the Registrar ignores the implications of his or her decision on those provisions of the Constitution and the applicable provisions of the law, he or she will be acting like a robot or a rubber stamp in the hands of those persons seeking the registration of the change of officials of the political party. The act or actions of the Registrar of Societies would therefore be liable to judicial review for her act can only supplement but cannot supercede the provisions of the Constitution.

Tying up the facts, Senior Counsel submitted that KANU had not convened any meetings to make any changes. The Applicants had an Annual Return under rule 13 of the Societies Rules, made on 31st December, 2005, with particulars showing *inter alia* *Hon. Katana Ngala* one of the *four Vice-Chairmen, and Dr. Josephine Ojiambo as Secretary for Gender.* The Returns were made on 5th July, 2006. When therefore a new set of officials were submitted to the Registrar on 27th November, 2006 for changes allegedly made on the same day (27th November, 2006), before the end of the Calendar year, would lend itself to inquiry as to the possible violation of Section 1A of the Constitution.

Counsel further submitted that the Registrar relied upon the Affidavit of Josephine Ojiambo at

paragraph 29 that the National Governing Council could convene a meeting of the National Delegates Conference under any article of the Constitution of KANU. The National Governing Council has no mandate and cannot call a National Delegates Conference *(Articles 11 and 12)* of the Constitution of KANU. The Party has 210 branches and no branch has a mandate to convene a National Delegates Conference. The provisions of Article 11 (3) (b) sets out the method for convening a National Delegates Conference, and it is clear therefrom that only the National Executive Council or the National Chairman can call a Special Delegates Conference. There was no evidence before the Registrar in terms of Article VI (4) (a) & (b) together with an agenda of any notices convening any such meeting by the Respondents or any one of them in any capacity.

Counsel concluded that any conscientious Registrar or responsible public officer would put on inquiry any such purported officials of party and ask who are you, and in what capacity are you filing the notification of change of officials of the party?

As the Registrar was acting in her official and public capacity her failure to follow procedure as laid down in the Societies Act, and to consider the constitutional implications of her decision in a multi-party and democratic state, to register the notification of change of the officials of the Kenya African National Union, is amenable to judicial review and should be quashed.

Similarly, Senior Counsel submitted, the decision of the Second Respondent, the Electoral Commission of Kenya to go along with alleged changes of the officials of a parliamentary party, not merely a political party, was contrary to the Constitution in light of the definition of a political party. Under Section 123 of the Constitution, the decision of the second Respondent was, therefore, liable to be quashed.

In his concluding submissions, Senior Counsel relied upon the list of authorities first above referred to and to some of which we shall revert to in the latter part of this judgment.

The Applicants' case was summarised by Mr. James Orengo under four grounds namely-

(1) whether the Applicants have locus standi to bring this motion,

(2) illegality of the action of the Registrar of Societies,

(3) Procedural impropriety,

(4) *Breach of the rules of natural justice.*

As these are the issues which we will consider in our analysis of the motion before our ultimate decision we will first consider the arguments on behalf of the First, Second and ultimately those for the Third, Fourth, Fifth and Sixth Respondents.

(C) SUBMISSIONS OF BEHALF OF THE RESPONDENTS

(1) THE FIRST RESPONDENT'S CASE

The motion was opposed by the First Respondent, the Registrar of Societies. Mr. Anthony Ombwayo, Principal Litigation Counsel, argued the First Respondent's case. Firstly, said Counsel relied upon the Replying Affidavit of Bernice Gachegu, Registrar-General in the *Department of the Registrar General*, sworn and filed on 14th February, 2007, the First Respondent's List of Authorities dated and filed on 19th December, 2006, and a summary of oral submissions reduced into writing, dated and filed on 28th May, 2007. The First Respondent's Counsel's submissions were:-

(a) The Registrar of Societies did not make a decision capable of being called up by the Court and be quashed.

(b) The Registrar of Societies has no duty to make a decision to register officers elected under the

Societies Act.

(c) No judicial orders of Certiorari, Prohibition and mandamus may be issued as prayed by the Applicants.

(d) The Registrar had not breached the principle of legitimate expectation.

These submissions followed closely the averments by the Registrar General's Affidavit acknowledging notification of changes of officers by the Respondents, that the said notification was in accord with the provisions of Section 17 of the Societies Act, which does not require the Registrar to make any decision, and that no decision had been annexed to the Affidavit of Hon. Uhuru Muigai Kenyatta to support the allegations of the Applicants, that the notification of change of name in form H dated 17th November, 2006 was not amenable to an order of certiorari because it had been authored by the Interested Parties who are not public bodies and do not hold public office and hence judicial review orders cannot be issued against them.

On advice of Mr. Ombwayo the Principal Litigation Counsel, Bernice Gachegu further deponed that orders of prohibition and mandamus would not issue because an order of prohibition will not issue for an event which has taken place, and there is no statutory duty imposed upon the Registrar of Societies to avail documents of a society's file in court but that the same may be perused in the Registry of Societies.

In support of these propositions and averments Counsel relied upon inter alia the cases of *REPUBLIC – VS- THE COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT & 2 OHTERS, ex parte David Mwangi & 15 others* where Bosire J, (as he then was) and Tank J. found an order of Certiorari will not lie where there is no decision "*on the facts and circumstances of this case*" at page 7) of their judgment (H.C. Misc. Application No. 805 of 1990).

Learned Principal Litigation Counsel also relied upon the well known case of *KENYA NATIONAL EXAMINATIONS COUNCIL –VS- REPUBLIC, ex parte Geoffrey Gathenji & 5 others* (*Civil Appeal No. 266 of 1996*) which sets out lucidly the principles of the orders of Certiorari, Prohibition and Mandamus and when the same will issue.

Counsel also relied upon the case of *ALVAN & OTHERS –VS- THE REGISTRAR OF SOCIETIES & OTHERS [2002] LLR* 4273 (HCK), where Onyango Otieno J. (*as he then was)* found on the facts of that case at page 5:-

"…. That the Applicants have not shown that the first two Respondents have a duty to declare the Applicants as the bona fide and properly elected and lawfully registered officials. If they have a duty, it is a public duty or a discretionary duty. I was not shown provisions that direct the Registrar of Societies to register as a public duty or at his discretion the contents of a Notice of Change of Office. My reading of Section 17 (1) of the Societies Act (Cap. 108) as read with rule 12 (4) do not convince me that the Registrar has a public duty to do such things as are now requested of him in prayer 4. He may have a discretionary duty i.e he would in receipt of the returns make amendments and changes as may be necessary having first checked the same information and being satisfied that it reflects the truth…"

Counsel also relied upon the decision of Juma J. in the case of NGARE & OTHERS –Vs- REGISTRAR OF CO-OPERATIVE SOCIETIES [2002] I KLR 877 (HCK) in which he found–

"*As to the removal from office, it was properly put that the decision was that of the members of the society. The Registrar of the societies did not remove the Applicants from office. The applicants did not exhibit any letter from the Registrar removing them from office. The whole issue lies within the society. The Registrar came in only to carry out an inquiry as provided for under the Act. After the inquiry it was upon the members of the society to take whatever action they deemed fit. The Application is directed against the Registrar and to that extent is misconceived. As regards the newly elected officials, the order of Certiorari cannot apply against them as they hold their present office by virtue of their election and not by virtue of the decision by the Registrar."*

The learned judge properly dismissed the application in that case as lacking any merit.

On the basis of those submissions learned Principal Litigation Counsel urged us to dismiss the Applicants motion as lacking merit.

The case for the Second Respondent, the Electoral Commission of Kenya, was urged by Miss Jemiman Kelli, and it was as set out below.

Miss Kelli, Counsel for the 2nd Respondent, the Electoral Commission of Kenya (hereafter referred to as ECK) in opposing the Notice of Motion, relied on the Affidavit sworn by Samuel Mutua Kivuitu sworn on 22nd January 2007. Mr. Kivuitu is the Chairman of the ECK. Counsel submitted that under the Constitution, a political party has to be registered by the Registrar of Societies who is also the custodian of all records pertaining to registration of all parties, that it is only the Registrar who can recognize issues of registered parties which information the public rely upon, that it is the Registrar who determines the authenticity of the information contained in the said documents and having relied on the said documents held by the Registrar, cannot be said to be the decision of ECK. Counsel said that the sole responsibility of the ECK is determination of nomination of candidates to the National Assembly who must have been elected by a political party under Section 17(4) of the National Assembly and Presidential Elections Act *(Cap 7 Laws of Kenya)* in accordance with the Constitution of the particular party and the ECK then seeks and relies on the information kept by the Registrar.

It was further contended that the decision making process of ECK is in accordance with S.41(11) of the Constitution and 3rd schedule of National Assembly and Presidential Elections Act whereby before a decision is made, a meeting has to be held to reach a decision and none was held in respect of KANU.

It is denied that the letter authored by Mr. Kivuitu on 1st December 2006 was a decision but that is mere information to alert Mr. Uhuru of change of officials and was well intentioned and to date there has been no response to the letter. Counsel contended that there has been no evidence disclosing any wrong on the part of the 2nd Respondent and the orders sought cannot be granted because the 2nd Respondent has no mandate to determine the question of registration of officials of KANU – but that the mandate rests with the Registrar. Counsel further submitted that no grounds have been pleaded in the statement to warrant the orders sought and there is no public duty with which the 2nd Respondent was charged to perform that they have failed or refused to perform to attract an order of Mandamus.

Counsel relied on the cases of R v COMMISSIONER OF COOPERATIVES (H MISC 805/1990) where the court held that for Judicial Review orders to issue the tribunal must have legal authority to determine questions affecting rights of parties and the authority is bound to act judiciously.

In the case of DR. AMUKOWA ANANGWE & OTHERS v KANU & OTHERS (MISC APPLICATION 232/05) – it was held that the statement is the main pleading in a Judicial review Application. Lastly Counsel urged that the averments in Mr. Kivuitu's Affidavit have not been controverted and the Applicants' Notice of Motion be dismissed with costs to the 2nd Respondent.

(2) THE THIRD, FOURTH, FIFTH AND SIXTH RESPONDENTS CASE

Submissions on behalf of the 3rd 4th 5th and 6th Respondents were made by Mr Kilukumi, Mrs. Kambuni and Mr. Kurgat. They relied on the following documents:

1) Replying Affidavit of Dr. Josephine Rose Majale Ojiambo sworn 17th January 2007 plus its annextures;

2) Skeletal arguments dated 25th January 2007;

3) 2 volumes of authorities;

4) KANU Constitution.

In his submissions, Mr. Kilukumi set out to demonstrate the legitimacy of KANU elections held on 24th November 2006 and to show that Uhuru Kenyatta and his group were not members of KANU as of that date, having joined ODM and were therefore not entitled to any notices convening of the meetings of KANU and that therefore they lack the locus standi to bring this application.

Counsel acknowledged that Uhuru Kenyatta had been elected KANU National Chairman at elections held on 31st January 2005 and 1st February 2005 and was expected to steer the party to realize KANU's objectives.

Friction in KANU commenced when ODM-K was birthed in September 2006 and the Applicants openly declared their membership in ODM-K and that Hon. Kosgey even holds out himself as National Chairman of ODM whereas Uhuru and Ruto are seeking Presidency on ODM-K ticket. Counsel submitted that to date there has been no denial of ODM-K membership by Applicants, that at the KANU National Governing Council Meeting of 16th November 2006 held at KANU HQs by the Applicants, it was resolved that KANU join ODM-K as a corporate member – (III B), and that all the officials i.e. Uhuru, Chairman, Ruto – General Secretary having joined ODM-K left a vacuum in KANU and those who did not want to join ODM-K decided to re-look at the options in the KANU Constitution. Under Article 12:4 of the KANU Constitution, 12 branches requisitioned for an emergency meeting of the Governing Council which was convened on 10th October 2006 which resolved to call the National Governing Council Meeting which in turn, resolved to call a National Delegates Conference to discuss the way forward, the fate of the Applicants who had joined ODM-K and the fate of KANU Assets.

That by various public declarations and by conduct and implication, the Applicants lost their membership in KANU in accordance with Article 4.9 of KANU Constitution (*Annextures to Dr. Ojiambo's Affidavit).*

Mr. Kilukumi urged that KANU Constitution does not approve for collaboration or cooperation with another party and under Article 3 of their Constitution, cooperation should not be with another political party but the merger must be for interest of the party. Counsel said that contrary to the view held by Applicants that National Delegates Conference can only be called by the Chairman or National Executive Council (NEC), the highest body of KANU is National Delegates Conference followed by National Governing Council, the National Executive Council. Article 12:2 sets out the functions of the Governing Council, as to enforce the Constitution and by-laws which include suspension and expulsion of members and that this is the provision the Respondents invoked to <u>suspend</u> the Applicants.

Article 13 sets out the functions of NEC and it is responsible to the National Governing Council.

Notice of the National Delegates Conference was advertised in the press and cannot be said to have been a secret and the question is whether the Respondents made any decision as a result of NDC and whether it can be subject to Judicial Review. Counsel said that the issues of who officers of KANU are/is not for this court to deal with but for arbitration, provided for in the KANU Constitution; that if there was any dispute, section 18 of Society's Act should have been invoked but none of the members invoked it and is therefore inapplicable.

Counsel adopted Mr. Ombwayo's submissions on S.17 of the Societies Act, that it imposes a duty on the Society to file a notification and that was duly done by the filing of form 'H' duly signed by KANU's Officials, the Vice Chairman Mr. Katana Ngala and Vice Secretary, Dr. Ojiambo, and the form is not amenable to Judicial review. That the notices are meant to update the Registrar on who office bearers are for purposes of transacting the society's business and that under S.48 of the Society's Act, a search can be done by the Society in writing to the Registrar which was done and it is this letter dated 28th July 2006 that sparked off this dispute. Counsel said that there is no discretion vested in the Registrar under S.17. The Registrar can only receive the notification.

Counsel observed that unlike Sections 11,12 and 14 of the Societies Act where the Registrar applies an objective test, so that if there is reasonable cause to believe, he can take action, under S.18, a subjective test is set so that if in the Registrar's opinion, there is dispute, the registration will not be done and the party will be asked to settle and if she formed the opinion that there was a dispute, the registrar would have cancelled form 'H'. That in this case the Registrar formed the opinion that there was no dispute and the court cannot substitute the decision of the Registrar with its own decision which was an exercise of discretion. See the case of KAMANI v KACC (HC 514/06)

He argued that the court cannot force the Registrar to make that opinion and therefore no prayer can be granted based on S.18. Counsel disputed the submission by the Applicants that upon receipt of Form 'H' the Registrar should have made an enquiry as to whether it was proper to register the new officials.

As regards what happens if the court does not quash the decision, Counsel submitted that there is no nexus between the leader of official opposition and officials of the society. This is because officials are elected by the General membership whereas the leader of official opposition is elected from the 68 KANU MPS, who form the KANU Parliamentary Group (Article 18) and that the position of leader of opposition remains unchanged unless KANU members in Parliament decide to remove him. The Chairman of KANU supervises the Parliamentary Group but if he is not an MP the members appoint a spokesman and therefore the KANU chairman is not necessarily the leader of opposition.

On whether the Vice-chairman had authority to preside over a meeting, it was submitted that Article 24 mandates him to do so. On removal of current Chairman, it was submitted that Article 6 provides for removal of chairman before the expiry of five years and that in this case the position of the Chairman became vacant and needed to be filled.

Mr. Kilukumi agreed with Mr. Orengo's submission that political parties are societies '*sui generis'* and have a special position in the Constitution. That S.34(d) and 123 of the Constitution preserve the integrity and supremacy of the members of the party and its Constitution and S.17 of the National Assembly and Presidential Election Act ensures that members who join parties voluntarily are not interfered with and it preserves the right of association. That despite their special place in the Constitution they are not public bodies but they remain private clubs.

On S.1A of the Constitution, Counsel said it has no relevance to the issues before court and the submission that the registrar is a threat to that Section was not demonstrated, and that the fact that KANU is seeking to join ODM-K is itself a threat to pluralism as KANU is strangled.

Mrs. Kambuni opened her submissions by responding to some of the issues raised in the Applicants' submissions. As regards the Registrar's letter of 28th November 2006 to Dr. Josephine Ojiambo, it was submitted that the Registrar in her letter of 28th November 2006 was merely replying to the request made by Dr. Ojiambo in her letter of 27th November 2006. That Dr. Ojiambo could have opted to do a search to confirm who the officials are or write, as she did.

In making reference to the letter of 4th December 2006 in which the Registrar said she was '*functus officio'* as per the issue of Registration of KANU officials was concerned, Counsel adopted the definition of the word '*functus officio'* contained in WORDS AND PHRASES; JUDICIALLY DEFINED by Roland Burrows Vol II at page 381 – that a person cannot be *funtus officio* when he has never performed a duty. It was Mrs. Kambuni's submission that the issue of '*functus officio'* does not arise and the court can only speculate as to what the Registrar meant by that term.

It was Counsel's submission that though bundles of authorities have been filed there is none where a notification of change of officials has ever been quashed because it is the decision of the party as to whose names appear on the notification but not the Registrar.

Mrs. Kambuni also replied to Mr. Kilonzo's submission on the form the notification was to take. It was her submission that the prescribed form of the notification is 'form H' which the respondent complied with.

On the question of how many AGMs a party can hold, Mrs. Kambuni was of the view that S.29 provides for holding of at least one AGM in a year and it did not matter that more than one was held. Whether there was mala fides in the speed with which change of officials was done, Mrs. Kambuni submitted that the Applicants cannot adopt this holier than thou attitude when in 2005 following the National Delegates Conference which ushered in the Applicants as officials, the Change of officials was done within four hours and the new officials notified and that despite a dispute raised by Amukowa Anangwe of New KANU, the record was updated. The Applicants are therefore adopting double standards when it suits them. It is also contended that the process for calling the National Delegates Conference was flawed. Initially a notice of 14 days was given for the Special National Delegates Conference to be held on 27th November 2006 but by a further notice it was changed to "*National Delegates Conference'* and notice given was only 6 days as opposed to the required 21 days in the Constitution and they should not complain about the Respondents flouting the KANU Constitution when they were first to do so. Counsel submitted that it is not the mandate of the Registrar to determine whether or not the elections were flawed as it would be impossible for her to know who the bona fide delegates were.

Regarding the ruling by the National Assembly Speaker Mrs. Kambuni said that neither the Registrar nor the court could be guided by the parliamentary proceedings because parliamentary proceedings cannot be questioned in a court of law due to parliamentary privilege. For this proposition Counsel relied on the case of R v EX PARTE ANDERSON STRATH (1983) 2 ALL KR 133 AND WILSONS TREATISE ON CONSTITUTIONAL AND ADMINISTRATIVE LAW (1386-389).

In response to Mr. Katwa's submission that the decision made on 27th November 2006 at NDC to join ODM was unanimous, Mrs. Kembuni urged that as of 27th November 2006, the Applicants were no longer KANU members having been suspended on 24th November 2006 at a Special National Delegates Conference and that the letter of the Registrar of 28th November 2006 was prompted not by form 'H' but by a notification filed on 27th November 2006. That the NDC held on 27th November 2006 was self serving as one had been held on 24th November 2006 and the Vice Chairman notified the Registrar on 'form H' in accordance with the Societies Act and that it was the decision of the membership of KANU. That the Applicants filed the notification of change on 27th November 2006 because they recognized the elections held on 24th November 2006.

On the allegation that Hon. Biwott had abandoned KANU for NEW KANU, it was submitted that there is no evidence to that effect. Dr. Ojiambo deponed that Hon. Biwott is a life member of KANU, Branch Chairman of Kerio South, and that that has not been contested. It was, however, admitted that Hon. Biwott did not file any Affidavit to confirm or deny the allegation leveled against him.

Mrs. Kambuni did agree with Mr. Kilonzo's submission regarding the centrality of the Constitution in promoting good governance and the Rule of Law. She submitted that the Applicants cannot claim to have been denied representation which is by S.1A of the Constitution because they are politicians and the ILCHAMUS CASE relied upon is distinguishable because the court there had to protect the voice of the minority which is not the case here. That instead the Applicants have become a threat to multipartism by joining KANU with another party whose future is uncertain. The submission that under SS 1, 1A, 5, 3(a), 122 of the Constitution and the National Assembly and Presidential Election Act *(Cap 7 Laws of Kenya*) political parties should be considered as Constitutional organs is untenable and the Court should construe political parties as construed under S.2 A of the Constitution, otherwise the court will be ordering the extinction of KANU and that it is the Respondents who have been fighting for protection of multipartism. The Court was urged to adopt the views of Professor J.B. Ojwang in his paper – CONSTITUTIONAL DEVELOPMENT IN KENYA: INSTITUTIONAL ADAPTATION AND SOCIAL CHANGE (1990) development in Kenya – where he says that Judicial Review is not open to political parties. That Judicial Review can only apply to statutory bodies which KANU is not. It being a voluntary establishment, and membership rests on contractual understanding. Similarly Walter Oyugi in his document POLITICAL PARTIES AS CONSTITUTIONAL ORGANS; observed that even in the one party regime, the political party was not a constitutional organ and that the state should take a neutral place in party matters. This court was urged to adopt the decision in DR. ANANGWE'S CASE that

political parties are not amenable to Judicial Review. Besides it is urged that the Applicants are seeking Judicial Review orders in their personal capacities because KANU is not enjoined to these proceedings.

It was urged that dual membership of political parties is not envisaged because of the objects of the parties is to compete successfully with other parties to ensure they form the next Government, and each party is supposed to *(nominate*) field one presidential candidate *(Chapter 7 Laws of Kenya)* which cannot be achieved by co-operation with ODM.

On availability of Judicial Review remedies, Counsel referred to the case of *R v PANEL ON TAKE OVERS & MERGERS* ex parte *DATAFIN* where the court enlarged the scope of judicial Review by holding that if the body exercises Governmental powers Judicial Review orders apply but that it caused uncertainty. The court was also urged to take judicial notice of political parties which seeks to further personal interest as opposed to public interest. In OBRIEN v BROWN 409 USI – courts have been reluctant to intervene in intra-party disputes.

On legitimate expectation, it was argued that the Applicants should not expect any favours as it is them who have disappointed their membership who elected them to office. But by coming to court, and not making a full disclosure of facts, they had acted contrary to the KANU Constitution. It was also submitted that the orders sought are not available and if there was any remedy it lies elsewhere.

Mr. Kurgat took us through the authorities relied upon by the Applicants and distinguished them from the present case and its facts and relevance or application to the present case.

In his opening address, Mr. Kurgat revisited the contention that the Applicants are themselves guilty of violating the KANU Constitution in that there is no evidence that notices in respect of the Special National Delegates Conference were dispatched or that KANU members were notified. That all the annextures to the Affidavit of Uhuru Kenyatta which include receipts for announcements cannot be linked to KANU and the persons to whom they are issued did not swear any Affidavit linking the said documents to KANU and it National Delegates Conference. The Applicants actions were *ultra vires* the KANU Constitution, and it is immaterial that ODM-K has similar objectives with KANU. The principle in the case of *EUROPEAN SOCIETY ARBITATION ACTS exparte LIQUIDATORS OF THE BRITISH NATION LIFE ASSURANCE ASSOCIATION (1878) CA VOL VIII 679*; stated that it is immaterial whether the parties have similar objectives, its merger or association had to be ratified by the membership.

In the cases of

(i) MIRUGI KARIUKI v AGA CA 70/91

(ii) INLAND REVENUE FEDERATION OF SELF EMPLOYERS BUSINESS LTD. HL (E) 1982

(iii) KENYA BANKERS ASSOCIATION –v- REPUBLIC

(iv) TAIBU MINISTER OF LOCAL GOVERNMENT C. APPEAL N0. 107/06…..

the courts held that the Applicant must demonstrate sufficient interest in order for orders of certiorari and mandamus to issue. Here the Applicants failed to do so as they were no longer members of KANU;

(1) DAVID MUGO T/A MANYATTA AUCTIONEERS v REP (CA 265/192) recognised the expansion of the scope of Judicial Review orders but that the Applicants still fall outside that scope;

(2) R NAGANJU ex parte NGACHA (2004) KLR 222 – The court lauded the use of press cuttings and the same should be recognized by this court in this case.

(3) THE LAW OF MEETING, THEIR CONDUCT AND PROCEDURE by Sir Shaw and Judge Denis Smith. prescribe the procedure and conduct of meetings which should be held in accordance with the

Regulations of the body (party) and relevant notice be issued. Mr. Kurgat submitted that the Applicants did not require notices for the meeting held in Mombasa on 24th November 2006 as they were not members of KANU;

(4) ALLIED WORKERS UNION –vs- REGISTRAR OF TRADE UNIONS (*HMSC 1682/04*) – on the basis of the above case the Applicants have not been faithful and yet they are guilty of breach themselves;

(5) KIPKALYA KONES -vs- REPUBLIC CA 94/2004 –demonstrates that the Applicants should have challenged the decision through arbitration. Orders cannot issue as elections are already done;

(6) REPUBLIC –vs- SMITH KHISA WASWA – that the Applicants have failed to show that the Respondents have been biased. Instead it is the Applicants who have abandoned KANU;

(7) NYONGO'S CASE - Counsel said that the facts were different from the case at hand. The court observed that political parties should be left alone.

(3) REPLY TO RESPONDENTS' SUBMISSION

Mr. Pheroze Nowrowjee, Counsel for the Applicants, in reply to the submission of the Respondents, argued that the Respondents' position that the Registrar had no obligation under the Societies Act to do anything more than to receive and file Form "H" was erroneous, misplaced and incorrect. He submitted that the functions and role of political parties in Kenya are central to our democratic process under Section 1 and 1A of the Constitution; that those who have been charged with the responsibility for the administration of political parties such as the Registrar and the Electoral Commission of Kenya must ensure that in addition to the provisions of the Societies Act, they take into account, and further the spirit and the values of the principles outlined in the Constitution; that the very fact that the definition of political parties is found not in the Societies Act, nor in the National Assembly and Presidential Elections Act, but in the Constitution itself emphasis the importance of political parties; that it was therefore an abrogation of responsibility on the part of the Registrar to simply say that she had no duties other than to receive and file documents under Section 17 of the Societies Act; that the said section 17 could not be construed in isolation of other provisions in the Societies Act, and the Constitution *(see ILChamus and Njoya cases);* that indeed Section 17 is not an isolated section – it is located in Part 4 of the Act under the heading "*Conduct and Administration of Societies"*; that administration applied not to how societies administered themselves, but rather to how the ***Registrar*** would administer them; that it is based on powers given to the Registrar under Section 18 where a society can be ordered to produce evidence of settlement of dispute, or order amendments under Section 19, or give consent to change under Section 20; that therefore on receipt of new information or change the Registrar ought to ask herself "what should I do to carry out the proper administration of the Society?"; that upon receipt of Form "H" the Registrar was duty bound to scrutinize the form for its validity, consider whether the change was in accordance with the KANU Constitution, the Societies Act and the Kenyan Constitution; that in particular, the Registrar should have asked herself whether the proposed change was in accordance with the KANU Constitution; whether the National Delegates Conference was properly convened; were notices sent; was there a quorum; were elections due; were minutes prepared.

Mr. Nowrojee referred to the case of *ALVAN & OTHERS –-VS- REGISTRAR OF SOCIETIES (HC. MISC. APPLICATION NO. 586/02)* where Justice Onyango Otieno emphasized the need for the Registrar to check the information in Form 'H' and satisfy herself that it was the truth.

In response to Mr. Ombwayo's submission that the letter of 28th November 2006 was not a decision, Counsel argued that the fact that the letter of 28th November, 2006 stated that a set of new officials had been registered, that letter constituted a "*decision*" - which is the subject of the prayer for certiorari. And that in any case, the Applicants, through Mr. Katwa, had questioned the process from the onset and asked for documents that the Registrar relied upon in arriving at her decision to register new officials. No documents were availed. That at the time Mr. Katwa and Hon. Ruto asked the Registrar not to register new officials, form 'H' had indeed not been registered. Counsel submitted that the Registrar's decision

was not based on reason, that it was unreasonable and illegal and should be quashed.

As to whether S.18 ever came into play, Mr. Nowrojee argued that the letter of Hon. Ruto dated 27th November 2006 was received by the Registrar before form 'H' was registered, and both Hon. Ruto's and Mr. Katwa's letters to the Registrar raised "*a dispute.*" Even then, the Registrar did not invoke section 18 of the Societies Act and declare that there was a dispute as to the officials of KANU and did not ask them to settle the same or move to issue sanctions under the Act.

(D) ANALYSIS AND CONCLUSIONS

Having been subjected to truly *Odyssean* peroration of submissions by learned Counsel on all sides of the spectrum we have surveyed the vast field by said gladiators and gladiatoress (es), on both sides of the massed armies. And what feats were to be overcome by the warring sides to reach the *golden fleece* of power and prestige firstly *For the Uhuru Muigai Kenyatta* team, to maintain the leadership of the oldest political party, and secondly for the Hon. *Nicholas Kipyator Biwott*, *Hon. Katana Ngala* and *Dr. Josephine Rose Majale Ojiambo*, team to ascend to the pinnacle of Official Leader of Opposition, and the unchallenged leaders of the oldest political party in Kenya? Is it all by the stroke of the pen and fiat of the Registrar of Societies.?

Unlike the twelve "*labours*" or tasks imposed upon *Hercules* by *Hera* to win her heart, the labours or tasks which Counsel had to overcome to reach the golden fleece are not twelve but fourteen (14) as per the Motion the subject of this judgment. We will consider each one of those labours and the heroics of Counsel in the subsequent passages of this judgment.

1. Of Whether the Applicants have *locus standi* to bring these proceedings.

It was basically the argument of the 3rd, 4th, 5th and 6th Respondents that the Applicants had no locus standi to bring the proceedings the subject of this judgment. The Respondents' grounds are set out in paragraphs 4 to 23 inclusive of the Affidavit of Dr. Josephine Rose Majale Ojiambo, the totality of which was that the Applicants had abandoned and jumped from the ship called KANU and joined another ship called *ODM – Kenya*. The proof of such abandonment of KANU by the Applicants were newspaper reports that the Applicants had abandoned and merged with *ODM – Kenya*. Cited to us in support of this contention were *inter alia* the meanings of "*merger*"- "*sunk*" or "*drowned*" whereby the *lesser or greater* estate in the same land come together and vest without intermediate estate, and Section 2 of the Societies Act, where it is declared for the avoidance of doubt for the purposes of the Act that where any body of persons whether incorporated or unincorporated, is a member of an association, all members of that body are members of that association.

If by that section *all members of* KANU are members of *ODM-KENYA*, then by the same token ODM-Kenya having merged with KANU, then all members of ODM-Kenya are equally members of KANU whether or not members of *ODM-Kenya* declare that they are members of KANU. That obviously is not an interpretation which would appeal to either members of ODM – Kenya who have never declared that they are members of KANU or by members of KANU. Membership of an association must be unequivocal, and newspaper cuttings and declarations are not without more conclusive proof of such membership. In any event, the resolution passed at the KANU's National Delegates Conference made on 27th November, 2006, merely declared that KANU was a corporate member of ODM-Kenya and there was no resolution of merger.

Locus Standi-

In the case of *Regina –Vs- Greater London Council Ex parte Blackburn [1976] I.W.L.R 556*, (cited with approval by Lord Diplock in *Regina – Vs- .I.R.C.*, *ex parte National Federation of Self Employed and Small Business Ltd. [1982]* A.C. 617 at page 64), Lord Denning M.R. said-

"*I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law is about to transgress it in a way*

which offends or injures thousands of Her Majesty's subjects then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced and the courts in their discretion can grant whatever remedy is appropriate."

The reference here is no doubt to flagrant and serious breaches of the law by persons exercising governmental functions which are continuing unchecked. The Applicants were immediate officials of the party. Their ouster from office is certainly not an act of the Registrar of Societies. The registration of change of officials is certainly an act of the Registrar, a person exercising governmental functions, which are continuing unchecked. The Applicants are directly affected parties, and have a legitimate grievance caused by the Registrar's act. They have *locus standi*. They have an unfettered right to bring this motion. *This leg of the objection fails.*

The accurate and correct interpretation of Section 2 of the Societies Act therefore is that co-operation between two societies, or as in companies limited by shares, a common shareholding, and board membership does not constitute a merger of two societies. The individual members and directors or managers of the respective entities, remain separate and independent of the other except for those decisions or policies upon which the objective or aims of the two or more bodies agree. To hold that because the management of ODM- Kenya and the officialdom of KANU share the same or similar political ideals does not constitute a merger or abandonment by the management or officials thereof of their respective societies, incorporated or unincorporated. Indeed as Counsel for the 3rd, 4th, 5th or 6th Respondents admit and state at paragraph 2.5 of their skeletal arguments dated 25th January, 2007, KANU has not merged with ODM- Kenya, and the managers of KANU at the time of the purported take over of management of the party by the team of Hon. Nicholas Kipyator Biwott have a legitimate interest in challenging their purported ouster by the latter management. They cannot be said to have no *locus standi* when their very offices and leadership has been challenged in highly disputed circumstances on both fact and in law.

We therefore hold that the Applicants have locus standi in bringing these proceedings. This finding is in essence a restatement of the position taken by the Judge at the leave stage, that the Applicants for judicial review had established an arguable or prima facie case which should be argued in a formal notice of motion, which again, is the subject of this judgment. *We further find and hold that there was no merger between KANU and ODM – Kenya, but merely a sharing of ideals, aims and objectives which the KANU Constitution allows in article 3 (8) and (9) and (14) thereof.*

(2) Of abuse of Court Process and Contempt of Court.

Having found and held that the Applicants had a legitimate interest in bringing these proceedings, the question of either abuse or contempt of court process does not arise.

(3) Of the non-availability of Public Law Remedies

Judicial review falls within that body of law, which lays a distinction between public law and private law, and this distinction goes to the heart of the civil jurisdiction throughout the countries where the common law was exported by the British Empire. It comprises all that body of statutes, including the Constitution (in countries where there is a written Constitution) which sets out powers and discretions of individual persons which powers must be exercised in accordance with the terms of the enabling law. So in essence a public law cause of action can be identified as one in which the challenged body or authority is alleged to have acted *ultra vires* by a sin of commission or omission.

The party making the challenge knows that he cannot succeed unless he can make that allegation good in the eyes of the court. He must not be found wanting procedurally in terms of promptitude, and must find favour with the court in terms of persuading it to exercise its discretion in his favour. If it is in truth a public cause of action he knows that he must not trade on the fact- that two of the available remedies are available also in private causes of action. Whether proceedings are public or private in character is one question, whether the parties are public or private in character is quite a different question. There is even the question whether the remedies are public or private in character.

In the motion at hand, the challenge is being mounted against the Registrar of Societies, a statutory office established under Section 8 of the Societies Act, with power to perform the duties and exercise the powers imposed and conferred upon the Registrar under the Act. One of the duties imposed upon the Registrar is registration of Societies, including political parties and any changes in respect of their officials, titles, etc. under Section 17 of the said Act.

The Electoral Commission of Kenya is a Constitutional body established under the provisions of Section 41 of the Constitution of Kenya and whose functions include the determination of constituencies (Section 42 (3), review the boundaries and names of constituencies and carry out alterations as a consequence of a census, (Section 42 (4) & (5) of the Constitution), conduct of elections, including (a) the *registration* of voters and maintenance and revision of the register of voters, (*b) directing and supervising* the Presidential National Assembly and local government elections *(c) promoting* free and fair elections (d) *promoting voter education* throughout Kenya and (e) carrying out such other functions as may be prescribed by law.

There is therefore no question that the Registrar of Societies is not only a public office or body but also carries out very public functions which affect the rights of the public both as private individuals and as associations with the constitutional right of assembly or association (Section 80 of the Constitution). The Electoral Commission of Kenya is the premier Constitutional Commission through whose functions and duties, every registered voter in Kenya exercises his or her Constitutional right to vote and more importantly through which every such citizen seeking elective office as President must be nominated by a political party (Section 5 (3) (a), or a member of the National Assembly be elected in accordance with Section 32 (1) & 34 (d) of the Constitution and Section 17 (1) of the Presidential and National Assembly Elections Act *(Chapter 7, Laws of Kenya).*

Similarly, therefore, there is also no question, that the Electoral Commission is indeed a public body. There is also no question that the functions of the two bodies are public in character and their respective sins of commission or omission attract public law remedies of Certiorari, prohibition or, as appropriate, mandamus.

The First question therefore is whether the decision of the Registrar of Societies and the Electoral Commission to recognize the Respondents as officials of the party, KANU as opposed to the Applicants was firstly in accord with the provisions of the Societies Act, and secondly the duties and functions of the Electoral Commission of Kenya as enshrined in the Constitution of Kenya.

On the first issue it was both eloquently and forcefully argued by both Mr. Ombwayo, Principal Litigation Counsel, on behalf of the Registrar of Societies, that the Registrar made no decision in receiving and issuing a receipt for the filing by one Dr. Josephine Rose Majale Ojiambo of Form H. of the Societies Act containing the names and titles of the new officials of the Kenya African National Union.

We were referred to Black's Law Dictionary, and to the Oxford Concise Dictionary as to the meaning of a decision. With respect to learned Principal Litigation Counsel, we find that argument both pedantic and simplistic. A decision is not merely found in the expression "*I have decided*" this or that. "*A decision*" is, indeed as Blacks Law Dictionary clearly explains, "*a judicial or agency determination after consideration of the facts and the law*."

Learned Counsel sought to find umbrance and succour in Section 17 of the Societies Act which says-

"*17(1) Notice in the prescribed form of any change of officers, or of the title of any office, of a registered society shall be given to the Registrar within fourteen days of the change and notice shall be signed by three officers of the society."*

Counsel urged that the Registrar is not under the said Section required to make any decision or adjudication in the definition of Black's Law Dictionary. This however cannot be so. The Section itself requires the Registrar to ascertain that the change of officials has been filed within the statutory period of fourteen days and that it has been signed by three officials.

It was observed by *Lesiit, Emukule and Mugo JJ* in the case *Rev. David Mulei Mbuvi & 21 others* (in the matter of an Application for leave to apply for order of Prohibition, Certiorari and Mandamus (H.C. at Nairobi Misc. Application No. 155 of 2006), at pages 13-14.

"*…..The Registrar is, in law bound to inquire and to satisfy himself that the amendments to the name or objects of the Constitution of the Society as a whole are effected in accordance with its Constitution. For instance the Registrar is bound to inquire into such aspects as to notice of the meeting, the quorum, and the majorities for carrying certain amendments or decisions affecting the Constitution of the Society. These are legitimate questions for the Registrar to consider whether or not a complaint exists, and more so like in this case, a complaint has been raised. They are also questions of legitimate inquiry by the Court."*

And further at page 14-15, the said learned judges observed-

"*Section 19 of the Society's Act lays down a minimum number of conditions which are to be contained in the Constitution of Rules of every society. Among these are, the manner of amending the name, constitution or rules of the society, the method of suspension or expulsion of members and frequently of quorums for doing and dates of the general meetings referred to in Section 29 of the Act. These are matters and any of the other sixteen (16) matters required to be included in a Constitution of a society are matters of legitimate concern by the Registrar, and any of which may cause the Registrar to reject an amended Constitution of an exempted society. The Registrar does therefore have a supervisory role over the Society."*

The issue in that case had to do with a preliminary point raised by Counsel for the Respondents that being a Church and an exempted society, the Registrar had no supervisory role and that judicial review proceedings do not lie. The court found as stated above that an exempted society under the Societies Act was subject to the supervisory role of the Registrar of Societies and that the Applicants being members and clergy of the African Inland Church had *locus standi* and could seek redress from the court.

In addition, Mr. Pheroze Nowrojee, learned Counsel in the Applicants' team of legal advisers, observed that Section 23 of the Societies Act sets out restrictions on appointment to the offices of treasurer, deputy treasurer or assistant treasurer or to the office of auditor or trustee, or any other office responsible for the collection, disbursement, custody or control of funds of the Society. Again those are legitimate matters of inquiry by the Registrar upon submission of a form for change of officials of a society and these are matters which must be done immediately because it would be a breach of the express statutory provisions and therefore illegal for any such prohibited person to remain in a list of persons who are officials of a society. If it were later found to be so, the Registrar would properly be accused of both indolence and dereliction of duty. Once again, these are all matters of legitimate inquiry by the Registrar. It is not open to the Registrar to pray, and for her Counsel to plead, that Section 17 of the Societies Act is passive and does not require her to do anything except to file away such return or notification of change of officials.

In the case of *Reg –Vs- Somerset County Council, ex parte Fewings and others [1995] I ALL E.R. 513* the Respondent County Council passed a resolution banning deer hunting on the Council's land.

The Statute in issue in that case was the Local Government Act, 1972, Section 120 (1) (b) of which said:-

"*for the purposes …. (b) the benefit, improvement or development of their area a principal council may acquire by agreement any land, whether situated inside or outside their area."*

It was common ground that the common (the land) was acquired under Section 122) (1) which provides:-

"*Subject to the following provisions of this Section a principal council may appropriate for any purpose for which the Council are authorized by this or any other enactment to acquire by agreement any land which belongs to the Council and is no longer required for the purposes for which it is held immediately*

before the appropriation; but the appropriation of land by Council by virtue of this subsection shall be subject to the rights of other persons in, every or in respect of the land concerned."

The single issue of principle argued was whether the subjective opinion of the majority of the Councillors voting, that deer hunting is morally repulsive a consideration which at law the court was entitled to regard as relevant). This is what the trial judge, Hon. Mr. Justice Laws said-

"The true construction of Section 120 is of critical importance, not because of any legalistic pedantry with which Councillors seeking to act in the public interest as they see it may justly feel impatient, but because a major principle of the common law necessarily engages it. The principle is this; a public body such as local authority, enjoys no such thing as an unfettered discretion. This is a sinew of the rule of law, and has been described by Professor Sir William Wade Q.C. in successive editions of his book "Administrative Law" it is expressed in the current edition as follows:-

"The powers of public authorities are…. Essentially different from those of private persons. A man making his will, may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has absolute power to allow whom he likes to use his land….. regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good (6th Edition 1988) pages 399 – 400.

The corresponding passage in the previous edition of Sir William's book, which is much to the same effect was endorsed as a correct statement of basic principle by Lord Bridge of Harwich in *Tower Hawlets of London – B.C. –Vs. Chitwik Developments Ltd. [1988] I ALL* E.R. [961, at 965 – 966, or [1985] A.C. 858 at 8762 –

"a truly unfettered discretion will at once put the decision-maker outside, or as I would prefer to say, above the law. Public bodies and private persons are both subject to the rule of law, nothing could be more elementary. But the principles which govern their relationship with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedom of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in some law books – such a notion would be anathema to our traditions of the rule of law. But for public bodies the rule is the opposite, and so of another character altogether.

It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute fulfillment of duties which it owes to others; indeed, it exists for no other purpose. I would say, a public body enjoys no rights properly so called; it may in various contexts be entitled to insist that this or that procedure be followed whether by a person affected by its decision or by superior body having power over it, it may come to court as a judicial review applicant to complain of the decision of some other public authority, it may maintain a private law action to enforce a contract or otherwise protect its property (though a local authority, at any rate, may not sue in defamation. (See Derbyshire CC -Vs- fumes Newspapers Ltd. [1993] A.C. 534) But in every such instance, and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith only to indicate the better performance of the duties for whose fulfillment it exists. It is in this sense that it has no rights of its own, no axe to grind, beyond its public responsibility a responsibility which defines its purpose and justifies its existence under our law this is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them."

This legal fact underpins our principles, rules of substantive judicial review, such as those enshrined in *Padfield –Vs- Minister for Agriculture Fisheries and Food [1968] I ALL E.R. [1968] A.C., 997 Associated Provincial Picture Houses Ltd. –Vs- Wednesbury Corporation* [1947] 2 ALL E.R. 680, [1948] I.K.B. 223; as for Padfield case –

"Where a statute does not by express words define the purposes for which the powers it confers are to be exercised, the decision –maker is bound nevertheless to ascertain and apply the aims intended, since no statute can be purposeless. And therefore unless the Act's true purpose is correctly understood, the decision-maker who is Parliament's delegate is at risk of using powers to an end for which they were never given him. If he does so, he exceeds his authority, as surely as he transgresses the plainest statutory language, the distinction is merely that between the implication and express provision, a distinction which the general law principle has never treated as one of principle. As regards Wednesbury, a decision – maker who fails to take into account of all and only those considerations material to his task, or who does not bring a rational mind to bear on what he is to do is in law, no more exercising authority within the limbs of its conferment than if he nakedly usurps his power."

We endorse and apply those principles to the motion at hand.

In the case of *Republic –Vs- the Attorney-General and the Registrar of Societies (H.C. at Nairobi*) Misc. Application 769 of 2004) *Nyamu and Ibrahim JJ* after reviewing nearly the entire spectrum of grounds for intervention in Judicial Review "*procedural fairness*, *protected interest* and *legitimate expectation*, *irrelevant considerations* and *illegality." unreasonableness and bias abuse of power, bad faith* and *procedural impropriety, including illegality."* concluded at page 18 of their judgement that the law relating to judicial review had not yet reached the furthest or the last frontier and that courts must endeavour to expand the grounds of intervention depending on the circumstances before them.

The learned judges observed in *obiter* that it was not possible in the circumstances of that case to extend the grounds of intervention to decisions made under the shadow "*of corruption or abuse of office, that nothing subverts the rule of law more than decisions induced by corruption or abuse of office."* Obviously absence of reasons or irrationability of a decision could suggest such a conclusion. We do accept that the grounds of intervention in judicial review do overlap and the facts of each case must either define the ground or suggest new ground.

So what is the situation in this case.? It is this, the Registrar receives warning notices from both the existing officials of the Party namely, William S. Ruto and their Advocates. Both letters are dated 27th November, 2006.

On 27th November, 2006 one Dr. Josephine Rose Majale Ojiambo does two things, files a Notification of Change of Officers or Title of any Officer and at the same time writes a letter to the Registrar seeking to know the names of the officials of KANU. In the meantime, on the next day, the Applicants Advocates Katwa & Kemboy write a reminder to the Registrar of their letter of 27th November, 2006. What does the Registrar do?

The Registrar ignores the said Advocates letters. The Registrar does not even appear to have examined the Notification of Change of Titles. If she did, she might have noticed that there was a new position of Deputy Chairman and two vice-Chairmen

The Registrar might have noticed if she cared to examine at all, that the Constitution of KANU (2002 Edition including the organogram and Article 5 (1) (a) – (e) annexed to the Replying Affidavit of Dr. Josephine Rose Majale Ojiambo refer to the position of a National Chairman and four (4) National Vice Chairmen. There is no reference in the Replying Affidavit of the said Dr. Josephine Rose Majale Ojiambo to any amendment of the KANU Constitution upon which the office of Deputy Chairman was created. Consequently, the Registrar's letter dated 28th November, 2006 to the said Dr. Josephine Rose Majale Ojiambo carrying the position of Deputy Chairman is contrary to both the Constitution of KANU (*Article 5 (1*) (*a) – (e)* as no amendment had been carried out to the said Article, and also contrary to Section 21 (1) of the Societies Act, and is therefore illegal.

Notwithstanding the said letter of 28th November, 2006 to Dr. Josephine Rose Majale Ojiambo, setting out the particulars of the newly registered officials of KANU, the Registrar wrote on 1st December, 2006 to William S. Ruto acknowledging receipt of the minutes, resolutions and notification of change of

officials of the Kenya African National Union following a meeting of the National Delegates Conference held at Kasarani Sports Centre on 27th November, 2006. The said letter further stated-

"*….We had received a notification of change of officials on 27th November, 2006 and the same was registered.*

It has come our notice that a letter was presented to this office, through Katwa & Kemboy Advocates on 27th November, 2006 objecting to the registration of any change of officials before the registration on 28th November, 2006.

In lieu of the above this office request for time to read the KANU Constitution, the Societies Act and other relevant documents files to make a reasonable decision."

Kindly call on us on 5th December, 2006 at 9.00 am. In the Conference Room.

Signed

for: REGISTRAR OF SOCIETIES."

Hardly three days later, on 4th December, 2006, a day before the scheduled meeting of 5th December, 2006, the Registrar wrote to Mr. William Ruto, to this effect.

Dear Sir,

RE: NOTIFICATION OF CHANGE OF OFFICIALS KENYA AFRICAN NATIONAL UNION (KANU)

Reference is made to your letters dated 27th November, 2006, 28th November, 2006 and your application letter of 29th November, 2006 together with the enclosed minutes, resolutions and notification of change of officials of KENYA AFRICAN NATIONAL UNION (KANU)

The contents of your said letter have been duly noted and addressed. This office confirms to you, that vide a letter of 28th November, 2006, a new set of officials were registered. Therefore, this office is unable to register and/or confirm a second set of officials.

In view of the above the Registrar of Societies is now *functus officio* as far as this matter is concerned. The meeting scheduled for tomorrow at 9.30 am is therefore cancelled.

Yours faithfully

Signed

for: REGISTRAR OF SOCIETIES

The learned Principal Litigation Counsel, Mr. Ombwayo submitted with force to us that an order of Certiorari will not lie because there was no decision made by the Registrar of Societies, the First Respondent herein. The contents of the above captioned letter belie that submission – "*this office confirms to you, that vide a letter of 28th November, 2006, a new set of officials (more) was registered." and*

…….in view of the above, the Registrar of Societies is now functus officio as far as this matter is concerned."

The esoteric Latin expression "*functus offiicio"* means '*having discharged a duty*" for instance where a

magistrate has convicted a person charged with an offence before him, he is functus officio and he/she cannot rescind the sentence or re-try the case. *Firstly* therefore the Registrar's letter confirms in express terms that a new set of officials was registered and consequently the office is unable to register a new set of officials. *Secondly* the Registrar of Societies had performed a duty however discretionary, and she could not rescind what she had done. Remember Herod's *reply* to the Jewish leaders objection at the time of the crucifixion to the description – "*This is Jesus Christ, King of the Jews." "Quod scripsit, scripsit"* (*What I have written, I have written).* So the Registrar replies to the Applicant's William S. Ruto, *what I have done, I have done. I will not undo it, whether you objected to it prior to my doing it or not. The deed is done period.*

Clearly, a decision was made by the Registrar irrespective of the irregularities in terms of Article 5 (1) (a) – (e) of the KANU Constitution, 2002 Edition, and contravention of Section 20 (1) of the Societies Act as to the requirement of obtaining the consent of the Registrar before amending the Constitution of the Society. There was no evidence or demonstration that an application signed by three officials of the society had been made to the Registrar for the abolition of one of the offices of Vice-Chairman and the creation of the office of Deputy Chairman or his functions defined in the Constitution of the society. The whole exercise appears to have been choreographed and became a charade tainted with both procedural impropriety, unfairness, breach of the rules of natural justice, bias and outright illegality on the part of Registrar of Societies.

(4) ON THE RIGHT TO BE HEARD

It was argued eloquently by Anthony Ombwayo, learned Principal Litigation Counsel, that Section 17 (1) of the Societies Act was a passive provision. It required the Registrar of Societies to do nothing once a Notice in the prescribed form of any change of officers, or of the title to any office, of registered society is filed within fourteen (14) days of the change, and the notice is signed by three of the officers of the Society. It is an offence for a society to default in filing such notification of change of officers of the title of any of the office of the society.

With respect to learned Counsel, we do not accept this reading or interpretation of the provisions of Section 17 (1) and (2) of the Societies Act. We do not agree with learned Principal Litigation Counsel that Section 17(1) is a passive provision. On the contrary , for the Registrar to invoke the provisions of Section 17(2), and to prosecute officials of a society for failure to file, a notification of change of officials of the society, Section 17(1) imposes a positive duty upon the Registrar not merely to receive the notification of change and collect filing fees in respect thereof, but rather to examine the returns and establish whether the change of which the notification has been made was carried out in terms of the Society's Constitution. This is because Section 19 (1) of the Societies Act imposes a duty upon the Registrar of Societies to ensure that the minimum matters to be provided for in Society's Constitution as required in the Schedule to the Act have been included, and that provision complied with.

According to the Schedule, the matters to be provided in the Constitution or rule of every society include – (1) the method of suspension or expulsion of members (rule 5), the titles of officers, trustees and auditors and their term of office and the method of their election, appointment, dismissal and suspension (rule 6), the frequency of quorum for and date of the general meetings referred to in Section 29 of the Societies Act (rule 9)

Section 29 of the Societies Act prescribes that every registered society shall hold a general meeting every year to which all members shall be invited, and the business to be transacted at such meeting. It is an offence for a Society to fail to hold such a meeting.

These are all matters of legitimate inquiry by the Registrar of Societies when confronted with a notification of change of officers purportedly made at a meeting which is not an annual general meeting whereof the prescribed agenda under Section 29 (1) is the election or appointment of officers of the society.

In the case of *MUSIKARI KOMBO & 2 others –vs- REGISTRAR OF SOCIETIES & 3 OTHERS (H.C.*

Misc. Application No. 725 of 2006), *EMUKULE J*. said at page 7 of this Ruling-

'……*The Applicants do not belong to just another society. The Applicants are member of a major political party, the Forum for the Restoration of Democracy. Any changes in it have serious constitutional implications, and cannot be allowed to pass easily in a democratic society which adheres to the rule of law.'*

In the old case *of COOPER –VS- THE BOARD OF WORKS FOR THE WANDWORTH DISTRICT* (1863) 32 L.J. C.P. 185,l 143 E.R. 414) the Metropolis Local Government Management Act 1855 (C. 120) S. 76 (repealed) empowered the District Board to alter or demolish a house where the builder had neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundation. It was *held that this did not empower them* to demolish the building without first having given the party guilty of the omission an opportunity of being heard, and Section 211 (*repealed*), which gave the right of appeal to the Metropolitan Board of Works, did not prevent the builder or owner of the premises from suing them for doing so.

In the speech, with which Willes J., Byles J., and Keating J. respectively agreed, ER le C.J. said-

"*The contention on the party of the Plaintiff has been that although the words of the statute taken in their literal sense without any qualification at all, would create justification for the act which the District Board has done, the powers granted by that statute are subject to a qualification which has been repeatedly recognized, that no man is to be deprived of his property without an opportunity of being heard*."

…..*The Board say, that no notice was given, and that consequently they had a right to proceed to demolish the house without delay, and without notice to the party whose house was to be pulled down and without giving him an opportunity of showing any reasons why they should delay. I think that power which is given by this Section is subject to the qualification suggested. It is a power carrying enormous consequences. The house in question was built only to a certain extent. But the power claimed would apply to a complete house. It would apply to a house of any value, and completed to any extent; and it seems to me to be a power which may be exercised most perniciously, and that the limitation which we are going to put upon it is one which ought, according to decided cases to be put on it, and one which is required to give the Plaintiff and to have allowed him to be heard.*

I cannot conceive any harm that could happen to the District Board from hearing the party before they subjected him to a loss so serious as to demolish his house, but I can conceive many advantages which might arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purposes of the statute, by which the restriction which we put upon them, that they should hear the party before they inflict such a heavy loss."

Willes J. weighed in with the same opinion-

'*I am of the same opinion. I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; and that that rule is of universal application, and founded upon the plainest of principles of justice. Now is the Board in the present case such a tribunal? I apprehend it clearly is, whether we consider it with reference to the discretion which is vested in it, or whether we look at the analogy which exists between it and other recognized tribunals (and no one ever doubted that such tribunals are bound by the rules which a court of justice is bound by), or whether you look at it with reference to the estimation in which it is held by the legislature, as appears from the language used in the statute…."*

Byles J. expressed the same opinion and after reiterating the facts and referring to past cases which established that –although there are no positive words in a statute requiring that a party shall be heard, yet justice of the common law will supply the omission of the legislature. The judgement of Justice Fortescue in Dr. Bentley's case (*the King –vs- the Chancellor Clt. Cambridge, 1 Stra. 557 led Raym 1334*

8 Mod. 145) is somewhat quaint but it is very applicable, and has been the law from that time to the present. He says-

"*The objective for want of notice can be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a learned man, upon such an occasion, that even "God himself did not pass sentence upon Adam before he was called upon to make his defence. "Adam" (say God) "Where art thou? Hast thou not eaten of the fruit whereof I commanded thee that thou shouldest not eat?" And the same question was put to Eve also." If therefore, the Board acted judicially, although there are no words in the statute to that effect, it is plain they acted wrongly. But suppose they acted mninisterially, ….. then it may be they were not bound to give the first sort of notice, the notice of the hearing, but they were clearly bound as it seems to me, by the words of the statute, to give notice of their order before they proceeded to execute it.*

……It seems to me that, whether the Board acted judicially or ministerally, they have acted against the whole current of authorities, and have omitted what justice requires, and contravened the words of the statute. The Board acted ministerially they ought to give a notice of the latter character."

In this case the Registrar of Societies having received objections from the Applicants prior to the registration of change of Officers, breached the rules of natural justice by failing to give the Applicants a hearing that was scheduled on 5th December, 2006 and which was subsequently cancelled.

On this ground alone the Registrar's decision is liable to be quashed by an order of Certiorari.

(5) THE ELECTORAL COMMISSION OF KENYA

And how does the Electoral Commission of Kenya act in all this choreography and charade.?

The one institution with the most intimate relationship with societies called political parties acts in no way better than the Registrar of Societies. The Replying Affidavit of its Chairman, Samuel Mutua Kivuitu, sworn on 22nd January, 2007 tells it all. While acknowledging that the Electoral Commission may request the Registrar-General for information regarding any registered political party (paragraph 10), and that it is the sole responsibility of the Electoral Commission of Kenya to determine the nomination of candidates to the National Assembly once selected by the registered political parties in accordance with their respective constitutions, and may rely on such information from the Registrar of Societies, there is no evidence or information attached to the said Replying Affidavit of the Chairman of the Electoral Commission that he wrote or otherwise sought clarification from the Registrar of Societies. The Chairman appears to have relied entirely on the partisan information conveyed to him by one Dr. Josephine Rose Majale Ojiambo dated 30th November, 2006 as Secretary-General of KANU. The said Dr. Josephine Rose Majale Ojiambo held no brief for the Registrar of Societies, not being an officer in that office, and it was incumbent upon the Chairman of the Electoral Commission of Kenya to cross-check that information with the Registrar of Societies. In these days of sophisticated forgeries, what if such list was a forgery? Or was otherwise inaccurate.?

Whereas under Section 44 (1) of the Societies Act, in any legal proceedings, a paper purporting to be a copy of an extract from any register or document kept by the Registrar, and purporting to be certified by him or her as a true copy or extract as aforesaid, shall be admissible as *prima facie* evidence of the contents of such register or document, that of Josephine Ojiambo to the Chairman of the Electoral Commission was merely information of the alleged changes. There was no certification from the Registrar of Societies, and the Electoral Commission could not rely on it to make the decision it conveyed to Uhuru Kenyatta per the Chairman's letter E/pp/51 dated 1st December, 2006. Although the learned Chairman of the Electoral Commission denies in paragraph 13 of his Affidavit that the said letter amounted to a decision of which the Court can review, let us look at the process of arriving at it. This is what the letter says-

" Hon. Uhuru Kenyatta E.G.H., MP.

Leader of the Official Opposition,

National Assembly,

Parliament Buildings

Nairobi.

Dear Hon. Kenyatta (in writing)

Re: CHANGE OF NATIONAL OFFICIALS OF KANU

We have received the letter with an annexture whose copies are enclosed herewith. Previous records in our possession gave you as the KANU National Chairman, which is not the case according to these documents. Electoral Commission of Kenya (ECK) acts on information from the Assistant Registrar of Societies with regard to the leadership of political parties.

HENCE WE SHALL FROM NOW TREAT THE NAMED PERSONS AS THE OFFICIAL LEADERS OF KANU IN THE OFFICES LISTED AGAINST THEIR NAMES" (*capitals and underlining ours).*

The learned Chairman of ECK depones in paragraph 13 of his Replying Affidavit that his letter (*which he calls alleged*) does not amount to a decision which can be subjected to a review by this Court. The reason why the letter is not a decision, the ECK Chairman depones, is because the ECK's decisions are only made by way of meetings in accordance with the third schedule of the National Assembly and Presidential Elections Act, (*Chapter 7 Laws of Kenya*) and that as there was no meeting held to discuss the changes in the officials of KANU before the letter was written there was no decision made.

Now that is the kind of argument which the North Americans would call the "*Micky Mouse" approach to issues. Hence we shall from now treat the named persons as the officials, leaders of KANU in the offices listed against their names,* is not a decision, because no meeting was convened and a decision taken in accordance with the requirement of the Third Schedule to the National Assembly and Presidential Elections Act." Which is which? Why does the Chairman of ECK approbate and reprobate.?

The Third Schedule to the National Assembly and Presidential Elections Act, is made pursuant to the provisions of Section 3B of the National Assembly and Presidential Elections Act which provides-

"*3B. For the better discharge of the responsibilities and functions of the Electoral Commission under the Constitution and any other law, the code of conduct for the members and staff of the Commission, and the rules of procedure of the Commission specified in the Second and Third Schedules respectively, shall apply."*

Indeed as the Chairman of the Commission depones, rule 7 of the Rules of Procedure of the Electoral Commission provides for the method of reaching binding and lawful decisions of the Commission. It says….

7. Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by concurrence of a majority of all members."

Section 3B of the National Assembly and Presidential Elections Act is made pursuant to Section 41 (10) of the Constitution of Kenya which says-

"*41. (10) subject to this Constitution and without prejudice to subsection (9), Parliament may provide for the orderly and effective conduct of the operations and business of the Commission and for the purposes of the Commission to appoint staff and establish committees and regulate their procedure."*

Section 41 (9) of the Constitution of Kenya provides for the independence of the Commission in the

exercise of its functions in these terms-

"*41 (9) In the exercise of its functions under this Constitution the Commission shall not be subject to the directions of any other person or authority."*

The *first* observation to make is that the provisions of Section 3B of the National Assembly and Presidential Elections Act, have direct not statutory but Constitutional, underpinning under Section 41 (10) of the Constitution. *The second* observation to make is that when the Chairman of the Commission, the bastion and custodian of the entire electoral process in Kenya (*National Assembly and Presidential as well as Local Government Elections)* says on oath that the Commission relies entirely on the records of the Registrar of Societies without question on the registered officials of a political party, let alone a parliamentary party, the Commission abdicates its constitutional mandate, duty and obligation to independently ascertain the veracity or otherwise of claims of the Registrar of Societies. *The third* observation to make is that when the Chairman of the Commission writes to a leader of a Parliamentary party and in this case, leader of the Official Opposition, that –

"*Hence we shall from now treat the named persons as the official leaders of KANU in the offices listed against their names"*

and later claims on oath his letter was not a decision because it was not made by the Commission, the Chairman expressly admits on oath that he committed an illegality. No meeting of the Commission was convened to deliberate over that weighty decision, and because Section 3B of the National Assembly and Presidential Elections Act, has statutory underpinning under Section 41 (10) of the Constitution of Kenya, *the Chairman's decision was equally contrary to the letter and spirit of the Constitution and it is therefore not only patently illegal but also ultimately unconstitutional.*

In the case of *RANGAL LEMEIGURAN & OTHERS –VS- ATTORNEY-GENERAL* and E.C.K. [2006] e K.L.R. the Constitutional Court dwelt at length at pages 29-37 and again at pages 42-47 of that judgement on the role of the Electoral Commission on defining and enforcing the rights of special interests besides gender in relations to the provisions of Section 33 of the Constitution on the appointment and nomination of members of Parliament by Parliamentary parties, and similarly enlarging the criteria by a wider and liberal interpretation of Section 42 of the Constitution in relation to the criteria for creation of additional constituencies, *that population or members alone are not the sole criteria but that special interests such as minorities, labour movements*, religious groups are relevant considerations in the nomination of members of Parliament and creation of new constituencies. The court found in that case that the Electoral Commission had misunderstood and misapprehended its role in respect of those matters and provisions of the Constitution.

In this matter the Electoral Commission has again not only misapprehended and entirely misunderstood its role to act independently under Section 41 (9) of the Constitution, and has sat back and surrendered that role to the Registrar of Societies, a subordinate tribunal or body to it, to determine the leadership of a Parliamentary Party without question. Worse still, its Chairman has acted contrary to the requirements of rule 7 of the Third Schedule to the National and Presidential Elections Act, and therefore contrary to section 3B of the said Act by purporting to convey a decision of the Commission, and later purporting to rescind the same on Oath, on the ground that the said decision was not made in accordance with the Commission's procedures, the Commission has failed itself and acted illegally.

(6) NATURE OF JUDICIAL REVIEW

The nature of the remedy of judicial review is well summarized in the Supreme Court Practice, paragraph 53/1- 1416-

"*The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. 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 it is no part of the purpose of judicial review to substitute the opinion of*

the judiciary or of the individual judges for that of the authority constituted by law to decide matters in question."

In the case of *KENYA HOTELS and ALLIED WORKERS UNION -VS- REGISTRAR OF TRADE UNIONS [2005] e.K.L.R.* Emukule J. cited and relied upon the case of *ONYANGO –VS-* A.G. [1987] K.L.R. 711 and the case of *NYONGESA & 4 OTHERS –VS- EGERTON UNIVERSITY COLLEGE [1990] K.L.R. 693* where the Court Appeal observed-

"*Courts are loath to interfere with decisions of domestic bodies and tribunals including college bodies. However courts will interfere and quash decisions of any bodies when moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side."*

The remedy of Certiorari exempliflies the central principle of the legal answerability of public authorities for due observance of the proper limits of the powers conferred upon them. The orders of mandamus and prohibition are more specialized, the former lying to compel positively, the performance of duties unlawfully omitted and the latter lying to prohibit expected performance of acts not lawfully permitted, both look to the future conduct of authorities challenged and so exert a legal control over prospective policy. The remedy of *Certiorari* invalidates past decisions in such a way as to concentrate attention on the issue of legality even though it is official policy which is affected thereby.

The decision of the Registrar of Societies as set out in its letter dated 28th November, 2006 addressed to Dr. Josephine Ojiambo together with the notification of change of officials and titles purportedly elected at a meeting of the Respondents Special National Delegates Conference on 24th November, 2006 and the confirmation of such decision as set out in a letter dated 4th December, 2006 addressed to William S. Ruto be brought up to this Court and the same be and is hereby quashed by the order of Certiorari.

Similarly, the decision of the Electoral Commission conveyed to Hon Uhuru Kenyatta by letter dated 1st December, 2006, be called into this court and be quashed by order of certiorari as prayed in paragraph 2 of the Applicants' Notice of Motion aforesaid.

Having come to that conclusion in respect of the two most important prayers, it is strictly not necessary for us to address ourselves on the other prayers. However, because, firstly of the apparent misunderstanding or misinterpretation of the true nature of the orders of *prohibition* and *mandamus* and secondly because of the *public interest* raised by this motion on the question of whether persons outside a party may raid and take over the management of that party as the Respondents purported to do in this matter, it is necessary for us to pronounce ourselves on those subsequent prayers (3) – to (14) inclusive.

As already stated above, the order of prohibition operates in the future to prohibit any person or body of persons or tribunal from acting unlawfully. An order of prohibition is not like an injunction restraining a person or body of persons from interfering with another person's right or vested interest. An order of prohibition, bans or prohibits the doing of any act or thing because it would be a violation of the law. So an order of prohibition will not prohibit the Registrar of Societies from making changes as to officials of KANU or the Electoral Commission, of Kenya from recognizing Nicholas Biwott as KANU'S Chairman. As explained by the Court of Appeal in the case of *KENYA NATIONAL EXAMINATIONS COUNCIL – VS- REPUBLIC, ex parte GEOFFREY GATHENJI & 8 others (Civil Appeal No. 266 of 1996*), only an Order of Certiorari has efficacy to reverse by quashing the decision of the Registrar of Societies, and the Electoral Commission of Kenya. We have already made such an order.

This being so, prayers for orders of prohibition set out in paragraphs 3, 4, 5, 6, 7, 8 and 9 do not lie. *The orders of Certiorari granted in respect of prayers 1 and 2 of the Notice of Motion effectively mean that the Respondents have no capacity to interfere with either the management or operations of KANU, as led by the Applicants, Uhuru Muigai Kenyatta and his team of lawfully elected officials.*

An order of mandamus is not an order of specific performance, like in a contract situation. A party in a judicial review seeking an order of mandamus must show the existence of a statutory duty conferred or

invested by statute upon some person, body of persons or tribunal which such person, *(the Registrar of Societies*), or body of persons *(the Electoral Commission*) has failed to perform. There is no such statutory duty imposed upon the Registrar of Societies or Electoral Commission to reinstate the status of KANU'S officials, or to avail and manifest to court all documents and particulars upon which the Registrar relied upon to change KANU'S officials as set out in the Registrar of Societies' letter of 28th November, 2006 or in our view any other documents. Consequently prayers Nos 10, 11 & 12 do not lie.

The other matters upon which we will comment but are not material to our decision herein, are the questions of the application of pronouncements contained in the *Hansard*, being proceedings of the National Assembly, and secondly, the law of meetings in Parliamentary democracy.

Commencing with pronouncements made in Parliament, the doctrine of the separation of powers connotes that Parliament is supreme, Parliament legislates, the Executive, formulates, and executes policy contained in the legislation, and the Courts interpret the law, while again the Executive ensures that the decisions of the courts are implemented and therefore obeyed. The supremacy of Parliament is enhanced by the National Assembly (Powers and Privileges) Act, (*Chapter 6, Laws of Kenya)* Section 12 of which provides that the decisions of Parliament shall not be questioned in any court.

Mr. Kilukumi relied on the case of *Regina –Vs- Secretary of State for Trade & Others ex parte Anderson Strathdyde* [1983] 2 *ALL E.R. 233,* where Dunn L.J. held *per curiam* that a report in Hansard of what has been said and done in Parliament cannot be used to support a ground relied upon in proceedings for judicial review in respect of something which occurred outside Parliament, following also the case of *Church of Scientology of California -Vs- Johnson-Smith [1971] I ALL E.R. 378.*

This submission was made in reference to the Ruling by the Hon. Francis Ole Kaparo on the Status of the Leader of *Official Opposition* in light of the purported take over of KANU as the largest Opposition parliamentary /political party in parliament as reported in the Hansard of 30th November, 2006. In his Ruling on this question the Speaker of the National Assembly said:-

"*Hon. Members, may I state very categorically that the registration of political party officials by the Registrar of Societies is extraneous, foreign and inconsequential to the conduct of Parliamentary business or proceedings in this House. The Constitutional responsibilities of conducting, managing, regulating and guiding Parliamentary business rests nowhere else on earth, but on the shoulders of the chair, a duty that the Chair has sworn to discharge without fear or favour……*

Therefore, to give guidance sought by Hon Member, I hereby order and rule that the leader of Official Opposition Party remains the Hon. Uhuru Kenyatta M.P., the Official Opposition Whip remains Justin Muturi, M.P., and the Shadow Cabinet remains as submitted by the leader of the official opposition vide his letter dated 11th June, 2003."

We agree with the passage in the case of *Regina –Vs- Secretary of State for Trade & Others ex parte Anderson Strathdyde PLC (supra)* cited to by Mr. Kilukumi, one of the Counsel for the Respondents, where Dunn L.J. said at page 239-

"*In my judgement there is no distinction between issuing a report in Hansard for the purpose of supporting a cause of action arising out of something which occurred outside the House, and using a report for the purpose of supporting a ground relied in proceedings for judicial review in respect of something which occurred outside the House. In both cases the court would have to do more than take note of the fact that a certain statement was made in the House on a certain date. It would have to consider the statement or statements with a view to determining what was the true meaning of them, and what were the proper inferences to be drawn from them. This, in my judgement, would be contrary to Article 9 of the Bill of Rights. It would be doing what Blackstone said was not to be done, namely to examine, discuss and adjudge on a matter which was being considered in Parliament. Moreover, it would be an invasion by the Court of the right of every member of Parliament to free speech in the House with the possible adverse effect….."*

Article 9 of the Bill of Rights (1688) provides:-

"*That the freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament."*

In turn Section 57 of the Constitution provides-

"57. *Without prejudice to the powers conferred*

by Section 56, Parliament may, for the purpose of the orderly and effect discharge of the business of the National Assembly, provide for the powers, privileges and immunities of the Assembly and its committees and members."

By Section 12 of the National Assembly (Powers and Privileges) Act (*Cap.6 Laws of Kenya*), it is provided that-

"12. *No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court."*

This section has its origin in Article 9 of the Bill of Rights (1688) and the English decisions such as the decisions of Browne J. in *Church of Scientology of California –Vs- Johnson Smith (supra) and Regina – Vs- Secretary of State for Trade Ex parte Anderson (supra*) which are of great persuasive authority to our courts.

We had occasion to construe Section 12 of the National Assembly *(*Powers and privileges) Act in the case of the *REPUBLIC VS- THE JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & HON. S.O.E. BOSIRE, JUSTICE OF APPEAL, AND PETER LE PELLEY, S.C., Ex. parte Hon. Professor George Saitoti (H.C. Miscellaneous Application No. 102 of 2006)*, the constitutional court found inter alia that the fact that the said National Assembly *(*Powers and Privileges*)* Act stems directly from Section 57 of the Constitution and Sections 4 of the said Act (No civil or Criminal proceedings shall be instituted against any member for words spoken before, or written in a report to the Assembly or a Committee, or by reason of any matter or thing brought by him therein by Petition, bill resolution, motion or otherwise) and Section 12 *(supra*), gives the said Sections Constitutional underpinnings in that the two sections reinforced the principle of separation of powers, and that therefore any finding which purports to encroach on a decision of Parliament which is made within its Constitutional territory or mandate would also be unconstitutional and the courts and other judicial bodies should be in the forefront of avoiding any possible constitutional conflicts in all their undertakings.

That court observed, and we agree with that observation, that the Executive and Parliament do have monopoly on issues of policy and a respectable interplay is encouraged in view of Parliament's role in terms of acting as a check on any excess of the Executive and also in its watchdog role. That Court further expressed the view with which we agree that executive decisions and policies except where they are reviewable under the Court's judicial review powers are within the province of the Executive and Parliament and not the province of the Courts not to mention Commissions or Tribunals.

Unlike in England where the House of Commons has passed a resolution allowing the citation from Hansard in the court, no such resolution has been passed by the National Assembly. On 31st October, 1980, the House of Commons passed the following- resolution-

"*That this House while affirming the status of proceedings in Parliament, confirmed by Article 9 of the Bill of Rights, gives leave for reference to be made in future court proceedings to the Official Report or Debates and to the published Reports and evidence of Committees in any case in which under the practice of the House, it is required that a petition for leave should be presented and that the practice of presenting petitions for leave to refer to Parliamentary papers be discontinued."*

Despite that leave, the question still remains for what purpose may the Hansard be used in Court. If it is

for the purpose of questioning any speech, debate, resolution or motion, it will almost be contrary to Section 12 of the Constitution and therefore unconstitutional.

In this matter, therefore, the Respondents need not worry that the Court would import the Ruling of the Hon. Francis Ole Kaparo, the learned Speaker of the National Assembly, into this judgement or be thereby influenced. The Court is keenly aware of this delicate balance because of the constitutional importance of Parliament retaining control over its own proceedings and because of the extent of Parliamentary privilege as stated in Sections 56 and 57 of the Constitution and expressly reaffirmed in Section 12 of the National Assembly (Powers and Privileges) Act. The Ruling by the Honourable Speaker of the National Assembly is therefore a matter both extraneous and external to this judgement.

The second issue we wish to touch upon is the question of the application of judicial review orders to actions and decisions of political parties. The question is whether the acts of the 3rd, 4th, 5th and 6th Respondents in purporting to convene and hold a meeting of a political party which they, and their agents, servants and supporters purportedly seek to take over by sending and filing a set of new officials comprising of themselves and others in the shadows are acts of a public character, and if so whether they attract the public law remedies of prohibition as prayed for in paragraphs 6, 7, 8 and 9 of the Applicant's motion.

(8) The Centrality of Political Parties in the Constitution

Unlike in England which has no written Constitution, the centrality of the political party in Kenya is at the heart of the Constitution of Kenya. But even in England where no such constitution exists, Lord Hailsham – *On the Constitution (Harpen Collins Publishers), Chapter VII – Party and Party System says at* page 13

"……Party lies at the very hinge of procedure in both Houses of Parliament. Party determines the composition of the House of Commons, and to a large extent, that of the Lords. Party lies at the root of cabinet government in all Parliamentary democracies. It is necessary to add that in single-party states party is an essential root of tyranny."

The party is therefore key to democratic government. It is at the core of the Constitution of Kenya. Section 1A of the Constitution of Kenya declares that "*Kenya shall be a multi-party democratic state."* It is the vehicle for nomination of a Presidential Candidate (S. 5 (3) (a) – each political party taking part in the general election shall nominate one candidate), for appointment to cabinet (Section 16 (2) read together with Section 17B (5) cross-party appointments to Cabinet to be made only with concurrence of the party sponsoring the candidate at the elections), qualification, nomination to Parliament (Sections 33 (3) and 34 (d) freedom of assembly and association (Section 80*)*, and Section 123 (1) definition of a political party), the party is therefore core to the political class of Kenya and for the ordinary citizen core to the democratic state and ideals. Its face looms large. All those in power are there by virtue and through a political party. The character of the party is therefore very public, and so are its acts. And yet the activities of its agents, the mouthpieces, can and do both good and havoc. When the acts of those agents or servants, the public face of the political party wreck havoc on their opponents, and their statutory supervisor joins in or looks aside, the public law remedies of certiorari, prohibition and mandamus will not touch them. The reasons are very simple.

The judicial remedies of Certiorari, Prohibition and mandamus, are predicated upon the existence of some positive duty invariably imposed by statute law, requiring the authority, person or body of persons to exercise the power conferred upon it or them by statute. When the authority, person or body of persons act contrary to that law, or exercise the power invested in them beyond that power, the public law remedies of certiorari or prohibition are invoked to quash the decision made or threatened to be made in the future in the case of the order of prohibition. When the authority fails to exercise the power invested in it, the public law remedy of mandamus comes handy to compel it to do so.

Unfortunately, the Societies Act under which political parties are currently registered jumble and mix political parties as any other club or social association for enhancement of entertainment and pleasure.

Political Parties are but not for either entertainment or pleasure. They are vehicles for political, and economic power. Those who control the political power also determine the economic destiny and wealth of a country. Therefore because of lack of definition in terms of the legal capacity of a Political Party other than its agents or servants against which no such public remedies may issue, those parties whose chief members also have the necessary political say and muscle, become attractive persons in the political game of chess. They fall prey into the hands of such agents or servants or more appropriately, power brokers.

So as one columnist wrote in the *People on Sunday* paper of 10th June, 2007-

"*all cohesive societies have common goals, intentions and ritual. There are those which are benign and have only social interest at hand, yet there are those whose goal and mission in life is to totally control power in all its forms and at any cost. Code of conduct in one group differs from the next and is dependent essentially on the leaders personality profile at the time.*

With an open society or an exclusive society, the need to belong is the key component in control. Our very positive need of assembling and being together with other fellow human beings is unfortunately a tool in the hands of mind controllers to have us peddle their dreams and missions too."

So until and unless either the public law remedies are extended under Sections 8 and 9 of the Law Reform Act *(Chapter 26, Laws of Kenya*) or in other words the powers of the judicial review court are extended to apply to quasi-public bodies like political parties to include not merely the classic prerogative order of Certiorari; prohibition, but also to issue the private law remedies of injunction, there is a danger of quasi-public bodies such as political parties, or their agents, winners and losers alike, perpetuating undemocratic practices by raiding those political parties with unwary leaders, and thereby acquiring through undemocratic and therefore unconstitutional means, vehicles for achievement of political grandeur, trusting always that the masses will fall in tune.

As of this matter, the orders of Certiorari, we have granted against the Registrar of Societies, and the Electoral Commission of Kenya will dampen the fires a little, but there is an urgent need to de-link the formation and registration of political parties from the claws of the Societies Act, and providing by legislation, the creation, administration or management of political parties as separate legal entities with capacity to sue, and be sued in their corporate names, and, provide also for their legal exit or cessation of life as such legal entities.

E: CONCLUSION

So, to conclude, we reiterate the Orders we have made. We allow prayer 1 and hereby quash, by way of an Order of Certiorari, the decision of the Registrar of Societies to register new officials of KANU as set out in the Registrar's letter to Dr. Ojiambo dated 28th November, 2006; and we allow prayer 2 and hereby quash, by way of an Order of Certiorari, the d0ecision of Electoral

Commission of Kenya to recognize Hon. Biwott as Chairman and Leader of KANU as conveyed to Hon. Uhuru Kenyatta by letter dated 1st December, 2006.

What this means is that the officials of KANU led by Hon. Uhuru Kenyatta before the purported change by the Registrar of Societies, shall remain the legitimate officials of the party, and not the Respondents. This also means that the Electoral Commission of Kenya shall continue to recognize Hon. Uhuru Kenyatta as the Chairman and Leader of KANU.

For reasons stated, we decline to grant the other prayers sought in this Application.

This being public interest litigation, we order that the Applicants and the Respondents shall bear respective costs arising out of the said Motion.

There shall be orders accordingly.

Dated and delivered at Nairobi this 28th day of June, 2007.

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Alnashir Visram

Judge.

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R.V.P. Wendoh

Judge.

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M.J. Anyara Emukule

Judge